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File Folder: Dade ~~Co.~~ County Set-aside Case [1 of 3]
~~OA 10792~~ Box 7

Date: 2/18/98

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. memo	J.Steven Rhodes to Michael K.Deaver re South Florida Chapter of the Association of General Contractors, Inc., vrs Metropolitan Dade County, Florida, 2p.	3/9/84	~~P5~~
2. memo	J.Steven Rhodes to James Baker III re South Florida Chapter of the Association of General Contractors, Inc., vrs Metropolitan Dade County, Florida, 2p. [same memo as in item 1]	3/9/84	~~P5~~ CCB 10/18/00

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]
- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]
- F-1 National security classified information [(b)(1) of the FOIA].
- F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
- F-3 Release would violate a Federal statue [(b)(3) of the FOIA]
- F-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
- F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

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Biff —

This material is from my personal files

Jim Ciccone
2/5

THE WHITE HOUSE
WASHINGTON

Mr. Deaver:

Mel Bradley called this morning saying that Brad Reynolds from Justice Department is killing us (see attached article.)

DB

Washington Post 3/8/84

Set-Aside For Blacks Challenged

By Howard Kurtz
Washington Post Staff Writer

The Justice Department, in a new attempt to narrow legal remedies for racial discrimination, has challenged a law in Dade County, Fla., that sets aside some county construction contracts for black-owned businesses.

The county ordinance, adopted in response to racial unrest in May, 1980, in Miami's Liberty City area of the county, is similar to provisions that the federal government and many states and cities have adopted to increase the share of public business awarded to minority firms.

William Bradford Reynolds, assistant attorney general for civil rights, called the Dade County ordinance unconstitutional in a brief filed Monday in federal court in Atlanta. He said no local government has authority to limit contract bids on the basis of race.

A three-judge panel of the 11th U.S. Circuit Court of Appeals in Atlanta had upheld the Dade statute, and Reynolds asked the full court to reverse that ruling.

Reynolds said yesterday that the Justice Department's position, if upheld, could invalidate "race-conscious set-aside" laws in many cities and states. The District of Columbia, for example, requires that 35 percent of contracts awarded by each city agency be set aside for minority bidders, while Detroit sets aside 40 percent of its contracts for small firms and those owned by minorities and women.

According to Reynolds' brief, there is no evidence that black firms that would be aided by Dade County's set-aside law have been victims

See CONTRACTS, A15, Col. 1

at the Ronald Reagan Library

THE WHITE HOUSE

WASHINGTON

March 8, 1984

U.S. Challenges Set-Aside for Blacks

CONTRACTS, From A1

of discrimination. He said that the 14th Amendment gives Congress special powers to fashion such remedies but that this authority does not extend to local governments.

The county's law "impermissibly infringes the equal-protection rights of non-black contractors in Dade County," the brief said, adding that "these racial selection devices" can be used only to help "identifiable victims of unlawful racial discrimination."

Reynolds said in an interview that Dade County officials "have discriminated against all those who are not of the particular race that is preferred. It plugs into the system a discriminatory selection process based on race . . . . It is one of the most pernicious excuses for government to operate. We have to get beyond the point where we are endorsing government decisions based on race classifications."

Reynolds added that set-aside programs provide little help for most minorities and that an individual black firm must prove it was the victim of racial bias before receiving preferential treatment.

Rep. Parren J. Mitchell (D-Md.), chairman of the House Small Business Committee, responded that "it's a specious argument to say that these contractors have not been victims." Local set-aside rules, he said, are aimed at "confronting ongoing, present discrimination. This is not an effort to reach back to remedy the ills of the past."

In 1980, the Supreme Court upheld Congress' right to set aside 10 percent of federal public-works contracts for minority firms in a broad endorsement of federal remedial programs, such as those run by the Small Business Administration. The ruling did not say whether local governments have similar powers, but such local laws have been upheld in several lower-court decisions.

Dade County Assistant Attorney Robert Cuevas said the Justice Department's brief is "consistent with the administration's policy" of trying to limit legal remedies in busing and affirmative-action cases. "I don't think Congress or Washington has all of the wisdom in terms of correcting past discrimination," he said.

Cuevas said Dade County, the state of Florida and the U.S. Commission on Civil Rights conducted studies after the Liberty City conflict and found that "a main cause of the riots was a total lack of participation by the black community in Dade's economic growth."

While blacks comprise 17 percent of the county's population, he said, black-owned firms have received fewer than 1 percent of county construction contracts, which total about $450 million annually.

In 1982, the county adopted an ordinance that would set aside an unspecified number of construction contracts for black-owned firms and set "goals" of reserving as much as half of some subcontracts if enough black bidders were available.

The first contract to be set aside was to build a subway station in a predominantly black area near Liberty City. Cuevas said the move was approved by the U.S. Transportation Department, which is paying 80 percent of the cost and has a minority set-aside program for highway contracts.

But the county was sued by Associated General Contractors, which represents 8,500 firms, most of them non-minority, and has challenged similar set-aside laws in Richmond, Atlanta and Seattle. The trial court rejected part of the Dade County law, but the appeals court upheld the entire program, prompting the Justice Department to intervene.

Bill Henry of the contractors' group said the county law does not consider whether black contractors are economically disadvantaged.

"It's such a sweeping and exclusive measure that it's robbing our members of their market," he said.

THE WHITE HOUSE
WASHINGTON

March 8, 1984

TO: JAB III

Attached is an additional memo, from Jack Svahn, on the Dade County case. It is a good summary.

In short, though, we are arguing that Congress has the authority to enact set-aside programs, but state and local governments who do the same are violating the equal protection clause of the 14th Amendment. Legally accurate, but very hard to explain as part of any coherent policy framework.

JC

THE WHITE HOUSE

WASHINGTON

March 8, 1984

MEMORANDUM FOR JAMES A. BAKER, III

FROM: JOHN A. SVAHN

SUBJECT: Dade County Case

You have asked for a brief factual summary of the Dade County set-aside case noted in this morning's newspaper.

Following the Liberty City riots, Dade County enacted an ordinance mandating a rigid set-aside for black contractors for all construction contracts let by Dade County. In addition, the ordinance set up a fifty percent goal for black subcontractors.

The first major contract to be let under this ordinance was for the construction of a portion of the Dade County metro system. That contract was challenged by the local contractors organization, and a federal district court held 1) that the provision of the ordinance calling for a hundred percent set-aside for prime contractors was unconstitutional because not limited as to scope or duration; and 2) that the provision dealing with subcontractors was valid because it contained a waiver clause, i.e., it was not a rigid quota.

On appeal, a three-judge panel of the 11th Circuit upheld both provisions of the ordinance.

A petition for rehearing by the 11th Circuit has been filed, and DOJ has entered as amicus. The DOJ brief argues that the ordinance cannot withstand the "strict scrutiny test" long mandated by the Supreme Court. The "strict scrutiny test" holds that any statute, regulation, or ordinance which classifies on the basis of race is presumptively invalid unless "a compelling state interest" can be shown to validate the classification. Since the set-aside in the Dade County ordinance is, according to Justice, blatantly based on race, it cannot and should not stand.

DOJ distinguishes federal set-asides of a similar nature on the grounds that they are not based explicitly on race, but rather on "sociological or economic disadvantage".

After learning the foregoing facts, I was informed that a memorandum setting forth the facts in this case was sent by DOJ to Ed Meese last Friday. Attached is a copy of that memo.

cc: Mike McManus
Larry Speakes
Mike Baroody

Attachment

U.S. Department of Justice

Civil Rights Division

Deputy Assistant Attorney General

Washington, D.C. 20530

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~~ March 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 establishment 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~~ the 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, supra.

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 "pressed 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 Supreme Court has long recognized that the unprecedented grant of authority contained in the enforcement clauses of

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

[Footnote continued on next page]

The panel's failure to give sufficient weight to this crucial distinction between the unique Section 5 remedial power of Congress and the power of a municipal government caused it to erroneously analyze the constitutionality of Dade County's racially preferential ordinance, and the application of that ordinance to the Earlington Heights project, under the comparatively deferential standard employed in Fullilove rather than the traditional "strict scrutiny" standard of review set forth above. As we have previously discussed, because the ordinance, both on its face and as applied to the Earlington Heights project, does not limit racially preferential treatment to those measures necessary to "make whole" victims of the County's past racially discriminatory contracting practices, it cannot be squared with the requirements of the Fourteenth Amendment. Accordingly, the panel's decision should be vacated and set for rehearing by the full court sitting en banc.

8/ [Footnote cont'd]
the choice of remedies may vary with the nature and authority of a governmental body." Fullilove, supra, 448 U.S. at 515-516, n.14 (concurring opinion of Powell, J.).

CONCLUSION

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

Respectfully submitted,

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SOUTH FLORIDA CHAPTER OF the ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., et al., Plaintiffs-Appellees, Cross-Appellants,

v.

METROPOLITAN DADE COUNTY, FLORIDA, et al., Defendants-Appellants, Cross-Appellees.

No. 83-5001.

United States Court of Appeals, Eleventh Circuit.

Jan. 27, 1984.

White construction contractors and subcontractors brought action against county challenging race-conscious affirmative action plan for county contracts contained in county ordinance. The United States District Court for the Southern District of Florida, James W. Kehoe, J., 552 F.Supp. 909, upheld part of ordinance and declared part of ordinance unconstitutional, and both sides appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) county commission was competent as matter of state law to make findings of past discrimination and to enact remedial legislation; (2) commission's findings of past discrimination were sufficient to justify measures designed to remedy past discrimination; (3) ordinance incorporated sufficient safeguards to ensure that it was narrowly drawn to legitimate objective of redressing past discrimination; and (4) ordinance as applied to metrorail construction project was constitutional.

Affirmed in part and reversed in part.

1. Constitutional Law ⇐215

Legislation employing benign racial preferences must incorporate sufficient safeguards to allow reviewing court to conclude that program will be neither utilized to extent nor continued in duration beyond point needed to redress effects of past discrimination.

2. Counties ⇐116

County, pursuant to its home rule charter, which specifically granted county power to waive competitive bidding when such waiver was in county's best interest, was competent, as matter of state law, to make findings of past discrimination and to enact remedial legislation granting preferential treatment to blacks in its contract-bidding process.

3. Counties ⇐47

Where county commission's findings that past discriminatory practices had impeded development of black businesses, resulting in economic disparity between blacks and other groups that had created unrest in black community, were based on reliable, substantial information compiled by independent investigations, findings established governmental interest justifying county ordinance granting preferential treatment to blacks in its contract-bidding process designed to remedy past discrimination.

4. Counties ⇐116

Adequate safeguards existed to uphold constitutionality of county ordinance granting preferential treatment to blacks in contract-bidding process in order to remedy past discrimination, where before set-aside or subcontractor goal contract was approved for county construction contract, it was required to pass three levels of admin-

istrative review, ordinance and regulation set out criteria to guide reviewing bodies as to whether set-aside and goals were appropriate, and entire project was subject to periodic review and assessment.

5. Constitutional Law ⇐215

Totality review is an appropriate means of ascertaining whether legislation employing benign racial preferences or its application is narrowly drawn so as to not unfairly infringe on rights of third parties.

6. Constitutional Law ⇐219.1

County ordinance which allowed county to set aside contracts for bidding solely among black contractors and contained subcontracts goal provision was constitutionally applied to metrorail station construction, where station constituted less than one percent of county's annual expenditures on contracts, blacks constituted over 17 percent of county's population, yet less than one percent of county contractors were black, effect of set-aside and subcontractor goal provisions was not disproportionate to either number of blacks and black contractors residing in county or to goal of increasing black business participation in order to redress pass discrimination, and third parties were not unfairly affected.

Appeals from the United States District Court for the Southern District of Florida.

Before KRAVITCH, HENDERSON and ANDERSON, Circuit Judges.

KRAVITCH, Circuit Judge:

This case involves the constitutionality of a Metropolitan Dade County ordinance and resolution granting preferential treatment to blacks in its contract bidding process. The ordinance allows the county to "set aside" contracts for bidding solely among black contractors [1] and contains a "goals" provision by which the county can require that a certain percentage of a contract's value be subcontracted to black contractors. The plaintiffs, non-profit corporations and trade associations, brought suit challenging the ordinance both facially and as applied to the county construction contract for the Earlington Metrorail Station.

The district court held that the "set aside" provision violated the Equal Protection Clause of the Fourteenth Amendment and granted a permanent injunction. The court, however, upheld the constitutionality of the "goals" provision. *South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County*, 552 F.Supp. 909 (S.D.Fla. 1982) [hereinafter cited as *Metro Dade*]. Both sides have appealed from the decision.

I.

The district court made extensive factual findings of the events leading up to the

1. The term "black contractor" as used in the challenged ordinance and throughout our opinion denotes a contracting or subcontracting business entity that is

> at least 51 percentum owned by one or more Blacks, or, in the case of a publicly-owned business, at least 51 percentum of the stock of which is owned by one or more Blacks; and whose management and daily business operations are controlled by one or more such individuals.

Metropolitan Dade County, Fla., Ordinance No. 82-67 (July 20, 1982).

present controversy.[2] The court found that the May 1980 disturbances in Liberty City had prompted the county to investigate the economic and social opportunities of blacks living in the area. The resulting studies concluded that race relations would continue to deteriorate unless steps were taken to enhance the business opportunities of the black community.

On November 3, 1981, the Dade County Commission in response to these findings adopted Resolution No. R-1672-81.[3] The resolution recognized that past discrimination had "to some degree" impaired the competitive position of black-owned businesses, resulting in a "statistically significant disparity" between the black population, the number of black businesses, and the number of county contracts awarded to black-owned enterprises. The resolution proceeded to announce a "policy of developing programs and measures to alleviate the problem ..., including specific race conscious measures."

On July 20, 1982, the Dade County Commission adopted Ordinance No. 82-67 [4] as a measure designed to implement its policy of fostering black business growth. The Commission premised the ordinance on a finding that:

> Dade County has a compelling interest in stimulating the Black business community, a sector of the County sorely in need of economic stimulus but which, on the basis of past experience, is not expected to benefit significantly in the absence of specific race-conscious measures to increase its participation in County contracts.

The ordinance required that all proposed county contracts be reviewed to determine whether race-conscious measures would foster participation by black contractors and subcontractors. Bid credits, set-asides, minority participation goals and other devices were to be considered. The district court summarized the administrative procedures mandated by the ordinance as follows:

> a. Each department is charged with the responsibility of submitting its recommendations concerning Black set-asides and goals on each construction project under its jurisdiction;
>
> b. A three member contract review committee comprised of county officials is charged with the responsibility of reviewing the Departmental recommendations and submitting a final recommendation on Black set-asides and goals to the county commission for final action;
>
> c. Black subcontractors goals are to be based on "the greatest potential for Black subcontractor participation" and ... "shall relate to the potential availability of Black-owned firms in the required field of expertise";
>
> d. Availability of Black subcontractors should include "all Black-owned firms with places of business within the Dade County geographic area";
>
> e. Black set-asides shall be considered where there exists at least three Black prime contractors with the capabilities consistent with the contract requirements;

2. The district court's findings are binding unless clearly erroneous. F.R.Civ.P. 52(a).

3. Resolution No. R-1672-81 is set out in full in the Appendix.

4. Ordinance No. 82-67 is set out in full in the Appendix.

f. A Black prime contractor can be under contract for up to three set-asides within any one year period, but no more than one set-aside at a time;

g. Prior to implementation of a Black set-aside, the county commission is to make findings that the Black set-aside is "in the best interest of the County in order to waive formal bid procedures"; and

h. Bid procedures limiting bids to Black prime contractors would be implemented.[5]

Metro Dade, 552 F.Supp. at 922.

On July 21, 1982, the day following the passage of Ordinance No. 82–67, the county received and opened bid proposals for the Earlington Heights Station, part of a billion dollar rapid-rail transit system financed with federal, state and local funds. A non-black prime contractor, Peter Kiewit Sons' Company, submitted the lowest bid. The next lowest bid was tendered by Thacker Construction Company, a black prime contractor. These bids were rejected for two reasons: (1) both exceeded the County Engineer's estimate of what the project should cost, and (2) the amounts of the bids had become public, rendering it impossible to conduct competitive bid negotiations under applicable federal regulations. The County Manager then proposed, and the Commission agreed, that the Earlington Heights contract be reviewed under the newly enacted ordinance.

After reviewing departmental recommendations, the Contract Review Committee proposed that the Commission waive the use of formal competitive bids, setting aside the Earlington Heights contract for competitive bidding exclusively among black contractors. In accordance with the administrative procedure provided by the ordinance, the Contract Review Committee found that there were a sufficient number of licensed black contractors in Dade County that possessed the requisite financial and technical capabilities to ensure competition for the contract. Additionally, the Committee suggested the inclusion of a subcontractor goal requiring that fifty percent of the contract's dollar value be awarded to black subcontractors. When combined with the general requirement that the prime contractor personally perform twenty-five percent of the contract, this meant that seventy-five percent of the Earlington Heights contract was being set-aside solely for black contractors.

On October 5, 1982, the Dade County Commission passed Resolution No. R-1350–82[6] adopting the Committee's recommendations. The County issued notice that the contract was open for bidding subject to the one hundred percent set-aside and the fifty percent subcontractor goal. The closing date for submission and the opening of bids was set for November 17, 1982.

The plaintiff-appellees filed a complaint in the Southern District of Florida on November 12, 1982, seeking declaratory and injunctive relief. Jurisdiction was premised upon 28 U.S.C. § 1343 as an action seeking relief pursuant to 42 U.S.C. §§ 1981 and 1983 and 28 U.S.C. §§ 2201 and 2202. Two related state-law claims were asserted under the district court's pendent jurisdiction. On November 16, 1982, after both sides presented evidence at a hearing, the district court granted the plaintiffs' motion for a temporary restrain-

5. The regulations are set out in full in the Appendix.

6. Resolution No. R–1350–82 is set out in full in the Appendix.

ing order. On December 16, 1982, the court issued its memorandum opinion, declaring the one hundred percent set-aside unconstitutional, but upholding the use of the fifty percent subcontractor goal.

II.

Because resolution of appellees' pendent claims might render discussion of the federal constitutional claims unnecessary, we address those claims first. *Hagans v. Levine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). The plaintiff-appellees first contend that the County's preferential treatment policy violates the Dade County Home Rule Charter. The district court concluded that the Commission, pursuant to section 4.03(D) of the Charter, may waive competitive bidding when it determines waiver to be in the County's best interests. *Metro Dade*, 552 F.Supp. at 927–28. We agree with this conclusion and discuss the relevant Charter provisions more completely *infra* Slip op. at 1406–1407, at ___ - ___.

Plaintiff-appellees also argue that the challenged policies contravene the Florida Constitution's due process and equal protection guarantees. The Florida courts have held that these provisions confer the same protection as their federal counterparts. *See Florida Canners Association v. Department of Citrus*, 371 So.2d 503, 513 (Fla.2d Dist.Ct.App.1979), *aff'd*, 406 So.2d 1079 (Fla.1981); *Florida Real Estate Commission v. McGregor*, 336 So.2d 1156 (Fla.1976). Determination of this pendent claim, therefore, is necessarily dependent upon the disposition of the federal constitutional issue.

III.

The United States Supreme Court first directly confronted the constitutionality of affirmative action plans in *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). Bakke challenged an admissions program instituted by the University of California at Davis Medical School, whereby sixteen of the one hundred available places in the entering class were set aside solely for minority applicants. He contended that the program violated both Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.

No clear consensus emerged from the Court's decision. Five justices held that the strict racial quota was invalid, but only Justice Powell, utilizing a strict scrutiny standard of review, reached the decision on constitutional grounds. Justice Stevens, joined by the Chief Justice and Justices Stewart and Rehnquist, concurred in holding the program invalid, but did so on the basis of Title VI, not deciding the constitutional issue. Justices Brennan, White, Marshall and Blackmun, on the other hand, agreed with Justice Powell that Title VI was implicated only if the Equal Protection Clause was also violated, but, relying on an intermediate level of scrutiny, would have upheld the program's validity as substantially related to an important governmental interest.

The Court next addressed the issue in the context of a congressional affirmative action program for federal funding of public works projects. *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). The *Fullilove* Court upheld a statute that required local governments receiving funds under a federal public works program to use 10% of the funds for the procurement of services or supplies from

statutorily defined minority owned and controlled businesses. Because *Fullilove* addresses the equal protection issue in the context of government construction contracts and funding, it is the most relevant case to our constitutional inquiry. See *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167, 170 (6th Cir.1983).

As in *Bakke*, the Court in *Fullilove* did not produce a majority opinion, with three different views emerging from those Justices voting to uphold the statute. Chief Justice Burger's opinion, in which Justices Powell and White concurred,[7] declined to adopt either a strict scrutiny or intermediate scrutiny standard. Instead of articulating a broad rule of law, the Chief Justice's opinion concentrated on "the context presented" in determining whether the statute's objective was within Congress' power and, if so, whether the means used was "narrowly tailored to the achievement of [Congress'] goal." 448 U.S. at 473, 480, 100 S.Ct. at 2772, 2775. The Chief Justice also broadly outlined those aspects that a reviewing court should consider when evaluating such programs:

> For its part, the Congress must proceed only with programs narrowly tailored to achieve its objectives, subject to continuing evaluation and reassessment; administration of the programs must be vigilant and flexible; and, when such a program comes under judicial review, courts must be satisfied that the legislative objectives and projected administration give reasonable assurance that the program will function within constitutional limitations.

448 U.S. at 490, 100 S.Ct. at 2781.

Justice Powell's concurrence reiterated his views in *Bakke* that strict scrutiny was the proper standard of review. The strict scrutiny test would require a finding that the racial classification was "a necessary means of advancing a compelling governmental interest." 448 U.S. at 496, 100 S.Ct. at 2783. This approach requires both specific findings of past discrimination and a choice of remedies "equitable and reasonably necessary to the redress of identified discrimination." *Id.* at 498, 510, 100 S.Ct. at 2785, 2791. Justice Powell also outlined five factors to consider in determining whether the strict scrutiny test is satisfied: (1) the efficacy of alternative remedies; (2) the planned duration of the remedy; (3) the relationship between the number of minority workers to be employed and the percentage of minority group members in the work force; (4) the availability of waiver provisions; and (5) the effect of the remedy on third parties. *Id.* at 510, 514, 100 S.Ct. at 2791, 2793.

Both Chief Justice Burger and Justice Powell's opinions stressed the fact that the statute in *Fullilove* was passed by Congress and should therefore be judged with deference to Congress' broad powers:

> Here we deal ... 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 does there repose a more comprehensive re-

7. The district court referred to the Chief Justice's opinion as the "plurality opinion" in *Fullilove*. *Metro Dade*, 552 F.Supp. at 931. Two justices also concurred in Justice Marshall's opinion, however, meaning that neither the Chief Justice nor Justice Marshall's opinion garnered the support of a plurality. Thus, to the extent that the term "plurality opinion" connotes that an opinion commands more support than other opinions in the case, neither Chief Justice Burger nor Justice Marshall's opinion qualifies.

> medial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.

Id. at 483, 100 S.Ct. at 2777; *see also id.* at 515 n. 14, 100 S.Ct. at 2794 n. 14 (Powell, J., concurring). Their emphasis on the fact that the Court was reviewing a Congressional statute suggests that constitutionally acceptable means of redressing past discrimination vary with the powers of the government body enacting the legislation.

Justice Marshall in his concurrence, joined by Justices Brennan and Blackmun, reaffirmed his view in *Bakke* that an intermediate standard of review was necessary, requiring that the use of benign racial classifications be "substantially related" to "an important and articulated" government purpose. *Id.* Justice Marshall believed that such an approach would guard against possible misuse or stigmatization while still allowing sufficient flexibility to redress past discrimination.

[1] In light of the diversity of views on the Supreme Court, determining what "test" will eventually emerge from the Court is highly speculative. The district court, based upon a review of federal court cases following *Bakke* and *Fullilove*, concluded that strict scrutiny was the proper standard. We rely instead on what we perceive as the common concerns to the various views expressed 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 interests over another; and (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination. Legislation employing benign racial preferences, therefore, must incorporate sufficient safeguards to allow a reviewing court to conclude that the program will be neither utilized to an extent nor continued in duration beyond the point needed to redress the effects of the past discrimination.

This approach is most closely akin to that set out in Chief Justice Burger's opinion in *Fullilove.* Without adopting a formal "test," it attempts to balance the legitimate objective of redressing past discrimination with the concerns that the chosen means be "narrowly tailored" to the legislative goals so as to not unfairly impinge upon the rights of third parties. Furthermore, the program must be structured in such a way that it is subject to reassessment and will be implemented in a manner that is flexible enough to account for changing needs and circumstances. 448 U.S. at 490, 100 S.Ct. at 2780.

IV.

A.

Pursuant to the above approach, we must first determine whether Metropolitan Dade County was a competent legislative body to adopt remedial measures designed to eliminate past discrimination. In *Fullilove,* both Chief Justice Burger and Justice Powell emphasized the "unique" role accorded Congress in dealing with past discrimination, 448 U.S. at 483, 500, 100 S.Ct. at 2777, 2786. We agree with the Sixth Circuit, however, that the references in *Fullilove* to Congress' power were not intended to imply that governmental bodies other than Congress may not act to remedy past discrimination, but were only empha-

sizing the "unequaled" power of Congress to act under its specific powers granted by the Fourteenth Amendment. *Ohio Contractors*, 713 F.2d at 172. Thus, although the scope of Congress' power to remedy past discrimination may be greater than that of the states, state legislative bodies are not without authority to ensure equal protection to persons within their jurisdictions. *Id.*

[2] Whether the Metropolitan Dade County Commission as a political subdivision of the State of Florida had the power to enact the ordinance is a question of state law. Dade County operates pursuant to its Home Rule Charter, which specifically grants the county the power to waive competitive bidding when such waiver is in the county's best interests:

> Contracts for public improvements and purchases of supplies, materials, and services other than professional shall be made whenever practical on the basis of specifications and competitive bids. Formal sealed bids shall be secured for all such contracts and purchases when the transaction involves more than the minimum amount established by the Board of County Commissioners by ordinance. The transaction shall be evidenced by written contract submitted and approved by the Board. The Board, upon written recommendation of the Manager, may by resolution adopted by two thirds vote of the members present, waive competitive bidding when it finds this to be in the best interest of the county.

Metropolitan Dade County, Fla., Home Rule Charter § 4.03(D) (as amended through October 5, 1978). When this provision is coupled with the other broad powers granted by the Home Charter, *see Metro Dade*, 552 F.Supp. at 934, we agree with the district court's conclusion that the Commission was competent as a matter of state law to make findings of past discrimination and to enact remedial legislation. *Id.* at 927, 934.

B.

[3] Having found that the Commission had the authority to enact the ordinance, we must now determine if the Commission made adequate findings to ensure that the county was acting to remedy the effects of past discrimination rather than advancing one group's interests over another based on a perceived need not founded in fact. We agree with the district court that the Commission made sufficient legislative findings to justify race-conscious remedies.

The court found that the Commission's actions were based on "reliable, substantial information compiled by independent investigations." *Metro Dade*, 552 F.Supp. at 917 (Finding # 17). These investigations revealed that past discriminatory practices had impeded the development of black businesses, resulting in an economic disparity between blacks and other groups that had created unrest in the black community. *Id.* at 916 (Finding # 16). Moreover, the court found from the evidence presented that although the present county government had not engaged in discriminatory practices, there had been "*identified discrimination* against Dade County black contractors at some point prior to the county's present affirmative action program." *Id.* at 925–26 (Finding # 41) (emphasis in original). The Commission in passing both Resolution No. R–1672–81 and Ordinance No. 82–67 relied on the above legislative findings as the premise for their actions, and these findings amply establish a governmental interest justifying the county's

measures designed to remedy past discrimination. *See Ohio Contractors*, 713 F.2d at 170–171.

C.

[4] We must next consider whether the Dade County ordinance facially incorporates sufficient safeguards to ensure that it is narrowly tailored to its legitimate objective of redressing past discrimination. After a careful review of the legislative provisions, we find that adequate safeguards exist to uphold the ordinance's constitutionality.

Before a set-aside or subcontractor goal is approved for a county construction contract, it must pass through three levels of administrative review. First, the county department must suggest through the County Manager which, if any, race-conscious measures are appropriate for the project being reviewed. Regs. 1.02 & 2.03. The suggestions are made on the basis of the availability of black contractors and the goals of the department. Reg. 1.02. Suggested actions may include the use of a set-aside, subcontractor goals, bid credits or no race-conscious measures at all. Reg. 1.04.

Next, the department's suggestions are reviewed by a three member Contract Review Committee. Regs. 2.01 & 2.02. The Committee formulates a recommendation on the advisability of the inclusion of race-conscious measures for the construction contract in question prior to the preparation of contract specifications. Regs. 2.04 & 2.06. This recommendation is then forwarded to the Board of County Commissioners. Reg. 2.06.

Finally, the Board conducts its review of the proposed measures, acting upon the Committee's recommendation and giving advice on how to proceed. Reg. 2.06. In the case of a set-aside, the Board must make findings that the set-aside would be in the best interests of the county before waiving formal bid procedures. Regs. 2.07 & 5.03.

The ordinance and regulations also set out criteria to guide the reviewing bodies as to whether set-asides and goals are appropriate. A set-aside may be used only upon findings that at least three certified black prime contractors are available and that the set-aside would be in the best interests of the county. Ord. 10–38(d)(2); Reg. 5.01. Subcontractor goals must be based upon estimates of the project's subcontracting opportunities and the availability of black subcontractors with the necessary expertise. Ord. 10–38(d)(1); Reg. 4.02.

In addition to the three-tiered review of each construction contract where race-conscious remedies are proposed, the entire program is also subject to periodic review and assessment. The Board must annually reassess the continuing desirability and viability of the program. Ord. § 10–38(e). This reassessment is in part based upon an annual report by the County Manager reporting the percentage of the value of county construction contracts awarded that year to black contractors and subcontractors. Ord. § 10–38(e). The County Manager is also charged with the duty of continually monitoring the program's use and periodically reporting its findings. Resol. § 3.

We find that these extensive review provisions provide adequate assurances that the county's program will not be used to an extent nor continue in duration beyond the point necessary to redress the effects of past discrimination. Although no definite expiration date is specified, the Board is

obligated to review the program annually to assess whether it should be continued or modified, and such a review adequately guarantees that the program will not be continued beyond its demonstrated need. See *Ohio Contractors*, 713 F.2d at 175 (no given expiration date required).[8] Likewise, although no target figure for the program's overall use is specified, adequate review mechanisms exist to ensure that the program will not be misused. Each contract where set-asides or goals are to be used must be approved at three different levels of the county government, and the entire program is subject to periodic monitoring and reassessment by the Board and County Manager.

Our conclusions on the adequacy of the program's safeguards are premised on the understanding that the review process, both for individual contracts and the entire program, will be conducted in a thorough and substantive manner. If the process is carried out in a conclusory fashion or extended beyond its legitimate purpose of redressing the effects of past discrimination, the plaintiffs may of course renew their challenge to the constitutionality of the county's program. We decline to hold the ordinance facially unconstitutional, however, merely on the speculation that the county will not vigorously undertake implementation of the review procedure.

V.

Having found that the ordinance is constitutionally acceptable, we must still determine whether the program was constitutionally applied to the Earlington Heights Station. After reviewing the record, we conclude that the set-aside and subcontractor goal were properly adopted by the county and were appropriate measures for the project.

After the formal bidding on the Earlington Heights contract was rejected,[9] the County Manager recommended that the contract be subjected to the newly enacted procedures of Ordinance No. 82–67. *Metro Dade*, 552 F.Supp. at 923. The Contract Review Committee, in accordance with the requisite administrative procedures, determined that a sufficient number of county black contractors were available with the requisite capability of serving as the prime contractor and recommended that bidding be set-aside. *Id.* The Committee also recommended a fifty percent subcontractor goal based on the availability of qualified black subcontractors and the requirements of the project. *Id.*

The Commission adopted the Committee's recommendations, finding:

> as a matter of fact that the use of both a set-aside and a goal on this contract will

8. A durational limit is one of the five factors that Justice Powell identified for assessing a program's constitutionality. 448 U.S. at 510, 512, 100 S.Ct. at 2791, 2792 (Powell, J. concurring). In *Ohio Contractors, supra*, the Sixth Circuit held that the lack of a durational limit was not "fatal" in light of the Ohio legislature's recognition of the need for future reassessment and reevaluation. 713 F.2d at 175. The dissent argued that the lack of a durational limit combined with what it believed was a lack of sufficient findings of past discrimination led to the statute "present[ing] a real danger of fostering a dependency upon favoritism, which is inimical ... to the commands of the Equal Protection Clause." 713 F.2d at 176 (Engel, T., dissenting). Here, we have adequate legislative findings, *supra*, which ensure that Dade County is not merely "fostering a dependency upon favoritism," as well as an annual reassessment by the Board of the continued need for the program.

9. The bids were rejected because they were substantially higher than the County's estimates and because the amount of the bids had become public. *Supra* Slip op. at 1403 at ——.

> contribute towards eliminating the marked statistical disparity ... between the percentage of overall Black business participation in County contracts and the percentage of Dade County's population which is Black.

Resolution No. R-1350-82. In accordance with the ordinance's regulations, the Commission formally found the set-aside to be in the best interests of the county and waived formal bidding. The Commission also incorporated the prior legislative findings of Resolution R-1672-81, which had found both evidence of past discrimination and a need for fostering increased participation by the black business community.

The set-aside and subcontractor goal for the Earlington Heights Station were thus properly adopted by the Commission pursuant to the ordinance and its regulations.[10] The Contract Committee reviewed the availability of qualified black contractors and the demands of the project before making its recommendations, and the Board found the recommendations to be necessary to eliminating the vestiges of past discrimination in the awarding of county construction contracts.

Moreover, we find that the 100% set-aside and 50% subcontractor goal were appropriate, narrowly tailored measures to achieve the legislative objective. In so concluding, we find that the district court erred on several grounds in striking down the set-aside.

First, when discussing the set-aside's relationship to the percentage of black contractors and its impact on third parties,[11] the district court rejected the county's argument that, viewed within the whole context of county procurement, the set-aside constituted only .6% of all county contracts over a ten year period: "It is the propriety of the 100% set-aside of the Earlington Heights Station that is for the determination of the Court. Nothing else." 552 F.Supp. at 937. Yet, when reviewing the 50% subcontractor goal, the court in essence undertook a "totality" review: "The record shows that this contract is but one out of twenty. It is located in the Black community and is a visible symbol of Black participation in the Metrorail system and county construction contracting in general." *Id.* at 941.

[5, 6] Although we do not agree that a ten year time frame is the proper reference point, a "totality" review is an appropriate means of ascertaining whether a program or its application is narrowly drawn.[12] Here, the estimated cost of approximately $6 million for the Earlington Heights Sta-

10. The measures, of course, were not proposed prior to the completion of contract specifications (Regulation 1.02), as the contract had already been bid upon. We do not find, however, that in the context of the proceedings concerning the Earlington Heights Station that this omission in any way affected the validity of the set-aside or goal.

11. We rely on Justice Powell's indicia for this part of our discussion not because we are adopting the "strict scrutiny" test, but because the district court relied upon them in its opinion. Moreover, these factors serve as a helpful guide in determining whether a statute satisfies the Equal Protection Clause, regardless of which standard of review is used.

12. All three opinions in *Fullilove* voting to uphold the statute compared the 10% figure in the statute to the total expenditures by the United States government on construction contracts. 448 U.S. 484 n. 72, 100 S.Ct. 2778 n. 72 (Burger, C.J.); 448 U.S. 514-515, 100 S.Ct. 2793 (Powell, J. concurring); 448 U.S. 521, 100 S.Ct. 2796 (Marshall, J. concurring). *See also Ohio Contractors*, 713 F.2d at 173. The Court's reliance on all funds expended on construction work in the United States as its reference point is an even broader one than we rely upon here.

tion, *id.* at 923, constitutes less than one percent of the county's annual expenditures of $620 million on contracts, *id.* at 917, and just over one percent of the approximately $581 million spent up to September 30, 1982 on the Dade County Metro rail system itself,[13] *id.* Considering that blacks constitute over seventeen percent of Dade County's population, yet less than one percent of Dade county contractors are black, *id.* at 926, the effect of the set-aside and the subcontractor goal is not disproportionate to either the number of blacks and black contractors residing in the county or to the goal of increasing black business participation in order to redress past discrimination.[14] Likewise, considering the small percentage of overall construction contracts affected, we do not find that the set-aside impacts unfairly on third parties.[15] *Cf. Fullilove*, 448 U.S. 484 n. 72, 100 S.Ct. at 2778 n. 72; 448 U.S. at 514–15, 100 S.Ct. at 2793 (Powell, J., concurring).

Second, the district court used an abuse of discretion standard to determine whether the 50% figure was reasonable, but not for the 100% set-aside. 542 F.Supp. at 936, 939. We find this inconsistent, as the effect of the 50% figure, although designated a "goals" provision, is to *set-aside* 50% of the contract's value for black contractors. We also question the use of an abuse of discretion standard in judging whether a percentage goal or set-aside is reasonable. Although Justice Powell did speak in his *Fullilove* concurrence of the set-aside percentage being within Congress' "discretion," he also noted that a higher level of scrutiny may be necessary for legislation passed by governmental bodies other than Congress. 448 U.S. at 515 n. 14, 100 S.Ct. at 2794 n. 14. We rely on the higher review standard of whether the percentages chosen, either as a set-aside or goal, are narrowly tailored to the legislative objective; we find that they are narrowly tailored here.

Finally, we cannot agree with the district court that the set-aside was impermissible in light of alternative remedies or because it lacked an adequate waiver provision. The county was not required to choose the least restrictive remedy available, *see Fullilove*, 448 U.S. at 508, 100 S.Ct. at 2790 (Powell, J. concurring), and, as discussed above, the set-aside was chosen only after careful consideration of alternative methods and a formal finding by the Board that the set-aside was necessary in this case to redress the effects of past discrimination. Similarly, although the ordinance lacks a formal waiver provision, the set-aside was not approved until after the county had determined both that it would be in its best interests and that enough black contractors were available. These determinations adequately provided the same safeguard as a formal waiver provision, which would protect against the potentially unfair effect "if [the set-aside] were applied rigidly in areas where minority group members constitute a small percentage of the population." *Fullilove*, 448 U.S. at 514, 100 S.Ct. at 2793 (Powell, J. concurring).

13. The total cost of the Metrorail system is estimated at approximately one billion dollars, 552 F.Supp. at 917 (Finding # 20), of which the Earlington Heights Station costs would constitute only .6%.

14. As of August 31, 1982, only 7% of the Metrorail construction was being performed by black contractors and subcontractors. 552 F.Supp. at 927 (Finding # 21).

15. We also note, as did the Sixth Circuit, that non-minority contractors may participate by owning up to 49% of a minority establishment. See, *supra* note 1; *Ohio Contractors*, 713 F.2d at 174.

VI.

This case has raised one of the most troublesome questions in the law: how to balance the legitimate goal of redressing past discrimination with concerns that remedial legislation will unfairly infringe on the rights of innocent third parties. Here, we find that Metropolitan Dade County has kept within the restrictions of the Equal Protection Clause in enacting the challenged ordinance, and thus uphold its constitutionality both facially and as applied to the Earlington Heights Station.

The district court's judgment is REVERSED IN PART and AFFIRMED IN PART.

APPENDIX

Resolution No. R-1672-81

WHEREAS, it has consistently been the policy of this Board to foster economic growth and business opportunities for its population and to promote the development of local businesses; and

WHEREAS, this Board believes that the favorable economic status and future growth prospects of Dade County are integrally linked to the economic and social conditions of the County's Black communities, residents and businesses; and

WHEREAS, this Board established the Black Business Participation Task Force and charged that Task Force with, among other things, investigating and assessing the present extent of Black business activity within the County generally and specifically in relation to doing business with the County; and

WHEREAS, this Board hereby adopts the findings and conclusions of the Task Force; and

WHEREAS, that Task Force found a statistically significant disparity between the County's Black population and both the number of Black businesses within the County and those receiving County contracts; and

WHEREAS, this finding of the Task Force that Blacks have not proportionately shared in Dade County's economic development is in accordance with the findings and conclusions set forth in Black Owned Businesses in Metropolitan Miami, a Statistical Analysis of U.S. Census Data, prepared by Tony E. Crapp, Sr., Director, Business Development Division, Department of Trade and Commerce Development, City of Miami (December, 1980); An Economic Adjustment Plan for the Civil Disturbance Areas of the City of Miami and Dade County, prepared by Janus Associates (May, 1981); and the Report of the Governor's Dade County Citizens Committee (October 30, 1980); copies of which reports are appended hereto, and the findings and conclusions of which are hereby adopted by this Board; and

WHEREAS, these reports have found that the gross economic disparity between the Black community and the other communities in Dade County has greatly exacerbated the frustrations of the Black community, which frustrations resulted in the May, 1980 riots and loom as sources of continuing racial and ethnic tensions; and

WHEREAS, this Board recognizes the reality that past discriminatory practices have, to some degree, adversely affected our present economic system and have impaired the competitive position of businesses owned and controlled by Blacks so as to result in this disproportionately small amount of Black businesses, and

APPENDIX—Continued

WHEREAS, the causes of this disparity are perceived by this Board as involving the long standing existence and maintenance of barriers impairing access by Black enterprises to contracting opportunities and not as relating to the lack of capable and qualified Black enterprises ready and willing to work; and

WHEREAS, Dade County greatly impacts the local economy and business development through its spending of revenue for various County projects and other needs; and

WHEREAS, Dade County has a compelling interest in stimulating the Black business community, a sector of the community sorely in need of economic stimulus but which, on the basis of past experience, is not expected to benefit significantly in the absence of specific measures to increase its participation in County business; and

WHEREAS, this County has a compelling interest in promoting a sense of economic equality for all residents of the County; and

WHEREAS, this Board believes that in order to effectively combat the unemployment and lack of economic participation of the Black community, the Black population must be provided with the opportunity of owning and developing their own businesses,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA:

Section 1. This Board hereby adopts the policy of developing programs and measures to alleviate the problem of lack of participation of Blacks in the County's economic life and to stimulate the local Black economy, including specific race conscious measures.

Section 2. Any program or procedure established pursuant to Section 1 above, shall continue until its objectives are met and must maintain sufficient flexibility to be able to achieve its purpose while still remaining viable in terms of the needs of the County to transact its business.

Section 3. The County Manager shall monitor such programs and present periodic reports to the Board as to their efficacy and viability.

ORDINANCE NO. 82-67:

WHEREAS, this Board has previously made the legislative finding in Resolution No. R-1672-81, adopted November 3, 1981, that Blacks have not proportionately shared in Dade County's economic development and has initiated a policy to promote increased participation of Black-owned businesses in County contracts; and

WHEREAS, such findings and the bases therefor as contained in said Resolution No. R-1672-81, a copy of which is attached hereto, are hereby adopted as the legislative findings on which this Ordinance is based; and

WHEREAS, the above findings are in accordance with the findings and conclusions of the June 1982 report of the United States Commission on Civil Rights entitled, "Confronting Racial Isolation in Miami", a copy of which is appended hereto; and

WHEREAS, the government of Metropolitan Dade County greatly impacts the local economy and business development through its spending of revenue for various County projects and other needs; and

WHEREAS, Dade County has a compelling interest in stimulating the Black business community, a sector of the County

APPENDIX—Continued

sorely in need of economic stimulus but which, on the basis of past experience, is not expected to benefit significantly in the absence of specific race-conscious measures to increase its participation in County contracts,

NOW, THEREFORE, BE IT OBTAINED BY THE BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA:

Section 1. Article II of Chapter 10 of the Code of Metropolitan Dade County, Florida, is amended by adding the following new section thereto:

Sec. 10–38. *Procedure to increase participation of Black contractors and subcontractors in county contracts.*

(a) The foregoing recitations are hereby incorporated and adopted herein and made a part of this Ordinance.

(b) Except where federal or state law or regulations mandate to the contrary, the provisions of this Section shall be applicable to all construction contracts funded in whole or in part by county funds.

(c)(1) "Black contractor and subcontractor" means a contracting or subcontracting business entity which is owned and controlled by one or more Blacks and has established a place of business in Dade County.

(2) "Owned and controlled" means a business which is at least 51 percentum owned by one or more Blacks, or, in the case of a publicly-owned business, at least 51 percentum of the stock of which is owned by one or more Blacks; and whose management and daily business operations are controlled by one or more such individuals.

(3) "Black" means a person who is a citizen or lawful permanent resident of the United States and who has origins in any of the Black racial groups of Africa.

(d) The County Manager shall establish an administrative procedure for the review of each proposed County construction contract to determine whether the inclusion of race-conscious measures in the bid specifications will foster participation of qualified Black contractors and subcontractors in the contract work. Such race-conscious measures may include goals for Black contractor and subcontractor participation and set-asides.

(1) *Goals.* When utilized, goals shall be based on estimates made prior to bid advertisement of the quantity and type of subcontracting opportunities provided by the project to be constructed and on the availability and capability of Black contractors and subcontractors to do such work. When goals are utilized, the invitation for bid and bid documents shall require the apparent lower and qualified bidder prior to bid award to meet the goal or demonstrate that he made every reasonable effort to meet the goal and notwithstanding such effort were unable to do so. In the alternative, the bid documents may require such demonstration regarding the goal or efforts to meet it to be included by all bidders as part of their bid submission. The steps required to demonstrate every reasonable effort shall be specified in the invitation for bid and the bid documents.

(2) *Set-asides.* A set-aside is the designation of a given contract for competition solely among Black contractors. Set-asides may only be utilized where prior to invitation for bid, it is determined that there are sufficient licensed Black contractors to afford effective competition for the contract. In each contract where set-asides are recom-

APPENDIX—Continued

mended, staff shall submit its recommendation and the basis therefor to the Board for its initial review and determination whether waiver of competitive bidding for such contract is in the best interest of the County."

(e) The County Manager shall annually report to the Board on the total dollar amount of County construction contracts awarded that year and the percentage thereof to be performed by Black contractors and subcontractors. At such time, the Board shall determine whether to continue in effect the administrative procedure for utilization of race-conscious measures authorized by this Ordinance.

Section 2. Section 10–34 of the Code of Metropolitan Dade County, Florida, is hereby amended as follows:

Sec. 10–34. Listing of subcontractors not required; exceptions.

Except for contracts for procurement or construction of all or any part of stage 1 of the rapid transit system, *construction contracts where race-conscious measures have been included in the bid specifications to foster participation of Black contractors or subcontractors*, or where federal or state law or regulations mandate to the contrary, no prime contractor submitting a bid for a project for which bids have been solicited by the legal entities to which this article applies shall be required to list thereon the names of any subcontractors it desires to be employed in connection with the subject project.

Section 3. Section 25A–4 of the Code of Metropolitan Dade County, Florida is hereby amended by adding the following paragraph at the end of subparagraph (b) of said section:

For all construction contracts, the trust shall comply with the provisions of Section 10–38 of the County Code and the administrative procedures adopted pursuant to said section.

Section 4. Section 32A–1 of the Code of Metropolitan Dade County, Florida, is hereby amended by adding the following after the last sentence of said action:

For all construction contracts, the authority shall comply with the provisions of Section 10–38 of the County Code and the administrative procedures adopted pursuant to said section.

Section 5. If any section, subsection, sentence, clause or provision of this ordinance is held invalid, the remainder of this ordinance shall not be affected by such invalidity.

Section 6. It is the intention of the Board of County Commissioners, and it is hereby ordained that the provisions of this ordinance shall become and be made a part of the Code of Metropolitan Dade County, Florida. The sections of this ordinance may be renumbered or relettered to accomplish such intention, and the word "ordinance" may be changed to "section", "article", or other appropriate word.

Section 7. This ordinance shall become effective ten (10) days after the date of its enactment.

REGULATIONS GOVERNING BID PROCEDURES UNDER ORDINANCE NO. 82–67:

1. DEPARTMENT RESPONSIBILITIES

1.01 All departments (including the Public Health Trust and the Miami-Dade Water and Sewer Authority) with funds budgeted for capital improvement projects are to develop a record keeping system which will

APPENDIX—Continued

include the dollar value of all construction contracts anticipated, a goal for Black participation for the fiscal year, and the dollar value of contracts awarded by minority classification.

1.02 Prior to the completion of contract specifications for each capital project, each department, in conjunction with the consultant project manager, if engaged, will analyze the trades certifications required for each project. After considering the number and types of Black-owned firms likely to be available to participate in the contract, the goals of the department, and a suggestion as to the type of race-conscious measures which could be provided within the contract work are to be developed.

1.03 Suggested actions shall be for (a) establishment of subcontractor goals, (b) set-asides for contractors, (c) bid credit, and (d) no race-conscious requirements.

1.04 Each project is to be submitted to a Contract Review Committee for action and recommendation to the Board of County Commissioners.

2. CONTRACT REVIEW COMMITTEE

2.01 A three (3) member Contract Review Committee comprised of an Assistant County Manager, the Capital Improvements Coordinator and the Affirmative Action Coordinator is created. Staff to the Committee will be provided by a Compliance Office included within the Affirmative Action Division.

2.02 The Committee is to meet monthly or sooner, as necessary, for the purpose of reviewing suggestions for the inclusion of race-conscious measures within contract specifications of each construction project.

2.03 Suggested race-conscious actions are to originate by the County project manager for the construction project and the consultant project manager, if commissioner.

2.04 Projects are to be submitted to the Contract Review Committee prior to preparation of the contract specifications.

2.05 The Contract Review Committee, after considering the number of anticipated subcontractors likely to be employed on the job, will recommend at what point the subcontractors will be listed.

2.06 Following review by the Contract Review Committee, a recommendation is to be submitted to the Board of County Commissioners for action, together with the request for advisement.

2.07 Recommendations for set-aside projects require a waiver of formal competitive bids by the Board of County Commissioners.

3. CERTIFICATION

3.01 All firms participating in the Black Contractors and Subcontractors Program will be certified as Black firms.

3.02 Certification records will be maintained by the Contract Compliance Office within the Dade County Affirmative Action Division.

3.03 Assistance in the certification process will be provided by authorized community-based organizations under contract with Dade County.

3.04 Applications for certification will be on standard forms and will include, but will not be limited to, primary business location, evidence of ownership, operation, experience, and the adequacy of the firms.

3.05 Appeals of denials of certification can be made to the Contract Review Committee.

APPENDIX—Continued

3.06 Certification of all firms will be updated annually.

3.07 Certification of each firm shall be completed prior to the award of any contract under the Black Contractors Program.

3.08 A concentrated, public advertising campaign by trade certification area will be undertaken to encourage certification.

4. SUBCONTRACTOR GOALS

4.01 Percentage goals for the dollar value of subcontractor work are to be considered when the review of the proposed contract indicates the greatest potential for Black subcontractor participation.

4.02 Goals shall relate to the potential availability of Black-owned firms in the required field of expertise.

4.03 Availability should include all Black-owned firms with places of business [that] are within the Dade County geographic area.

4.04 When goals are included with the contract of the prime contractor, bidders shall use good faith efforts to meet the goals.

4.05 Lack of good faith efforts will make the prime contractor's bid ineligible for award and not responsive.

4.06 A prime contractor may include the subpart of the volume of value of a joint venture of a certified subcontractor towards the contract goal.

5. SET-ASIDES

5.01 Contracts for set-asides shall be considered in those contracts when at least three (3) certified prime contractors with the capabilities consistent with the contract requirements exist.

5.02 A prime contractor can be under contract for only one (1) set-aside contract at a time, and no more than three (3) within any one (1) year period.

5.03 Prior to the advertising for set-aside contracts, the Board of County Commissioners is to make findings as to the proposed set-aside contract in the best interest of the County and waiving formal bid procedures.

5.04 Bid procedures limiting competitive bids to Black certified firms will be implemented.

6. BID CREDIT

6.01 Implementation of bid credit will not be done at this time.

RESOLUTION NO. R-1350-82:

WHEREAS, this Board on November 3, 1981, adopted Resolution No. R-1672-81, finding that Blacks have not proportionately shared in Dade County's economic development and setting forth a policy to promote increased Black business participation in County business; and

WHEREAS, this Board on July 20, 1982, enacted Ordinance No. 82-67 which requires review of proposed county construction contracts to determine whether the addition to bid specifications of race conscious measures will foster participation of Black contractors and subcontractors in the contract work; and

WHEREAS, pursuant thereto the County Manager has created a contract review committee to review each construction contract prior to advertisement and to make recommendations thereon to this Board; and

WHEREAS, the committee has reviewed the Metrorail Earlington Heights Station

APPENDIX—Continued

contract together with the data and suggestions submitted by the Dade County Transportation Administration; and

WHEREAS, the committee has determined that there are sufficient licensed Black general contractors to afford effective competition for the station contract were the contract set aside for competition solely among Black contractors, and based thereon has recommended use of a set-aside on this contract; and

WHEREAS, in addition thereto, the committee has estimated the quantity and type of subcontracting opportunities provided by the contract and the availability and capability of Black contractors and subcontractors to do such work and based thereon has recommended a goal of fifty percent (50%) of the dollar value of the contract to be subcontracted to Black contractors; and

WHEREAS, Earlington Heights is the last of the 20 Metrorail stations to be bid and is located within the Black community of Dade County; and

WHEREAS, increased participation of Black contractors and subcontractors on this contract will have a substantial impact in the community to be served by this station both in terms of the credibility of the County's efforts to involve Black-owned businesses in the economic growth of this County and in terms of greater employment opportunities for members of such community; and

WHEREAS, this Board specifically finds and determines as a matter of fact that the use of both a set aside and a goal on this contract will contribute towards eliminating the marked statistical disparity, noted in this Board's prior legislation, between the percentage of overall Black business participation in County contracts and the percentage of Dade County's population which is Black; and

WHEREAS, this Board further finds that the use of both a set aside and a goal will help to alleviate unemployment and stimulate the Black business community, a sector of Dade County's economy which is sorely in need of economic stimulus, but which on the basis of past experience cannot be expected to receive any significant amount of the public funds to be expended on this contract in the absence of such race conscious measures,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, that:

1. Resolution No. 4-1672-81 [sic] and Ordinance No. 82-67, together with the findings contained therein, and the documents and reports attached thereto, and the foregoing recitations are hereby incorporated and adopted as the legislative findings of this Board and are made a part of this resolution.

2. The recommendations of the contract review committee are accepted by this Board.

3. This Board finds that it is in the best interests of Dade County to waive formal competitive bidding procedures for the Earlington Heights Metrorail Station contract, and authorizes the set aside of such contract for competition solely among Black contractors, formal bidding being waived in this instance pursuant to Section 4.03(D) of the Home Rule Charter by two-thirds (⅔) vote of the Board members present.

4. In addition to the set aside, a goal of 50% of the dollar value of the contract work for Black subcontractors is adopted on this project.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

MEMORANDUM

OFFICE OF THE VICE PRESIDENT
WASHINGTON

Jim Cicconi for comments.

March 9, 1984

MEMORANDUM TO MICHAEL K. DEAVER

FROM: J. Steven Rhodes

SUBJECT: South Florida Chapter of the Association of General Contractors, Inc., vs. Metropolitan Dade County, Florida.

After having 24 hours to completely reflect on the above mentioned case, I am horrified at the nonchalant fashion in which major policy decisions affecting minority communities are developed within this Administration.

It is not necessary to recount the number of incidents where the Department of Justice has taken action that has not only had a civil rights impact on the minority communities but also long term detrimental ramifications for the Republican Party. It is unbelievable that the Department of Justice could file an amicus brief charging that state and local governments do not have the constitutional authority to set aside contracts on the basis of race without bringing this fundamental question to the attention of an appropriate cabinet council.

It is no wonder that the President constantly finds himself explaining to the American people that he is fair. [redacted] oversights are evident:

1) For the federal government to intervene in this case is an apparent contradiction of our belief in the federalist approach to government. If we believe in states rights, we must believe in states rights.

2) The principle programs this Administration has designed to answer the needs of the minority communities are the enterprise zones and the minority business program. If we assume that it is unconstitutional for state and local governments to

determine the best way to solve their problems, (i.e.: set aside programs based on race) then we will eventually be forced to question the right of the federal government to set aside contracts on the basis of race.

3) In speaking with Department of Justice lawyers regarding the case, they constantly referred to "equal treatment under the law". This kind of thinking ignores history in America. If, in fact, there was no need to provide special assistance to minorities in this country, there should not have been a need for the six major pieces of civil rights legislation or a civil rights division at the Department of Justice.

4) This sort of policy making, which is not fully discussed and debated on its merits, will surely provide black Republicans, black Americans and fair minded people reason to question our motives regarding the treatment of the socially and economically disadvantaged in this country.

Please keep in mind that if this was the only such action undertaken by this Administration, it might not be as serious as it is being viewed by Americans who believe in fair play. We have demonstrated a consistent insensitivity as to how such policies will be viewed by members of the minority community. It is also ironic that even for political purposes this action did not go before the cabinet council process or even representatives from minority communities here, on the White House staff.

Finally, in light of the fact that this will be viewed by minority communities as the Administration's attempt to renege on minority business promises, a corner stone of our urban and ethnic strategy, we should be well advised to prepare a clarification statement from the President to eliminate the horror and disenchantment developing not only throughout our black Republican base of support but also among fair minded Americans. Black Americans feel that the Administration is now taking away the only tool it has in place to address chronic problems facing minority communities.

THE WHITE HOUSE

WASHINGTON

March 9, 1984

MEMORANDUM FOR JIM BAKER

THRU: FAITH WHITTLESEY

FROM: MEL BRADLEY MB

SUBJECT: The Attached Articles Re: The Justice Department's Legal Action Opposing Minority Business Set-Asides at the State and Local Levels

This is a very serious problem that might well have serious consequences. The feed-back I am getting is that unless something is done rather promptly to reverse or offset this move, it will do irreparable damage to the credibility of most of the President's Black friends and supporters both within and without the Administration.

Their credibility is at stake because of their perseverance in defending and promoting the President's policies and programs in the face of a nationwide tidal wave of vocal opposition by Black Democrats who, after each such attack on a vital interest of Black Americans, is able to state quite convincingly: "I told you so."

They express the view that this is the action of a small group which has managed to control the Administration's civil rights policy and machinery and betray the President's commitment to Black Americans on (1) supporting legitimate affirmative action and equal employment opportunity, (2) expanding minority business development opportunities, (3) not writing off Black political support, and other important matters.

They are discussing various strategies, including press conferences, meetings with senatorial and congressional representatives, meetings with White House and Administration officials, etc. as a means of bringing this to the attention of the President, who they believe is not aware that his commitments are being undercut.

Meanwhile, civil rights leaders are speaking of the necessity to form alliances with other groups for the purpose of instituting more broadly based boycotts as a means of pursuing affirmative action in employment, contracting opportunities, and other vital interests from which they believe the federal government has retreated.

Attachments

bcc: Jim Cicconi ✓

THE NEW YORK TIMES
MONDAY, MARCH 5, 1984

U.S. to Support Whites in Suits On Bias Decree

Officers in Birmingham Challenging Remedies

By ROBERT PEAR
Special to The New York Times

WASHINGTON, March 4 — The Justice Department has gone to court to challenge actions taken by the city of Birmingham, Ala., under a decree that the department signed three years ago to help blacks and women win promotions in the city's police and fire departments.

The Justice Department is joining 10 white police officers and firefighters who contend that Birmingham violated their rights by promoting blacks and women under the court decree.

The employees, all of them men, filed lawsuits last year charging that they had been denied promotions because they were white. The police also charged that they had suffered discrimination on the basis of sex. The lawsuits charged that some less-qualified blacks and women had been hired or promoted to meet "numerical quotas."

'Steeped in Discrimination'

Birmingham officials responded that the city's hiring practices follow the requirements of an affirmative action plan approved by a Federal court and the Reagan Administration in 1981.

Mayor Richard Arrington Jr. of Birmingham said in an interview: "I am greatly disappointed at the position of the Justice Department, which is changing sides on a decree that it helped fashion. The Reagan Administration is joining the rather persistent attacks to undermine or completely undo our decree. They have reneged."

Mr. Arrington, a Democrat and Birmingham's first black mayor, added: "This city was once steeped in discrimination. If affirmative action can't prevail here, it can't prevail anywhere in America."

U.S. Invited to Give Views

The Justice Department said in a Federal District Court in Birmingham last week that it wanted to intervene in the cases on the side of the white male employees because their allegations, if true, "establish a course of conduct which we believe to be unlawful."

William Bradford Reynolds, the Assistant Attorney General for civil rights, said Saturday that the Justice Department was intervening in the case because the court had invited the Government to express its views. Mr.

Continued on Page A15, Column 1

U.S. TO BACK MEN IN ALABAMA SUIT

Continued From Page A1

Reynolds said the Justice Department was "in the process of a preliminary investigation" and did not yet know whether the allegations in the white employees' lawsuits were true.

"But," he said, "if there is an allegation of discrimination, the Government's responsibility under the law is to come in and say we're against discrimination on account of race. We always side with those people who claim they have suffered discrimination on account of race."

The Justice Department sued the City of Birmingham in 1975, charging that there was a pervasive "pattern and practice" of illegal job discrimination against blacks and women. After a long trial, the Justice Department helped negotiate the consent decree, which set forth an extensive plan of affirmative action, including numerical goals for the hiring and promotion of blacks and women. It also provided $265,000 in back pay.

Numerical goals and quotas are contrary to Reagan Administration policy. But a Justice Department lawyer, Richard J. Ritter, signed the decree on May 19, 1981, three days before Attorney General William French Smith attacked racial quotas in his first major speech on civil rights. The consent decree gained the force of law when it was approved by Federal District Judge Sam C. Pointer Jr. in August 1981.

White firefighters and police have repeatedly tried to block enforcement of the decree. Judge Pointer denied their request for a preliminary injunction, and his action was upheld last December by the United States Court of Appeals for the 11th Circuit.

Remedies in Decree Criticized

Raymond P. Fitzpatrick Jr., an attorney for the white employees, said in a telephone interview: "The consent decree does not terminate our rights. I think the consent decree provides illegal and unconstitutional remedies because race preferences are illegal and unconstitutional."

Justice Department officials denied that they were trying to undermine the consent decree. But in carrying out the decree for the benefit of blacks and women, they said, Birmingham officials must not discriminate against white men. They noted that Judge Pointer said in 1981 that the consent decree would not require the hiring or promotion of an unqualified person or "a person who is demonstrably less-qualified" than a white male applicant for the same job.

The Reagan Administration has sided with white city employees complaining of discrimination under affirmative action programs in cases in Boston, New Orleans, Memphis and Detroit. But the Federal Government was not a party to the original decree in those cases.

Years of Litigation

James K. Baker, the City Attorney of Birmingham, said the Justice Department's position was "rather startling" in view of the history of the case. "This case was in litigation for seven years," he said. "The Government suggested we ought to settle. We negotiated for over a year. We ended up with a consent decree which, by its terms, bound the Federal Government to defend the decree if it ever was attacked. The decree mandated racial preferences and said that the city's compliance with the decree shall not be viewed as a violation" of the civil rights laws.

WASHINGTON POST , Thursday, March 8, 1984

Set-Aside For Blacks Challenged

By Howard Kurtz
Washington Post Staff Writer

The Justice Department, in a new attempt to narrow legal remedies for racial discrimination, has challenged a law in Dade County, Fla., that sets aside some county construction contracts for black-owned businesses.

The county ordinance, adopted in response to racial unrest in May, 1980, in Miami's Liberty City area of the county, is similar to provisions that the federal government and many states and cities have adopted to increase the share of public business awarded to minority firms.

William Bradford Reynolds, assistant attorney general for civil rights, called the Dade County ordinance unconstitutional in a brief filed Monday in federal court in Atlanta. He said no local government has authority to limit contract bids on the basis of race.

A three-judge panel of the 11th U.S. Circuit Court of Appeals in Atlanta had upheld the Dade statute, and Reynolds asked the full court to reverse that ruling.

Reynolds said yesterday that the Justice Department's position, if upheld, could invalidate "race-conscious set-aside" laws in many cities and states. The District of Columbia, for example, requires that 35 percent of contracts awarded by each city agency be set aside for minority bidders, while Detroit sets aside 40 percent of its contracts for small firms and those owned by minorities and women.

According to Reynolds' brief, there is no evidence that black firms that would be aided by Dade County's set-aside law have been victims

U.S. Challenges Set-Aside for Blacks

discrimination. He said that the 14th Amendment gives Congress special powe to fashion such remedies but that this thority does not extend to local governments.

The county's law "impermissibly inges the equal-protection rights of on-black contractors in Dade County," e brief said, adding that "these racial lection devices" can be used only to elp "identifiable victims of unlawful ra- al discrimination."

Reynolds said in an interview that Dade County officials "have discrimiated against all those who are not of the articular race that is preferred. It plugs nto the system a discriminatory selection rocess based on race . . . . It is one of he most pernicious excuses for government to operate. We have to get beyond the point where we are endorsing government decisions based on race classifications."

Reynolds added that set-aside programs provide little help for most minorities and that an individual black firm must prove it was the victim of racial bias before receiving preferential treatment.

Rep. Parren J. Mitchell (D-Md.), chairman of the House Small Business

Committee, responded that "it's a specious argument to say that these contractors have not been victims." Local set-aside rules, he said, are aimed at "confronting ongoing, present discrimination. This is not an effort to reach back to remedy the ills of the past."

In 1980, the Supreme Court upheld Congress' right to set aside 10 percent of federal public-works contracts for minority firms in a broad endorsement of federal remedial programs, such as those run by the Small Business Administration. The ruling did not say whether local governments have similar powers, but such local laws have been upheld in several lower-court decisions.

Dade County Assistant Attorney Robert Cuevas said the Justice Department's brief is "consistent with the administration's policy" of trying to limit legal remedies in busing and affirmative-action cases. "I don't think Congress or Washington has all of the wisdom in terms of correcting past discrimination," he said.

Cuevas said Dade County, the state of Florida and the U.S. Commission on Civil Rights conducted studies after the Liberty City conflict and found that "a main cause of the riots was a total lack of participation by the black community in Dade's economic growth."

While blacks comprise 17 percent of the county's population, he said, black-owned firms have received fewer than 1 percent of county construction contracts, which total about $450 million annually.

In 1982, the county adopted an ordinance that would set aside an unspecified number of construction contracts for black-owned firms and set "goals" of reserving as much as half of some subcontracts if enough black bidders were available.

The first contract to be set aside was to build a subway station in a predominantly black area near Liberty City. Cuevas said the move was approved by the U.S. Transportation Department, which is paying 80 percent of the cost and has a minority set-aside program for highway contracts.

But the county was sued by Associated General Contractors, which represents 8,500 firms, most of them non-minority, and has challenged similar set-aside laws in Richmond, Atlanta and Seattle. The trial court rejected part of the Dade County law, but the appeals court upheld the entire program, prompting the Justice Department to intervene.

Bill Henry of the contractors' group said the county law does not consider whether black contractors are economically disadvantaged.

"It's such a sweeping and exclusive measure that it's robbing our members of their market," he said.

THE WHITE HOUSE
WASHINGTON

TO: Jim Baker

FROM: **FAITH R. WHITTLESEY**
Assistant to the President
for Public Liaison

☑ Information
☐ Action

I thought you should have the benefit of the reaction of our coordinated Black liaison in the Dade County, Florida set aside intervention decision by Justice.

3/12

JC

See this + attached by Mel B. Where are we on this DOJ intervention + the history of how it happened? What should we do now if anything?

JHB

MEMORANDUM

3/13 JC

Let's discuss this overall prob. in context of the Myd B memo & my note to you.
JAB III

OFFICE OF THE VICE PRESIDENT

WASHINGTON

March 9, 1984

MEMORANDUM TO JAMES A. BAKER, III

FROM: J. Steven Rhodes Steve

SUBJECT: South Florida Chapter of the Association of General Contractors, Inc., vs. Metropolitan Dade County, Florida.

After having 24 hours to completely reflect on the above mentioned case, I am horrified at the nonchalant fashion in which major policy decisions affecting minority communities are developed within this Administration.

It is not necessary to recount the number of incidents where the Department of Justice has taken action that has not only had a civil rights impact on the minority communities but also long term detrimental ramifications for the Republican Party. It is unbelievable that the Department of Justice could file an amicus brief charging that state and local governments do not have the constitutional authority to set aside contracts on the basis of race without bringing this fundamental question to the attention of an appropriate cabinet council.

It is no wonder that the President constantly finds himself explaining to the American people that he is fair. In this particular incident a number of oversights are evident:

1) For the federal government to intervene in this case is an apparent contradiction of our belief in the federalist approach to government. If we believe in states rights, we must believe in states rights.

2) The principle programs this Administration has designed to answer the needs of the minority communities are the enterprise zones and the minority business program. If we assume that it is unconstitutional for state and local governments to

determine the best way to solve their problems, (i.e.: set aside programs based on race) then we will eventually be forced to question the right of the federal government to set aside contracts on the basis of race.

3) In speaking with Department of Justice lawyers regarding the case, they constantly referred to "equal treatment under the law". This kind of thinking ignores history in America. If, in fact, there was no need to provide special assistance to minorities in this country, there should not have been a need for the six major pieces of civil rights legislation or a civil rights division at the Department of Justice.

4) This sort of policy making, which is not fully discussed and debated on its merits, will surely provide black Republicans, black Americans and fair minded people reason to question our motives regarding the treatment of the socially and economically disadvantaged in this country.

Please keep in mind that if this was the only such action undertaken by this Administration, it might not be as serious as it is being viewed by Americans who believe in fair play. We have demonstrated a consistent insensitivity as to how such policies will be viewed by members of the minority community. It is also ironic that even for political purposes this action did not go before the cabinet council process or even representatives from minority communities here, on the White House staff.

Finally, in light of the fact that this will be viewed by minority communities as the Administration's attempt to renege on minority business promises, a corner stone of our urban and ethnic strategy, we should be well advised to prepare a clarification statement from the President to eliminate the horror and disenchantment developing not only throughout our black Republican base of support but also among fair minded Americans. Black Americans feel that the Administration is now taking away the only tool it has in place to address chronic problems facing minority communities.

THE WHITE HOUSE

WASHINGTON

March 12, 1984

MEMORANDUM FOR: FAITH RYAN WHITTLESEY
ASSISTANT TO THE PRESIDENT
FOR PUBLIC LIAISON

FROM: WILLIAM A. KEYES
SENIOR POLICY ANALYST

SUBJECT: JUSTICE DEPARTMENT ACTIVITY WITH DADE COUNTY, FLORIDA, MINORITY BUSINESS SET-ASIDE CASE

Without regard to the merits of minority business set-asides, there is one major problem with the Justice Department's intervention in the Dade County, Florida, case: It seems inconsistent to have this Administration challenging set-aside programs at the local level while we are administering federal set-aside programs here in Washington.

In 1980 the U. S. Supreme Court upheld Congress' authority to reserve federal public works contracts for minority businesses. And several lower court rulings have upheld the authority of local governments to administer such programs.

The Dade County case has some unusual circumstances. First, the program was established in 1982, after the Supreme Court had made it clear that set-aside programs were appropriate for legislatures to establish. And second, the Dade County program was established to mitigate some of the problems that led to the Liberty City riots. It may have been a better idea for Justice to accept the 11th U. S. Circuit Court of Appeals' decision upholding Dade County's authority.

I would recommend that the White House should be involved in future decisions to enter cases of this nature. To my knowledge, we were not involved.

THE WHITE HOUSE

WASHINGTON

March 9, 1984

MEMORANDUM FOR JIM BAKER

THRU: FAITH WHITTLESEY

FROM: MEL BRADLEY

SUBJECT: The Attached Articles Re: The Justice Department's Legal Action Opposing Minority Business Set-Asides at the State and Local Levels

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