COUNCIL OF 100

AN ORGANIZATION OF BLACK REPUBLICANS

1523 L Street, NW, Seventh Floor
Washington, D.C. 20005

Telephone: (202) 628-2216

1 - Ciccone
for comments

March 9, 1984

Mr. Michael K. Deaver
Deputy Chief of Staff and
Assistant to the President
The White House
Washington, D. C. 20500

Dear Mr. Deaver:

There should be no doubt that the Council of 100 should have an immediate response to this letter.

Further, we the Council members believe that President Reagan can get increased support among black voters and we are actively engaged in trying to have this happen. With this in mind a representative group of the Council would appreciate talking to the President very soon.

Please help expedite the response to this letter as a first step.

Sincerely,

Elaine

Elaine B. Jenkins
Chairperson

ENJ/pab

Enclosure(s)

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The thrust of the press accounts is that Mr. William Bradford Reynolds has filed a brief in the Federal Circuit Court in Atlanta taking the position that local or county laws providing set asides for black owned businesses are unlawful, unconstitutional and wrong as a matter of policy.

The purpose of this letter is to seek clarification so that the Council of 100 (which as you know seeks to bring to this Administration and to the Republican Party, the support of black business people and their networks nationwide) will be fully advised as to whether this unacceptable view of the law is the personal position of Mr. Reynolds, the position of the Department of Justice, or whether it indeed is the position of this Administration. It is of the utmost importance that clarification be

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forthcoming without delay, inasmuch as the impact of today's press report has already generated intense reactions throughout our national membership.

Your early response is awaited with great interest, particularly in light of the impending change in leadership at the Department of Justice.

Sincerely,

Elaine B. Jenkins

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Chairperson

EBJ/pab

LeGree S. Daniels
Chairman
National Black Republican Council
Washington, D.C. 20001

March 14, 1984

J. Cecconi

more

Mr. Michael K. Deaver
Deputy Chief of Staff and
Assistant to the President
The White House
Washington, D.C. 20500

Dear Mr. Deaver:

I felt it was important that you receive a copy of the enclosed letters to the President and Vice President.

Sincerely,

LeGree S. Daniels

LSD:rh

1715 Glenside Drive
Harrisburg, Pennsylvania 17109

March 14, 1984

Honorable Ronald Reagan
President of the United States
The White House
Washington, D.C. 20500

Dear Mr. President:

For the first time since I have been a Republican, I am livid and frustrated.

The March 8, 1984 press accounts that William Bradford Reynolds, assistant attorney general for civil rights, is allegedly challenging the Dade County Minority Set-Aside Program must be replaced with positive presidential action on behalf of minority economics. This must be viewed as political dynamite during an election year.

The minority enterprise program is one that Republicans have spent a decade contributing to the Black economy.

Mr. President, this is your program.

Your program has helped me bring the conservative Republican Black vote up to twenty-five percent as reported in USA Today. It is not enough to be negatively opposed to quotas, we must continue to offer market oriented solutions that are not only good for minorities and conservative Black Republicans, but good for the American economy. We cannot let this happen. The multiplier effect is too devastating.

We must discuss this now.

Warm regards,

LeGree S. Daniels

LSD:rh

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Vice President of the United States
The White House
Washington, D.C. 20500

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The minority enterprise program is one that Republicans have spent a decade contributing to the Black economy.

Mr. Vice President, you have been a champion of minority economics and the future of minority enterprise is at stake in this country. We are in dire need of your support to ensure that the alleged William Bradford Reynolds decision is defeated.

We must meet now to discuss ways to rise above this issue.

Warm personal regards,

LeGree S. Daniels

LSD:rh

Gree S. Daniels
airman
ational Black Republican Council
ashington, D.C. 20001

March 14, 1984

The Honorable James A. Baker, III
Chief of Staff and Assistant to
the President
West Wing, The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

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3/15

Jim

What do you think? Should I run this by Fielding? Need a quick turnaround.

THE WHITE HOUSE

WASHINGTON

March 14, 1984

MEMORANDUM FOR JIM BAKER

FROM: MEL BRADLEY

Per your request I have attached a draft response to the letters from Elaine Jenkins, Chairperson of the Council of 100. Also, I have outlined below a rationale for the response.

(1) Among other things the President's statement, executive order and pertinent documents on minority business development commits the Administration to

a) retaining and building upon existing federal contract set-aside programs;

b) encouraging -- in a manner consistent with principles of federalism -- reasonable minority participation in contracts by State and local governments in cases where they are the recipients of federal grants and agreements; and

c) expanding the involvement of private firms in these efforts.

(2) As I understand it, Justice is using what may be a correctible technical flaw in the Dade County set-aside program -- for the Black section of the city the set-aside amounts to 100% -- as an opportunity to seek to establish that there is constitutional proscription against general minority set-aside programs at the state and local levels. If so, their action would seem to run counter to the spirit if not the actual letter of the President's commitment.

(3) Contrary to past practices, my office was not involved in any clearance deliberations to proceed on a matter of such overriding importance to the Black and disadvantaged communities. I have also been given to understand that Wendell Gunn, Executive Secretary to the Cabinet Council on Commerce and Trade -- the originator of the Administration's policy in this area -- was similarly not involved.

(4) One of the central thoughts behind the draft letter is that it might be best to give to those who got us into this apparent contradiction the first opportunity to get us out in a manner which does no damage to the President.

Attachment

THE WHITE HOUSE

WASHINGTON

March 14, 1984

Dear Mrs. Jenkins:

Thank you for your letter of March 9 to President Reagan and to me. I would like to take this opportunity to respond to both.

The President is grateful for the strong and abiding commitment of the Council of 100 to assist him in reaching out for the support of Black Americans and would welcome a future meeting in this regard.

I have not yet had an opportunity to review the position of the Civil Rights Division of the Department of Justice in the Dade County matter. However, the general position of the Administration on minority business development is set forth in President Reagan's statement of December 17, 1982, his Executive Order of July 14, 1983 and accompanying documents on this subject. I would like to suggest that you meet with officials of the Department of Justice to determine whether there are substantial differences on this matter and, if so, to seek a resolution.

I appreciate your sense of urgency on this question and I hope it can be resolved in that fashion.

With best regards,

James A. Baker, III
Chief of Staff and Assistant
to the President

Mrs. Elaine Jenkins
Chairperson
Council of 100
1523 L Street, N.W.
Washington, D.C. 20005

Enclosures

THE WHITE HOUSE
WASHINGTON

Date: 3/12/84

TO: MEL BRADLEY

FROM: *KATHERINE CAMALIER*
Staff Assistant to
James A. Baker, III

☐ Information

☒ Action - QUICK TURNAROUND, PLEASE

Jim Baker asked if you would please prepare an appropriate draft response for his signature. We have sent FYI copies of this letter to Faith Whittlesey, Fred Ryan and Fred Fielding.

Thanks.

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WHY A COUNCIL OF 100?

Now as never before it is the time for the Republican Party to listen and learn from the voices of responsible, moderate, and off-times conservative, views offered from a black perspective, before attempting a whosesale re-ordering of the existing public approaches to assuring equal opportunity in economics, foreign policy, education, community development, law enforcement, public administration and communications.

To fail to so listen and learn from such expert opinion in the black quarters of the GOP will only make long-term solutions more illusive, confused or self-defeating.

It was in this light, therefore, that the Council of 100, as a black Republican political organization was conceived almost a decade ago. Since then, it has issued clear warnings lest Republican Administrations, legislators and Party officials tarnish their image by seeming to be insensitive to the vital interest of minority group Americans.

In this connection it was thought important to avoid the stereotype of Republican opinion as calling for a "dog eat dog" society with no room for programs to overcome historic social, economic and political inequities. Just the opposite is needed. The Republican position, the Council believes, should be that the best way to preserve order and a respect for law in our society is by offering the reasonable assurance that everyone can expect to benefit from personal effort and achievement without the arbitrary intervention of the state or the resort to private unlawful acts.

Accordingly the Council urges the notion of affirmative action as a minimal method for accomplishing already agreed upon change, while conserving the basic framework of individual responsibility for self-improvement. Indeed what better way to assure the universal respect for law and order than be reassuring those with less that there are limitless rewards for self-improvement, initiative and discipline?

Given the clear demonstration of disadvantages, beyond their control, suffered by minority group people, it is urgent that a constructive way be found to offer hope within the system as a better alternative to the attempted destruction or disruption of the system. But to give this assurance, the system of America whether economic or political must show themselves capable of accommodating orderly de facto change.

Black people are now more than ever insisting on "securing the blessings of liberty for themselves and their posterity." The sound approach for Republican public policy is to accommodate the legitimacy of these demands and to reward those willing to show the initiative for full participation. This is the whole meaning of the type of affirmative action the Council of 100 supports.

With the truth of these principles conceded, the Council views its role within the Party as an important point of contact in the advancement and protection of the public interest of black people separate and distinct of smaller self interests of individuals.

The Council believes that we cannot expect to enjoy an uncompromised choice between things which we do like and those which we don't like in the highest and most powerful public offices in the land; instead we as a people must be firmly committed to the full use of our leverage within the two-Party system based on issues in which our interests are at stake.

Therefore, the Council of 100 stands up for the principle of group as well as individual self-interest as one of the ingredients in making one's political choice, as long as we as a people are not prepared to renounce participation in government business programs, the civil service patronage system and the application of our brain power to help resolve the many matters of public policy and administration in which it is needed.

Finally, it must be remembered that political parties, like men, must be subject to change. But unlike men, they are incapable of change born in and of themselves; they need the work and the inspiration of new and different energies and points of view.

The Council of 100 is an organization committed to contributing such work, inspiration, and energy in Republican circles on behalf of black America's point of view.

The Council is establishing Task Forces to monitor many of the major agencies and departments of Federal government. In addition to performing monitoring activities the Task Forces promulgate program initiatives and present such initiatives to Cabinet officers, agency heads and White House staff.

In addition to sponsoring regular luncheon forums with high level federal officials, members of Congress and Republican Party officials and receptions for black federal appointees, the Council also assists with the operation of The Fund for a Representative Congress, a political action committee designed to support black Republicans seeking election to Congress.

The general membership of the Council os governed by a Board of Directors which established policy directives and elect officers to serve as an Executive Committee for the implementation of policy directives. General membership meetings are held quarterly with the Board of Directors convening at the call of the Chairman. It is anticipated that during the '84 Campaign we may meet after each luncheon.

The Council's operating expenditures are borne by membership dues and assessments. General membership dues are One Hundred Dollars annually. Those members serving as Directors pay sustaining dues of Two Hundred Fifty Dollars per year.

- -

MEMBERSHIPS ARE AVAILABLE IN THE FOLLOWING CATEGORIES:

__ Corporate Members $250.00 per year
__ Regular $100.00 per year
Installments of 2 payments are acceptable

Make checks payable to "Council of 100" and mail to:

Elaine B. Jenkins, Chairperson, Council of 100
1523 L Street, N. W., Suite 700, Washington, D. C.,20005

or

Robert Jeffers, Jr., Treasurer, Council of 100
2000 K Street, N. W., Suite 351, Washington, D. C. 20006

Black businesswoman supports Republicans

PROFILES

February is Black History Month — a time to recognize the contributions of black individuals and the black community to this country.

Each day during February, The Journal *is running a profile of one of the county's black leaders.*

In a county that is overwhelmingly white and Democratic, and whose businesses are predominantly owned by men, Elaine B. Jenkins is somewhat of an anomaly.

Jenkins is black, a woman, and the head of a business consulting firm. But she is perhaps best known for her activities as chairman of the nationwide Council of 100 Black Republicans, known in political circles simply as the "Council of 100."

Jenkins believes that blacks must enter "mainstream America" and that they can best do that by having business, employment and appointment opportunities.

"We think that you don't get anywhere in America unless you get a piece of the action," Jenkins said.

She believes blacks can best obtain a piece of the action by embracing Republican philosophy.

"The country is being deceived that there are not black voices in the Republican Party," Jenkins said. "That is the illusion the Democratic Party would like you to believe.

"I am pro-Reagan and I feel that blacks have not done their homework and they have not understood the Republican philosophy. Blacks are being misled if they don't understand that this country is more conservative than not, and it is into an era of bootstraps. No president who is elected will reach back and dole out."

Jenkins was born in Butte, Mont., but moved at an early age to Wilberforce, Ohio, an affluent black community. Her father was a minister and her grandfather was a professor of business at Wilberforce University.

Elaine B. Jenkins
Firm grosses $2.5 million

Jenkins earned a master's degree in philosophy of education at Ohio State University and later moved to the Washington, D.C., area when her husband Howard was offered a position at Howard University Law School.

In 1970 Jenkins started One America, a management consulting firm based in Washington. The firm has average gross revenues of about $2.5 million, she said.

In August, Howard Jenkins retired from a position on the National Labor Relations Board. Today, both Elaine and Howard Jenkins are active in efforts to reelect President Reagan.

The Washington Post

1984, The Washington Post Company

WEDNESDAY, FEBRUARY 15, 1984

Higher in Areas Approximately 75 Miles From District of Columbia (See Box on A2)

LETTERS TO THE EDITOR

'Being a Black Republican': A Clarification

With reference to the article by Pat Press [op-ed, Feb. 6], "The Pain of Being a Black Republican," there was some misunderstanding of circumstances surrounding the presence of Edwin Meese and Lyn Nofziger at our luncheon.

The Council of 100 is an organization that utilized the luncheon forum, in part, to provide opportunity for personal contact and dialogue with Republican Party leadership, legislative leadership and administration officials.

This forum, which was founded in 1974, under the leadership of the late Samuel C. Jackson, has proven to be an effective and recognized mechanism for black Republicans to gather information and influence Republican policy. The membership is composed of a small group of business and professional men and women, many of whom have held high positions in Republican administrations.

What the writer did not know was that Mr. Meese was invited and accepted an invitation to speak at the Jan. 31 meeting. His confirmation to speak occurred prior to his being nominated to be attorney general. After the nomination occurred it was mutually agreed that Mr. Meese would speak at a later date. Nevertheless, as a show of support for the organization, he agreed to attend two pre-luncheon receptions.

Mr. Nofziger, a consultant to the Reagan-Bush campaign, and personally known by most black Republicans, came to discuss the campaign plans and to hear issues of concern. This is in keeping with the historic format of the Council of 100 luncheon forum.

ELAINE B. JENKINS
Chairman, Council of 100

Washington

Pat Press

The Pain Of Being A Black Republican

Ed Meese came. He did not speak. Looking every bit the attorney general he intends to be, he was afraid to, and so he smiled, and although billed as the luncheon speaker, he brought greetings from no one in particular, and left. Wait, he implied, until after confirmation.

Lyn Nofziger came to speak in Meese's place. Looking every bit the outsider he no longer wants to be, he too was afraid, and so he smiled and brought greetings from no one in particular. Wait, he implied, until after he re-enters the fold. Nofziger was playing it safe, and almost escaped unscathed.

Until Jerry Moore stood to ask a question at the monthly meeting, held two blocks from the White House, of the Council of 100, a group of black Republicans.

Nofziger did not know Jerry Moore. And when Nofziger expressed surprise that in this city of 165,000 registered Democrats and 20,000 registered Republicans, there was indeed an elected Republican member of the D.C. Council, Jerry Moore responded with a dip to his voice, "Well, now you know."

And in that split second, Lyn Nofziger, the man who loves Ronald Reagan, who goes the extra mile for the president, made the same mistake his boss and all Reagan insiders continue to make—not knowing how to include blacks within their sphere, not even those blacks who do not expect handouts.

To be black and Republican in the city of Washington is to be a glutton for punishment, to beat one's head against an unyielding wall. The Reagan administration, after three years in Washington, in a city that is 72 percent black, in a city that has the best-educated and the highest-income blacks of any city in this country, fears any meaningful contact with them.

It does not yet understand, even a little, what blacks or black Republicans need from it, or can give to it.

This does not speak well of an administration whose love for America is worn on its cuff, that its understanding of one-tenth of America's population is too small to measure.

What was crystal clear from Nofziger's guarded remarks was that because the Republican campaign cannot expect more than 10 percent of the black vote, it would be business as usual, and very little money would be spent on an investment that the reelection committee has already determined cannot be counted on to produce dividends on Election Day.

Nofziger said this after boasting that the campaign expects to raise enough money not to have to accept matching funds. There will be no spending of good money on good will.

The Reagan administration is so afraid that it may have to give something away to blacks that it is unwilling to take what blacks—some at that meeting have been Republicans since before Nofziger was born—have to give them: some old-fashioned advice on how to attract blacks to the old red, white and blue party. And in ignoring black Republicans, they have put them on the defensive and many on the fence, which is what Jerry Moore told Nofziger as he asked for some "encouraging words to take to his constiuency." He received none.

Nofziger was speaking to people who, like himself, want to be insiders. They want, not only to be wined and dined at the White House (as many there had been during the Nixon and Ford administrations) but to be rewarded with appointments after working in the trenches and to render counsel on solving problems peculiar to black people.

They also want the Reagan insiders to cease their efforts to snuff out "set-asides" for minority business people. Nofziger, denying that he has the key, and claiming he could only "look, listen and take back," did not open the door.

Nofziger's performance—and he tried so hard—convinces me that Republicans, already invisible in Washington, will remain so. D.C. Republicans are, like Meese and Nofziger, afraid, but for different reasons. They are afraid of returning to the black community "empty-handed" without delivery systems," as Moore put it; afraid of a mayor who is not kind to "nonbelievers" (that is, people who don't believe in him); and afraid to admit that they have no party.

Nofziger during his speech mentioned that he had learned from Art Fletcher, who, standing tall, was there and who will be working for the reelection of the president, not to say "You people" to blacks because we are "one nation, one people, one party". One nation, yes. One people, maybe. But if Jerry Moore's comment to me is true, that Lyn Nofziger represents the "ignorance and imperceptions of that element of the party," one party, maybe never.

Pat Press is a Washington writer.

JET MAGAZINE
FEBRUARY 20, 1984

Officers of Council of 100 Elaine Jenkins and LeGree Daniels (2nd, r) display campaign sticker with Edwin Meese and Nofziger (r).

Republican Strategy For Black Vote Revealed At Council Of 100 Meeting

If Jesse Jackson drops out of the presidential race, Republicans hope to appeal to thousands of newly-registered Black voters, who may be unhappy about tactics directed against the Democrats' first major Black candidate.

This strategy was bared during a free-for-all discussion at a sold-out luncheon of the Black Republican Council of 100 in Washington, D.C.

Addressing the organization of business-oriented Republicans, headed by Ms. Elaine Jenkins, Reagan campaign political strategist Franklin (Lyn) Nofziger denied the party was "writing-off the Black vote." He stressed that the vote was essential and that because of new voting registration drives, particularly by Jackson, this new crop of voters would be a target.

He said that polls fluctuate after each party selects a standard bearer, and the Black vote will become more important.

Noting that President Reagan leads in current polls and that money is "coming in nicely," he said that the GOP might not apply for the restrictive federal matching funds.

The federal funding rules limit the amount of private funding a candidate can receive. If Reagan accepted the funding he would only spend the money where he would be sure to get support. That would be in the White community, he explained. Normally, the Republican party expects only ten percent of the Black vote, he said.

During a question-and-answer period, Nofziger was confronted with charges the administration failed to implement a ten percent set-aside provision for minority firms, failed to reappoint veteran Black Republican appointees, such as National Labor Relations Board Commissioner Howard Jenkins and postal system governor Tim Jenkins, and ignored many Black and Hispanic minority party members.

GOP has 'fallen on its face' with blacks, Nofziger says

By Bill Kling
WASHINGTON TIMES STAFF

Some of the Washington area's leading black Republicans stormed yesterday at F. Lyn Nofziger, President Reagan's former political adviser, over their treatment by the White House and the GOP — and Mr. Nofziger indicated their complaints may be valid.

The former Reagan White House official said the GOP "has fallen on its face" in providing help to black Republicans, and that the Democrats "have been doing an awfully good job of registering minorities."

Still, Mr. Nofziger said, the president's re-election campaign is "going to surprise a lot of people if, indeed, we can go ahead and put together our black organizations in each state . . . where there is a significant black population."

"I know there are a lot of concerns," Mr. Nofziger said at a luncheon sponsored by the Council of 100, a black Republican organization. "I recognize that three years have gone by and this administration — like all previous administrations of both parties — has not dealt with those concerns as fully as it might have.

"I've spent the last 11 or 12 years very much concerned about what the Republican Party has been able to do in the black community. I think frankly the Republican Party has fallen on its face as a party. I do not think we've devoted the time or the effort or the money we should have. I admire you all for hanging in there anyway and for recognizing that principle is more important than some in the party would have you think."

Mr. Nofziger substituted at the Sheraton-Carlton Hotel luncheon for White House counsel Edwin Meese III, who opted against a public speech because of his recent nomination as attorney general.

"Between the time you're nominated and the time the confirmation votes are taken, it's a good idea to disappear," Mr. Meese said.

Mr. Nofziger, bristling at suggestions Republicans are "writing off" the black vote, said Mr. Reagan wants to increase the 10 percent black vote he got in 1980.

Audience criticism came during a question-and-answer period.

"If we have only 10 percent and seek only 10 percent, we make a big mistake," Floyd McKissick, general counsel of Black Voters for Reagan-Bush, said. "There are millions of blacks now on the books. If the Republican Party is ever to change that percentage, you're going to have to do it this year."

The Rev. Jerry Moore, GOP District of Columbia councilman-at-large, said, "We do not hear, out of this administration, encouragement and specifics about what this administration does for minorities," Mr. Moore said. "If you want to turn the vote around, people have to have something they can believe in, that's going to come to them as a people, as individuals. We are not hearing this in the black community.

"Consequently, the index level of suffering comes out in overt fashions — resistance, negatives. It's this kind of thing that we need to turn around. Nobody is saying, 'We are going to make this thing work for you, and we are going to see to it that you are going to get your share of what's in that pie.' Somewhere this administration needs to say this to people."

Tim Jenkins, a former governor of the Postal Service Board, scored "a number of forced retirements of black presidential appointees," including himself; Carlos Campbell, a former assistant secretary in the Economic Development Administration; and Howard Jenkins, a former member of the National Labor Relations Board.

"When we go through the black community and ask them to vote for the Republican ticket and we show that we can't even do anything for ourselves, it somewhat undercuts our credibility," Mr. Jenkins said. "It is recognized . . . that, without white Republican support, you aren't listened to in the political appointment process. This is unconscionable and it cannot continue at the same time the party mouths that it's trying to build its black support."

Mr. Jenkins' wife, Elaine Jenkins, chairman of the Council of 100, said, "One of our key thrusts is that we must have blacks in key positions in all the posts. We don't have enough black officials who are elected Republicans."

Arthur Fletcher, a former Republican administration official who has held a number of GOP posts and has been a Republican candidate for D.C. mayor, said many black Republicans are being overlooked when they "are very capable of getting beyond the mere rhetoric and talking about the technical aspects of implementing government programs at the neighborhood level, so it's very clear that it's not only workable, but it's working."

Mrs. LeGree Daniels, chairman of Black Voters for Reagan-Bush and of the National Black Republican Committee, said blacks, "as a people, and this transcends party politics, really need to build a two-party system for our own good."

AP

Lyn Nofziger (left) greets Edwin Meese yesterday as Council of 100 President Elaine Jenkins looks on.

THE WHITE HOUSE
WASHINGTON

3/15

MDT:

Cicconi has a copy of the attached. He also has Mel Bradley's draft response to a similar letter from Elaine Jenkins of the Council of 100. Jim wants to talk to JAB about it because he is interested in trying to overturn Justice's decision. I wanted to run this by you to make sure that it's appropriate. If so, I'll tell Cicconi that he has the ball and the responsibility to follow through.

KC

BACK TO CICCONI PER JAB --

LeGree S. Daniels
Chairman
National Black Republican Council
Washington, D.C. 20001

March 14, 1984

The Honorable James A. Baker, III
Chief of Staff and Assistant to
the President
West Wing, The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Baker:

I felt it was important that you receive a copy of the enclosed letters to the President and Vice President.

Your input is necessary.

Sincerely,

LeGree S. Daniels

LSD:rh

1715 Glenside Drive
Harrisburg, Pennsylvania 17109

March 14, 1984

Honorable Ronald Reagan
President of the United States
The White House
Washington, D.C. 20500

Dear Mr. President:

For the first time since I have been a Republican, I am livid and frustrated.

The March 8, 1984 press accounts that William Bradford Reynolds, assistant attorney general for civil rights, is allegedly challenging the Dade County Minority Set-Aside Program must be replaced with positive presidential action on behalf of minority economics. This must be viewed as political dynamite during an election year.

The minority enterprise program is one that Republicans have spent a decade contributing to the Black economy.

Mr. President, this is your program.

Your program has helped me bring the conservative Republican Black vote up to twenty-five percent as reported in USA Today. It is not enough to be negatively opposed to quotas, we must continue to offer market oriented solutions that are not only good for minorities and conservative Black Republicans, but good for the American economy. We cannot let this happen. The multiplier effect is too devastating.

We must discuss this now.

Warm regards,

LeGree S. Daniels

LSD:rh

1715 Glenside Drive
Harrisburg, Pennsylvania 17109

March 14, 1984

Honorable George Bush
Vice President of the United States
The White House
Washington, D.C. 20500

Dear Mr. Vice President:

For the first time since I have been a Republican, I am livid and frustrated.

The March 8, 1984 press accounts that William Bradford Reynolds, assistant attorney general for civil rights, is allegedly challenging the Dade County Minority Set-Aside Program must be replaced with your positive support in assisting the President on behalf of minority economics. As you are well aware, this is politically explosive.

The minority enterprise program is one that Republicans have spent a decade contributing to the Black economy.

Mr. Vice President, you have been a champion of minority economics and the future of minority enterprise is at stake in this country. We are in dire need of your support to ensure that the alleged William Bradford Reynolds decision is defeated.

We must meet now to discuss ways to rise above this issue.

Warm personal regards,

LeGree S. Daniels

LSD:rh

THE WHITE HOUSE

WASHINGTON

March 15, 1984

J. Cecconi

more

MEMORANDUM FOR MICHAEL K. DEAVER

FROM: CRAIG L. FULLER

SUBJECT: Dade County Case

Steve Rhodes sent me a copy of his letter. I know he has strong feelings. Before you respond you should know:

1. Justice did advise the White House by memo of March 2, 1984. (A few days in advance of action being taken.)

2. Their action was consistent with Administration policy and previously taken positions.

3. There was a failure here, once we knew what Justice was going to do, to advise interested parties, including the Vice President and our minority advisers. (This is something Brad Reynolds has done and will do upon request -- but, unfortunately, the details were closely held.

I should note that we are not advertising the fact that this memo was at the White House.

U.S. Department of Justice

Civil Rights Division

Deputy Assistant Attorney General

Washington, D.C. 20530

March 2, 1984

MEMORANDUM FOR MR. MEESE

Re: South Florida Chaper of the Associated General Contractors, Inc. v. Metropolitan Dade County, Florida, No. 83-5001 (11th Cir.)

On February 2, 1984, the Department of Justice filed in the Court of Appeals for the Eleventh Circuit (Atlanta, Georgia) an amicus curiae brief supporting appellant's Suggestion of Rehearing En Banc in the above-referenced case.

This case presents a constitutional challenge to a county ordinance authorizing (1) the setting aside of county construction projects for bidding exclusively among black prime contractors and (2) the establishment of unlimited black subcontractor "goals." Also at issue in the case is the County's initial application of the ordinance to a contract for the construction of a specific Metrorail subway station -- the Earlington Heights Station. The County limited bidding on the Earlington Heights project exclusively to black prime contractors (i.e., a 100% set-aside) and established an additional "goal" of 50% black subcontractors. Plaintiffs -- trade associations comprised primarily of non-black contractors and subcontractors in Dade County -- challenged the ordinance and its application to the Earlington Heights project as violative of their equal protection rights under the Fourteenth Amendment.

The district court invalidated the provision of the ordinance authorizing an absolute (i.e., 100%) racial set-aside on the ground that it was not sufficiently limited in scope or duration to be a constitutionally acceptable remedial device. The district court upheld the "goal" provision, however, primarily because it contained a waiver clause and because the 50% figure was "not excessive in light of the racial realities that presently exist in Dade County." 552 F. Supp. 909, 938-941 (S.D. 1982).

On appeal, a three-judge panel of the Eleventh Circuit upheld the constitutionality of the ordinance -- both the absolute set-aside provision and the "goals" provision -- as well as

its application to the Earlington Heights project. The panel based its conclusion primarily on its view that the County's establish of a three-tiered system for reviewing racially exclusionary contracts and the annual assessment of the entire program established adequate procedural safeguards to ensure that the program's racial preferences were limited to remedial purposes. The panel did not view the absolute set-aside for black prime contractors on the Earlington Heights Station as excessive since the project constituted only 1% of the County's annual contractual expenditures.

Our amicus filing argues, in essence, that the Dade County ordinance, on its face and as applied to the Earlington Heights project, cannot withstand the traditional "strict scrutiny" test applied to racial classifications enacted by state or local governmental bodies. We argue that the racial classification established by the ordinance is not "precisely tailored" to serve the "compelling governmental interest" of redressing past unlawful discrimination because the racial preferences accorded under the ordinance would inevitably benefit nonvictims of Dade County's past racial discrimination in its construction contracting practices. The thrust of our position is captured in the following sentence: "We submit that the compelling government interest of curing the effects of past racial discrimination -- the only compelling government interests involved in this case -- would justify a class-based infringement of legitimate interests and expectations of innocent third parties only to the extent necessary to restore proven discriminatees to the position they would have occupied in the absence of the discrimination." Amicus br. at 7. We have previously advanced an identical victim-specific constitutional analysis in the analogous context of racially preferential employment quotas. (E.g., the New Orleans Police case; the Detroit Police case.)

Our filing has been carefully crafted to avoid calling into question federal statutes and regulations establishing various forms of race-conscious set-asides and preferences (i.e., MBE regulations). We argue at length (Amicus br. at 11-14) that that Congress' unique power "to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]" entitle such legislation to special judicial deference, a deference not owing to the race-conscious enactments of state and local governments. It is this crucial distinction between congressional legislation enacted pursuant to Section 5 of the Fourteenth Amendment, on the one hand, and the enactments of state and local governments, on the other, that the Court of Appeals failed to appreciate. Accordingly, it erroneously relied upon the Supreme Court's decision in Fullilove v. Klutznick, 448 U.S. 448 (1980), which upheld federal legislation authorizing

that 10% of federal funds for local federal works projects be set aside for contracts with "minority business enterprises." The Court's decision in Fullilove, we argue, has limited application in the context of state and local race-conscious enactments.

Copies of our amicus brief and the court of appeals' opinion is attached.

Charles J. Cooper
Deputy Assistant Attorney General
Civil Rights Division

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-5001

SOUTH FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., et al.,

Plaintiff-Appellees
Cross-Appellants,

v.

METROPOLITAN DADE COUNTY, FLORIDA, et al.,

Defendants-Appellants
Cross-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT'S SUGGESTION OF REHEARING EN BANC

WM. BRADFORD REYNOLDS
Assistant Attorney General

CHARLES J. COOPER
Deputy Assistant Attorney General

MICHAEL CARVIN
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2151

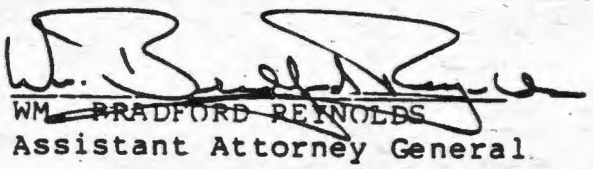
STATEMENT OF COUNSEL

I, the undersigned counsel, express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

> Brown v. Board of Education, 347 U.S. 483 (1954), and its progeny, particularly
>
> University of California Regents v. Bakke, 438 U.S. 265 (1978); and the panel's decision is not supported by
>
> Fullilove v. Klutznick, 448 U.S. 448 (1980).

I further express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance:

Whether, in the circumstances of this case, a county government may, consistent with the Equal Protection Clause of the Fourteenth Amendment, (1) adopt an ordinance authorizing the setting aside of county construction contracts for bidding exclusively among black prime contractors and the establishment of unlimited black subcontractor "goals," and (2) apply the ordinance by establishing an absolute (100%) set-aside for black prime contractors and a 50% black subcontractor goal on a specific construction project.



WM. BRADFORD REYNOLDS
Assistant Attorney General

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STATEMENT OF ISSUES PRESENTED

(1) Whether the Equal Protection Clause of the Fourteenth Amendment is violated by a county ordinance authorizing the setting aside of County construction projects for bidding exclusively among black prime contractors and the establishment of unlimited black subcontractor "goals."

(2) Whether the county's establishment of an absolute (100%) set-aside for black prime contractors and a 50% black subcontractor "goal" for a specific construction project violates the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

A. Proceedings in the District Court

The plaintiffs in this action are trade associations comprised primarily of non-black prime contractors and subcontractors that regularly work on various construction projects for Metropolitan Dade County. 552 F. Supp. 909, 911 (S.D. Fla. 1982). In November of 1982, plaintiffs filed suit challenging, as violative of the Fourteenth Amendment, County Ordinance No. 82-67, enacted earlier that year. The ordinance authorizes for all County construction contracts (1) the setting-aside of contracts for bidding exclusively among black prime contractors and (2) the establishment of unlimited black subcontractor "goals." Id. at 922. Also challenged was the initial application of the ordinance to the Earlington Heights Station contract, where the County limited bidding exclusively to black prime contractors (i.e., a 100% set-aside) and established an additional 50% black subcontractor "goal."

After temporarily enjoining application of the ordinance, the district court invalidated as unconstitutional the set-aside provisions of the ordinance, both facially and as applied to the Earlington Heights contract, but upheld the "goals" provisions and their application.

As an initial matter, the district court rejected plaintiff's contention that the ordinance was invalid because the County was not a competent governmental authority to find or remedy prior discrimination and, in any event, had not made any findings of past discrimination adequate to justify the race-conscious ordinance. The court concluded that, unlike the administrative educational agency in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), the Dade County Commission was competent to establish racially remedial programs because it was a legislative body concerned with the general welfare. 552 F. Supp. at 934. The court further concluded that the County had made findings of prior discrimination sufficient to support remedial action. The court noted that, "[a]lthough societal discrimination may be the ultimate cause of the extremely low percentage of Black contractors doing business in Dade County, there is evidence in this record from which the Court can find identified discrimination against Dade County Black contractors * * *." Id. at 925-926 (emphasis in original). The court pointed to the history of discrimination in the construction industry nationally, the disproportionately low percentage of black contractors, and the correspondingly low percentage of county contracts awarded to black contractors, which the court attributed to the "present effects of past discrimination." Id. at 926.

The district court, however, held that the racial set-aside provision was not sufficiently limited in its scope or duration to be a constitutionally acceptable remedial device. The court, relying primarily on the factors considered by Justice Powell in his concurring opinion in Fullilove v. Klutznick, 448 U.S. 448, 510-511 (1980), noted that the ordinance contained no waiver provision, that the set-aside provision was potentially permanent in nature, and that the absolute (100%) set-aside greatly exceeded the County's overall minority percentage. Id. at 935-938. In contrast, the court upheld the "goal" provision, primarily because it contained a waiver provision and because the 50% figure was "not excessive in light of the racial realities that presently exist in Dade County." Id. at 938-941.

B. The Panel's Decision

The panel declined to apply any formal standard of review or "test" but rather analyzed the constitutionality of the County ordinance in light of the three factors it believed were primarily considered in Bakke and Fullilove:

> (1) that the governmental body have the authority to pass such legislation; (2) that adequate findings have been made to ensure that the governmental body is remedying the present effects of past discrimination rather than advancing one racial or ethnic group's interest over another; and (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination. Slip op. at 1406 (emphasis in original).

The panel agreed with the district court's conclusion that the County satisfied the first two criteria, for essentially the same reasons. Slip op. at 1406-1408. The panel, however, disagreed with the district court's determination that the absolute black set-aside for the Earlington Heights project, and the ordinance authorizing it, were an impermissible means of accomplishing

the County's remedial objectives. The panel found that the "goals" and set-aside provisions of the ordinance, both facially and as applied to the Earlington Heights project, were "appropriate, narrowly tailored measures to achieve the legislative objective." Id. at 1410.

The panel based this conclusion primarily on its view that the County's establishment of a three-tiered system for reviewing racially exclusionary contracts 1/ and the annual assessment of the entire program established adequate procedural safeguards to ensure that the program's racial preferences were limited to their remedial purposes. Id. at 1408-1409. The panel further determined that the absence of both a durational limit and waiver provision and the availability of less discriminatory alternatives did not invalidate the County's program. Id. at 1408-1411. Also, the absolute set-aside for black contractors on the Earlington Heights project was not excessive, in the panel's view, since the Earlington Heights contract constituted only 1% of the County's annual contractual expenditures. Id. at 1410-1411. Finally, the panel cautioned that its "conclusions on the adequacy of the program's safeguards are premised on the assumption that the review process . . . will be conducted in a thorough and substantive manner." Id. at 1409.

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF THE ISSUES

All of the facts necessary for the argument of these issues are contained in the Statement of the Course of Proceedings and Disposition of the Case, supra.

1/ Racial goals and set-asides for particular contracts must be approved by the County Manager, the County's Contract Review Committee, and the Board of County Commissioners. The criteria for approval are the availability of black contractors, the racial goals of the particular County department awarding the contract and, in the case of a set-aside, the Board's determination that such action would be in the best interests of the County. Slip Op. at 1408.

ARGUMENT AND AUTHORITIES

For the reasons that follow, we submit that the panel's ruling upholding the race-conscious ordinance and its application to the Earlington Heights project is inconsistent with governing Supreme Court precedent and involves questions of exceptional public importance. This case is thus proper for review by the full Court, sitting en banc.

It is well settled that "all legal restrictions which curtail the rights of a single racial group are immediately suspect" and that "courts must subject them to the most rigid scrutiny." Korematsu v. United States, 323 U.S. 214, 215 (1944). See, e.g., Shelley v. Kraemer, 334 U.S. 1, 22 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 351 (1938). That a governmental classification, such as the County's racially preferential ordinance, works to the detriment of all non-black contractors rather than solely a "discrete and insular minorit[y]" (United States v. Carolene Products Company, 304 U.S. 144, 152 n.4 (1938)), is without constitutional significance. 2/ "[I]t is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group . . . ." University of California Regents v.

2/ As Justice Powell observed in Bakke, discreteness and insularity have "never been invoked in [Supreme Court] decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny." University of California Regents v. Bakke, supra, 438 U.S. at 290 (opinion of Powell, J.).

Bakke, supra, 438 U.S. at 299 (opinion of Powell, J.); see, e.g., Shelley v. Kraemer, supra, 334 U.S. at 22 ("[R]ights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."); McCabe v. Atchison, T. & S.F.Ry., 235 U.S. 152, 161-162 (1914). And, if the Equal Protection Clause creates "personal rights," "guaranteed to the individual," its safeguards "cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." University of California Regents v. Bakke, supra, 438 U.S. at 289-290 (opinion of Powell, J.). Accordingly, when a person is classified by government on the basis of race or ethnic origin, "the burden he is asked to bear on that basis [must be] precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background." Id. at 299; see Shelley v. Kraemer, supra; Missouri ex rel. Gaines v. Canada, supra, 305 U.S. at 351; Fullilove v. Klutznick, supra.

Application of this standard to the facts of this case compels the conclusion that the County's racially preferential ordinance and its application to the Earlington Heights project impermissibly infringes the equal protection rights of non-black contractors in Dade County. 3/ The governmental interest in vindicating the legal rights of victims and redressing unlawful conduct is substantial, indeed compelling, and generally justifies judicial imposition of

3/ As we discuss fully at pages 11-14, infra, federal legislation enacted pursuant to Congress' unique remedial authority under Section 5 of the Fourteenth Amendment is entitled to judicial deference not owing to state and local measures. Fullilove v. Klutznick

measures necessary to remedy the injury, even though such measures may incidentally impinge on the interests of innocent third parties. This principle does not change when the unlawful behavior is racial discrimination. "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, * * * 'a sharing of the burden' by innocent parties is not impermissible." Fullilove, supra, 448 U.S. at 484, citing Franks v. Bowman Transportation Co., 424 U.S. 747, 777 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); accord, 448 U.S. at 497 (Powell, J., concurring). That the class of victims is defined by race is but a concomitant of the fact that the defendant's unlawful behavior was defined by race.

We submit that the compelling government interest of curing the effects of past racial discrimination -- the only compelling government interest involved in this case -- will justify a class-based infringement of the legitimate interests and expectations of innocent third parties only to the extent necessary to restore proven discriminatees to the position they would have occupied in the absence of the discrimination. 4/ The rights protected under the equal protection guaranties of the Constitution belong to individuals, not groups. In order fully to vindicate these individual rights, courts should fashion remedies designed to ensure that the identifiable victims of unlawful racial discrimination are restored to their "rightful places." The legitimate "rightful place"

4/ We thus disagree with the holdings in Ohio Contractors Association v. Keip, 713 F.2d 167 (6th Cir. 1983) (upholding law requiring state officials to set aside designated percentages of state contracts for bidding by minority business enterprises only) and Schmidt v. Oakland Unified School District, 662 F.2d 550 (9th Cir. 1981) vacated and remanded, 457 U.S. 594 (1982) (upholding 25% minority business set-aside for school construction).

claims of identifiable discriminatees warrant imposition of a remedy calling for a "sharing of the burden" by those innocent third parties whose "places" are the product of, or at least enhanced by, the challenged discrimination.

Persons who have not been victimized by the discriminatory practices, however, have no claim to "rightful place" relief. And any preferential treatment accorded to nondiscriminatees -- or to discriminatees beyond those measures necessary to make them whole -- necessarily deprives innocent third parties of their "rightful places." Accordingly, as between nonvictims of the unlawful discrimination and innocent third parties, "it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another." Bakke, supra, 438 U.S. at 308-309 (opinion of Powell, J.).

In this case, the 100% set-aside and the 50% subcontractor "goal" for the Earlington Heights Station, as well as the ordinance which authorizes these provisions, are victim-blind: they embrace without distinction nonvictims as well as victims of Dade County's allegedly discriminatory practices. 5/ No inquiry of any kind is

5/ Neither the district court nor the County identified any discriminatory action by either the County or non-black contractors or any artificial barrier in the County's construction contracting procedures which adversely affected minorities. Although the district court found what it termed "identified discrimination," a finding upon which the panel heavily relied, it never "identified" who had engaged in such discrimination or how it was accomplished. Metro Dade, supra, 552 F. Supp. at 925-926; Slip Op. at 1407. Specifically, the court did not find that Dade County, or any other entity involved in the County's contracting process, had engaged in such discrimination or was otherwise responsible for it. The only evidence relied upon by the district court in support of this finding was the statistical disparity between the number of black contractors and the overall black population in Dade County (1%-16%), and a corresponding disparity in the percentage of County contracts

[Footnote cont'd on next page]

conducted concerning whether the black contractors benefitting from these racial selection devices have ever been discriminated against by the County, or any other entity, in the process for choosing contractors and subcontractors for county projects. 6/ These provisions thus inevitably accord racially preferential treatment to persons who have no "rightful place" claim vis-a-vis non-black contractors. Because Government has no compelling interest in according such preferential treatment to nondiscriminatees at the

5/ [Footnote cont'd] awarded to black contractors (1.4%-16%). Ibid. The court did not indicate that the underrepresentation of black contractors was due to any practice relating to the County's contracting process or construction industry generally or that the disproportionately low number of contracts awarded to black contractors stemmed from any discriminatory selection, rather than the acknowledged lack of available black contractors. (See note 6, infra, concerning absence of any qualified black prime contractors in the County.)

Thus, the statistical evidence relied upon by the court appears to relate solely to the lingering effects of general societal discrimination that disadvantage minority businesses across the Nation and not to any discrimination, subtle or otherwise, by the County's government or non-black contractors. Indeed, the district court apparently acknowledged as much. Ibid. It is clear, however, that any race-conscious remedial action must be premised on findings of prior discrimination that are "far more focused . . . than the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past." Bakke, supra, 438 U.S. at 307 (opinion of Powell, J.). See Fullilove, supra, 448 U.S. at 477-478, 482; id. at 498 (concurring opinion of Powell, J.).

Since neither the district court nor the County made any such "focused" findings concerning prior discrimination attributable to the County's contracting policies or procedures, the necessary predicate for "remedial" action by the County is lacking. The County cannot justify its racial classification as serving the compelling interest of remedying its prior unlawful discrimination, since it has not reasonably determined that such discrimination occurred. Bakke, supra, 438 U.S. at 307-310; Fullilove, supra, 448 U.S. at 477-478. Thus, even assuming that state and local governments are constitutionally empowered to make findings of past discrimination and to take class-based, race-conscious "remedial" action benefiting persons not actually victimized by discrimination, Dade County's ordinance is nevertheless invalid because it was enacted without adequate findings of prior discrimination.

6/ Indeed, the only black prime contractors participating in the exclusionary selection procedures were from outside Dade County (and, in some instances, the State of Florida) and thus could not plausibly have suffered from any discrimination in the County's contracting procedures. Metro Dade, supra, 552 F. Supp. at 926.

expense of innocent third parties, governmental imposition of these set-asides and goals would be unconstitutional.

Contrary to what the panel below apparently concluded, the Supreme Court's decision in Fullilove v. Klutznick, supra, does not suggest either that a state or local regulation according preferential treatment to nondiscriminatees is constitutionally permissible or that the traditional "strict scrutiny" standard should not be used to judge the County's racially preferential actions.

In that case, the Court rejected a constitutional challenge to a federal law requiring that at least 10% of federal funds for local public works projects be set aside for contracts with "minority business enterprises." Administrative and legislative findings that minority businesses had been excluded from significant participation in government construction contracts were held sufficient to justify this exercise of Congress' remedial authority. Id. at 456-472. The plurality opinion emphasized that the administrative program contained sufficient procedural safeguards to provide reasonable assurance (1) that application of racial or ethnic criteria would be narrowly limited to accomplishing Congress' remedial purposes by restricting preferential treatment to those "businesses owned and controlled by members of minority groups" whose competitive position has actually been "impaired" by the "present effects of past discrimination" (id. at 487), and (2) that misapplications of such criteria would be "promptly and adequately remedied administratively." Ibid; see generally id. at 486-489. Moreover, the plurality stressed that the Court was deciding only a facial challenge to the MBE provision and that any equal protection claims

arising out of the specific awards that "cannot be justified . . . as a remedy for present effects of identified prior discrimination * * * must await future cases." Id. at 486. In sum, then, the plurality in Fullilove indicated that the MBE provision, which "press[ed] the outer limits of congressional authority," (id. at 490) would not have passed constitutional muster had it been based solely on the contractor's race rather than on its "impaired * * * competitive position" resulting from the "present effects of past discrimination" in government construction contracting. Id. at 487; see id. at 477-478.

Moreover, as the panel below correctly noted, the minority set-aside at issue in Fullilove was enacted by Congress pursuant to its enforcement powers under Section 5 of the Fourteenth Amendment. As the Fullilove plurality opinion repeatedly emphasized, the analysis employed in that case was adopted precisely and only because the challenged set aside was enacted pursuant to this express constitutional grant of congressional enforcement authority. Fullilove, supra, 448 U.S. at 472, 476-480; id. at 499-502, 508-510 (concurring opinion of Powell, J.). When, however, a racially based set-aside is established by a governmental body other than Congress, it should be judged under the traditional "strict scrutiny" standard and, for the reasons set forth above, invalidated. Examination of the unique power granted to Congress under Section 5 to enforce through appropriate legislation the Equal Protection guaranties of the Fourteenth Amendment, and the correspondingly unique treatment the Fullilove plurality gave to the set-aside enacted pursuant to that power, makes this clear.

the Civil War Amendments gave Congress authority to enact legislation it deemed necessary to remedy the consesquences of racially discriminatory action. 7/ "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Morgan, supra, 384 U.S. at 651. Pursuant to this power, Congress may invalidate practices that the Supreme Court would not find violative of the Fourteenth Amendment. See Morgan, supra; Oregon v. Mitchell, 400 U.S. 112 (1970).

Thus, when acting to effectuate the demands of the Equal Protection Clause, Congress has extraordinarily "broad remedial powers" that exceed even those of the judiciary. Fullilove, supra, 448 U.S. at 483. As the Fullilove plurality noted:

> Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Id. at 483. Accord, id. at 501, n.3, 516 (concurring opinion of Powell, J.).

Accordingly, in the "unique" context of interpreting a congressional remedial provision enacted pursuant to Section 5 of the Fourteenth Amendment, courts must give appropriate deference to the evidentiary basis upon which the measure was premised and to the means chosen by Congress to accomplish the remedial objective.

7/ Fullilove, supra; Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 745 (1966); Ex Parte Virginia, 100 U.S. 339 (1879). See Bohrer, Bakke, Weber and Fullilove: Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment, 56 Ind. L.J. 473 (1981).

Id. at 472, 476-478. Accord, id. at 499-502 (concurring opinion of Powell, J.), Morgan, supra, 384 U.S. at 648-656; South Carolina v. Katzenbach, supra, 383 U.S. at 323-327. The Fullilove plurality made clear, however, that judicial deference to congressional judgments made pursuant to its Section 5 authority is not absolute, stressing that any racial classification must be given the "most searching examination." Fullilove, supra, 448 U.S. at 491; id. at 496 (concurring opinion of Powell, J.) (applying "strict scrutiny" test). Indeed, the plurality specifically noted that the race-conscious remedial set-aside at issue in that case "press[ed] the outer limits of congressional authority." Id. at 490 (emphasis added).

A municipal government such as Dade County, however, stands on entirely different constitutional footing. The County has, of course, no remedial authority comparable to that granted Congress under the Enforcement Clause of the Fourteenth Amendment. Rather, the Fourteenth Amendment acts solely as a limitation on the County's action. Consequently, when judging a racial classification imposed by a state or municipal government, the statute or ordinance is not entitled to deference comparable to that accorded federal legislation enacted pursuant to Congress' Section 5 authority. To the contrary, the court must "strictly scrutinize" the classification to ensure that it is precisely tailored to serve a compelling government interest. Accordingly, even if Congress could lawfully enact a particular remedial program, it does not follow that local governments could do likewise. 8/

8/ As Justice Powell expressly noted, the fact that the congressional set-aside was upheld did not mean "that the selection of a set-aside by any other governmental body would be constitutional. See Bakke, 438 U.S. at 309-310. The degree of specificity required in the findings of discrimination and the breadth of discretion in

CONCLUSION

For the foregoing reasons, the panel opinion should be vacated and the case set for rehearing by the full Court.

Respectfully submitted,

WM. BRADFORD REYNOLDS
Assistant Attorney General
Civil Rights Division

CHARLES J. COOPER
Deputy Assistant Attorney General

MICHAEL CARVIN
Attorney
Civil Rights Division

CERTIFICATE OF SERVICE

I, Michael Carvin, certify that on March 2, 1984, I served copies of the foregoing Motion of the United States to Intervene as a Party Appellant and Suggestion of Rehearing En Banc by mailing copies thereof, postage prepaid, to the following counsel of record:

R. A. Cuevas, Jr., Esq.
Assistant County Attorney
Dade County Courthouse
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