The Impact of the *City of Richmond v. J.A. Croson* Decision Upon Minority and Female Business Programs in Selected Cities of Ohio

Ohio Advisory Committee to the U.S. Commission on Civil Rights

Volume 1
Summary Report
Appendices A-D

March 1997

This summary report of the Ohio Advisory Committee to the United States Commission on Civil Rights was prepared for the information and consideration of the Commission. Statements and viewpoints in the report should not be attributed to the Commission or the Advisory Committtee, but only to individual participants in the community forum where the information was gathered.

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Letter of Transmittal

Ohio Advisory Committee to the
U.S. Commission on Civil Rights

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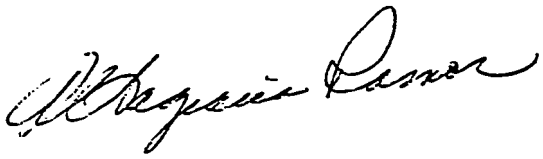
The Ohio Advisory Committee submits this report, *The Impact of the City of Richmond v. J.A. Croson Decision Upon Minority and Female Business Programs in Selected Cities of Ohio,* pursuant to our responsibility to advise the Commission about relevant civil rights issues in our State. The Advisory Committee unanimously approved this report by a 12 to 0 vote.

The report is a summary of selected views and opinions on the impact of the 1989 U.S. Supreme Court decision, *City of Richmond v. J.A. Croson,* upon minority and female business programs in several Ohio municipalities. The information contained in this report was collected from background research and a community forum held in Columbus, Ohio, on September 24, 1990, and does not purport to be an exhaustive review of the effect of the *Croson* decision on minority and female business utilization in Ohio.

Six members of the current Ohio Advisory Committee, including myself, were not on the Advisory Committee at the time of the community forum, but there remains interest in this topic. With anticipation that the Commission will find this report of value in its collection of information related to discrimination on the basis of race, color, sex, and national origin, it is presented to the Commission for its consideration.

Respectfully,



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* Was not a member of the Advisory Committee at the time of the community forum.
** No longer a member of the Advisory Committee.

Acknowledgments

The Ohio Advisory Committee wishes to thank the staff of the Commission's Central Regional Office for its help in the preparation of this report. The community forum and report was the principal assignment of and prepared by Farella E. Robinson with assistance from Melvin L. Jenkins. Support services were provided by Jo Ann Daniels. Editorial assistance was provided by Gloria Hong. The project was carried out under the overall supervision of Melvin L. Jenkins, Director, Central Regional Office.

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1. Introduction

The Croson case marks an ironic and discouraging turning point in civil rights history. Twenty-five years ago, State and local governments were the main challenge to affirmative action programs. Now, the tide has turned and the Supreme Court, long a primary actor in efforts to eliminate discrimination, has become the primary challenge to voluntary efforts of State and local jurisdictions to eradicate the vestiges of racial and gender discrimination in their communities. Unfortunately, the Croson decision. . . .will make it more difficult for minorities and women throughout this Nation to secure fair and equal employment and entrepreneurship opportunities. . . .

Senator Paul Simon
Statement Before the Committee on
Governmental Affairs
U.S. Senate, June 22, 1989

The Federal, State, and local governments have used minority and female business enterprise programs (MWBE) as a way to ensure full participation of minorities and women in the mainstream of American life. MWBE programs are found in various State and local government resolutions and operating procedures throughout the country to foster and promote the development of such businesses.[1] Their use has played a particularly significant role in the area of government contracting, where black and other minority business enterprises had been frozen out of the process. To combat this discrimination and provide equal opportunity for minority and female businesses, first the Federal Government, then other governmental entities, enacted legislation requiring that certain percentages of their contracts or subcontracts be set aside for such businesses. To some, these programs provide a level playing field to ensure MWBEs a share of government business.[2]

The affirmative action concept has not been free from controversy. Although MWBE programs held the promise of ensuring equal opportunity in the marketplace, they have continued to be controversial since their inception. Some have claimed that such programs are in themselves discriminatory and therefore violative of the constitutional guarantee of equal protection. As with many intractable societal issues, the courts were called upon to resolve the conflict.[3]

In 1989 the debate came to a fork in the road, when the Supreme Court issued a decision in *City of Richmond v. J.A. Croson Co.*,[4] which struck down that city's minority enterprise program, and called into question the legality of such programs throughout the country. The Court ruled that Richmond's minority business enterprise program, which set aside 30 percent of the dollar amount of each contract awarded by the city for minority-owned firms, violated the 14th amendment. Although the decision did not ban race-based business enterprise programs altogether, it required a higher level of scrutiny to demonstrate the present effects of past discrimination in the particular industry and required that such programs must be narrowly tailored to remedy the discrimination.[5] In the wake of *Croson*, many MBWE programs throughout the country were challenged in the courts, abandoned, placed under evaluation or modified to meet the guidelines laid down by the *Croson* decision.[6]

2. Background

On January 23, 1989, in the *Croson* decision, the Supreme Court struck down the City of Richmond's MBE Ordinance as violative of the equal protection clause of the 14th amendment to the

[1]D.J. Miller and Associates, Proposal for Minority and Female Business Enterprise Utilization Study, Oct. 24, 1989, p. 1.
[2]Anthony J. Celebrezze, Jr., "The Future of MBE Programs Cities and Villages," *The Journal of the Ohio Municipal League*, October 1989, p. 11.
[3]Ibid.
[4]488 U.S. 469 (1989).
[5]Tyrone D. Press, Minority Business Enterprise Legal Defense and Education Fund, Inc., memorandum to MBE/WBE/DBE Program Compliance Officers, Other Interested Parties, Mar. 31, 1993, The Effect of *Richmond v. Croson* and Similar Attacks on Federal, State and Local MWDBE Programs Nationwide (hereafter cited as Press memorandum).
[6]Ibid.; Gregg Ivers and Karen O'Connor, "Minority Set Aside Programs in the States After *City of Richmond v. J.A. Croson Co.*," *Publicus: The Journal of Federalism*, vol. 20, (1990), p. 63 (hereafter cited as Ivers and O'Connor article).

U.S. Constitution. For the first time, in a 6-3 majority decision authored by Justice O'Connor, the Court applied a strict scrutiny standard to reject Richmond's affirmative action program for minority businesses.[7]

The Court held that State and local governments may implement MBE programs, provided they demonstrate a compelling governmental interest justifying the program (e.g., the present effects of past discrimination in the marketplace) and if they "narrowly tailor" the programs to remedy the discrimination identified.[8]

The Richmond MBE ordinance failed under both prongs of the test. Richmond's generalized assertions of discrimination and broad statistical comparisons of disparities in contract awards to minorities versus percentages of minorities in the overall population were found to be insufficient proof of discrimination. Moreover, Richmond's program was not narrowly tailored because it benefited classes of minorities for whom there was not specific evidence of discrimination. Similarly, the Court found no rational basis for the size of the set-aside goal, no logical ending point for the program, and no consideration given to the use of less restrictive race-neutral remedies.[9]

The Court reaffirmed, however, the less strict application of the standard of review as enunciated in *Fullilove v. Klutznick*,[10] applicable to Federal MBE initiatives. There, the Court accorded great deference to congressional findings of societal discrimination and the remedial powers of Congress under section 5 of the 14th amendment. Justice O'Connor distinguished this power from the *constraint* on State power found at section 1 of the 14th amendment.[11]

The *Croson* lawsuit was bought by the Associated General Contractors of America, which earlier had challenged successfully a San Francisco plan on similar grounds. It was reported by the Minority Business Enterprise Defense and Education Fund that the U.S. Department of Justice selected *Croson* as part of the larger mosaic of cases to test legislation, municipal ordinances, and other programs that incorporated quota systems, numerical remedies, and preference plans, and viewed the Richmond plan as the most ripe for constitutional attack.[12]

National Perspectives

The Minority Business Enterprise Legal Defense and Education Fund (MBELDEF), a nonprofit public interest law firm and advocacy organization on behalf of MBE programs has monitored and identified the effects of the *Croson* decision.[13] According to MBELDEF, the *Croson* decision and its progeny of litigation have severely reduced the level of minority participation in local government contracts across the Nation.[14] MBELDEF reports that many various forms of marketplace discrimination have continued and have been identified through the collection of anecdotal evidence from minority businesses and based on disparity studies. Such forms of marketplace discrimination have included:[15]

- stereotypical attitudes

[7]488 U.S. 469 (1989); Press memorandum.

[8]Ibid.

[9]488 U.S. 469 (1989); Press memorandum. In *Adarand* v. *Peña*, 115 S.Ct. 2097 (1995), a case involving the use of a Federal contract set aside program, decided by the U.S. Supreme Court, Adarand Constructors, Inc. claimed that the Federal Government's practice of giving general contractors on Federal Government projects a financial incentive to hire subcontractors controlled by socially and economically disadvantaged individuals, and in particular, the Federal Government's use of race-based presumptions in identifying such individuals, violated the equal protection component of the Fifth Amendment's Due Process Clause.

In *Croson*, the U.S. Supreme Court agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by State and local governments. But *Croson* had no occasion to declare what standard of review the Fifth Amendment requires for such action taken by the Federal Government.

In line with the *Croson* decision, the U.S. Supreme Court ruled in *Adarand* that all racial classifications imposed by Federal, State, or local governments must be analyzed by a reviewing court under strict scrutiny. 115 S.Ct. 2097 (1995). In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

[10]100 S.Ct. 2758 (1980).

[11]Ibid. and Press memorandum.

[12]Ivers and O'Connor article, p. 72.

[13]Press memorandum.

[14]Franklin M. Lee, Chief Counsel, Minority Business Enterprise Legal Defense and Education Fund, Inc., letter to Farella E. Robinson, civil rights analyst, U.S. Commission on Civil Rights re: Effects of the *Croson* decision, Nov. 3, 1993 (hereafter cited as Lee letter).

[15]Ibid.

- discrimination in previous employment
- unequal access to financing
- unequal access to bonding
- price discrimination by suppliers and unequal access to supplies
- refusals to work for MBEs by majority employees
- necessarily restrictive contract specifications and bidding procedures
- denials of opportunities to bid
- exclusion from "Good Old Boy" networks
- bid shopping
- bid manipulation
- unfair denials of contract awards
- double standards in evaluating performance
- harassment
- slow payment and nonpayment
- governmental resistance to MBE participants

The Women's Business Ownership Act of 1988[16] noted the following with respect to women-owned businesses:

> (1) the need for management and technical training to maximize the growth potential of women-owned businesses;
>
> (2) inequality of access to commercial credit;
>
> (3) the virtual exclusion of women-owned businesses from government procurement activities; and
>
> (4) the inadequacy of information and data relative to women-owned businesses.[17]

MBELDEF reports that disparity studies have been fairly successful in defending programs that have been under legal challenge.[18] Several recent court decisions have addressed the adequacy of factual predicates for MBE programs, such as *Concrete Works of Colorado, Inc. v. City and County of Denver*, 823 F.Supp. 821 (D. Colo. 1993), rev'd, 36 F.3d 1513 (10th Cir. 1994); *Coral Construction Co. v. King County*, 729 F. Supp. 734 (W.D. Wash. 1989), aff'd in part and rev'd in part, 941 F.2d 910 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992); and *Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987).[19]

In the wake of *Croson*, some jurisdictions have resorted to race- and gender-neutral remedies in an effort to improve minority business participation in State and local government contracts. Some of these race-neutral measures have included disadvantaged business enterprise programs, local disadvantaged business enterprise programs, small business enterprise programs, enhanced outreach efforts to solicit bids from MBEs, technical and management assistance, bonding assistance, financial assistance and loan guarantee programs, on-the-job training programs, and disaggregation of contracts.[20] While such alternative remedies have been somewhat helpful, in general, they have not been nearly as effective in increasing MBE contract participation as mandatory race-conscious affirmative action remedies have been.[21]

Early on, there were some efforts by Senator Paul Simon and Congressman John Conyers to introduce Federal legislation to overcome the effects of *Croson*. Hearings were held before the Senate Committee on Governmental Affairs and the House Committee on Government Operations.[22] The proposed legislation would have insulated local governments from factual predicate requirements of *Croson* through the Federal delegation of authority to the States to assist in the elimination of marketplace discrimination. (See appendix D.) However, due to the anti-affirmative action political climate in the early 1990s, this legislation was never brought to a vote.[23]

The *Croson* decision did open the floodgates to additional litigation and, according to some, adversely affected many State and local programs seeking to improve access to the marketplace for businesses owned by minorities and women. Governmental agencies in 26 States and the District of Columbia were affected by legal challenges; 29 government sponsored programs were reported as having taken steps to dismantle voluntarily estab-

[16]Pub.L. No. 100-533, 102 Stat. 2689 (1988).
[17]U.S. Small Business Administration, "Facts About Women-Owned Small Businesses," Fact Sheet #45, August 1987, p. 2.
[18]Lee letter.
[19]Lee Letter (see also appendix B).
[20]Ibid.
[21]Ibid.
[22]Ibid.; See also appendix B and D.
[23]Ibid.

lished programs without any litigation having been filed; and 88 have or are currently reevaluating their programs.[24] Government programs in the following States were affected: Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Massachusetts, Minnesota, Missouri, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.[25] (See appendix B.)

Ohio Perspectives

The Associated General Contractors of Ohio (AGC) and Ohio Contractors Association (OCA) came out strongly against MWBE programs with preferences. AGC and OCA challenged or threatened to challenge the validity of such programs throughout Ohio. J.A. Croson Company, the majority firm that challenged the city of Richmond in the landmark Supreme Court case, is headquartered in Columbus, Ohio.[26]

Other organizations such as the Ohio Valley Chapter of Associated Builders and Contractors, the Western Ohio Chapter of the National Electrical Contractors Association, the Sheet Metal and Roofing Contractors Association of Miami Valley, Ohio and the Dayton Area Piping Industry, to name a few, also came out against set-aside programs.[27]

According to a report by the MBELDEF, eight different legal challenges were made against minority and female economic development programs operated by government agencies in Ohio. Governmental programs affected were in the cities of Dayton, Columbus, Cincinnati, and Elyria, and also in Montgomery County and the State of Ohio.[28] Although a lawsuit was not filed, Cleveland's program was threatened with a lawsuit.[29] Immediately following the *Croson* decision, more lawsuits were filed against set-aside programs in Ohio than were on record for any other State.[30]

There is consensus among Ohio minority contractors that without government set-asides or goal programs that they would not have been able to advance as far as they have in the marketplace. They say that, even with the programs, minority and female companies were only getting a small slice of the pie because of the inherent discrimination that occurs in the area of financing and the "old boy network"[31] Since *Croson*, minority contractors report a change in the behavior and attitude of majority firms. The most obvious change cited is that majority firms are no longer contacting minority firms to participate in joint ventures or subcontracting jobs.[32]

According to representatives of the Ohio Valley Chapter of Associated Builders and Contractors, Inc., set-aside programs are not the solution to advancing minority participation in the industry. In 1989 Kathy Somers, a representative of the organization, stated:

> The awarding of contracts to firms based on any criteria other than the lowest responsible bid is incompatible with the principle of open, fair competition that characterizes the free enterprise system. . . .Set aside programs or other programs that establish quotas in awarding contracts have proven to be largely unworkable and counterproductive to increasing long-term job opportunities for MBEs.[33]

[24]Ibid.

[25]Press memorandum.

[26]Ed Freeman, "*Croson*: Now A Household Word," February 1990, p. 2; *Transcript*, pp. 351-53; and Randall Edwards, "Judge Temporarily Halts Ameriflora Project," *The Columbus Dispatch*, Nov. 15, 1989, p. 1B.

[27]See James L. Francis, assistant city manager, Dayton, Ohio, memorandum to Charles Jones, acting city manager, Dayton, Ohio, "City of Dayton-Set Aside Program," June 14, 1989.

[28]Press memorandum.

[29]*Transcript*, p. 353.

[30]Press memorandum, pp. 17-19.

[31]Joseph Dudley, general superintendent, Aries Construction, Inc., *Transcript*, p. 289; Warren Wise, president, Wise Construction Company, *Transcript*, p. 316; Ben Espy, Columbus City Council, *Transcript*, p. 237; and Dana Mattison, executive director, Black Elected Democrats of Ohio, *Transcript*, p. 143.

[32]Warren Wise, president, Wise Construction Company, *Transcript*, pp. 316-17, 322; Terry Boyd, administrator, Columbus Minority and Female Business Development Program, *Transcript*, pp. 250-52; Jerald Steed, executive director, Dayton Human Relations Council, *Transcript*, p. 314; Gilbert Price, coordinator, Ohio Division of Equal Opportunity, *Transcript*, p. 117.

[33]Kathy Somers, executive director, Ohio Valley Chapter of Associated Builders and Contractors, Inc., *Associated Builders and Contractors, Inc. Newsletter*, February 1989, p. 6A.

However, Warren Wise, president of Wise Construction Company of Dayton, Ohio, one of the top minority contractors in Ohio, stated:

> I say without reservation or hesitation that if it were not for the MBE and FBE goals programs and the set-aside programs, there would be no Wise Construction Company. These programs gave me the opportunity that I needed to start a company. . . .If Wise Construction wanted to compete in the open market. . . .all things being equal, we could not have gotten support from the bonding company and the bank without the set-aside program.[34]

3. Legal Analysis of *Croson* Decision

In light of the split among scholars regarding the impact of the *Croson* decision on future business opportunities for minorities and women, scholars with opposing views were invited to provide an analysis of the decision. Dr. Louis A. Jacobs of Ohio State University, School of Law, provided an analysis in support of *Croson*. Dr. Harry Clor, professor of political science, Kenyon College, provided an analysis opposing the decision.

Dr. Louis A. Jacobs, Law Professor, Ohio State University

Dr. Jacobs said that non-Federal set-aside programs were severely limited by the *Croson* decision.[35] The constitutional boundaries established caught States and their political subdivisions by surprise.[36] The city of Richmond thought it had more leeway and flexibility than it did. According to Dr. Jacobs, Richmond passed legislation based on one set of rules and when it reached the Supreme Court was told that under a new set of rules its program did not qualify.[37] Consequently, set-aside programs developed prior to *Croson* have either been rescinded or almost uniformly been struck down upon constitutional challenge.[38] Beyond that, *Croson* has chilled the enthusiasm of local, county, regional, and State governments for remedying discrimination.[39] Dr. Jacobs noted that although a legal burden has been imposed upon government set-aside programs it can be overcome.[40]

Dr. Jacobs said that the legal principle has long been settled that racial classifications are subject to strict scrutiny by the courts in an equal protection clause analysis.[41] The 14th amendment to the United States Constitution was adopted in reaction to slavery and the Civil War, and its equal protection clause was clearly intended to prevent States and their political subdivisions from using racial classifications to discriminate against African Americans.[42] Therefore, any governmental effort to adopt a racial classification has been suspect, with courts refusing to accept any racial classifications except for the most compelling reasons.[43] According to Dr. Jacobs, governmental efforts to remedy rather than discriminate are due more deference by the courts. After all, he said, the equal protection clause was written to prevent discrimination in order to remedy the tragic consequences of slavery.[44]

Dr. Jacobs stated that at the Federal level, a more deferential standard of scrutiny was used in *Fullilove v. Klutznick*,[45] in part due to the allocation of power in section 5 of the 14th amendment to Congress to enforce the equal protection clause.[46] No such deference was given the city of Richmond. Under *Croson*, rather than empowering States and their political subdivisions, the 14th amendment was interpreted to restrain those governments. He stated that some deference is due to laws enacted by democratically elected local governments. However, Dr. Jacobs believes that one should question whether or not little deference is due non-

[34] *Transcript*, pp. 316, 318.
[35] Dr. Louis A. Jacobs, written statement submitted to Ohio Advisory community forum, August 1990, pp. 2-4 (hereafter cited as Jacobs Statement).
[36] Ibid.
[37] *Transcript*, p. 86.
[38] Jacobs Statement.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] 448 U.S. 448 (1980).
[46] Ibid.

Federal levels of government when they adopt legislation characterized as remedial. *Croson* uses strict scrutiny to "smoke out" whether remedial motivations produced the set-asides rather than racial politics or stereotypical thought. On this issue what most concerned the Supreme Court in *Croson* was the fact that the city of Richmond was politically controlled by minorities. According to Dr. Jacobs, the experience in Columbus, Ohio has demonstrated that any significant political influence of racial minorities will undermine deference.[47] He goes on to say: "[A]ny time a special interest group—racial, ethnic, or otherwise—holds the balance of political power, there is a risk that local government may accede to its demand at the expense of the rights of other citizens."[48]

Dr. Jacobs stated that early affirmative action programs were largely ineffectual because they failed to utilize race-conscious means.[49] Instead, race-neutral means were used, such as broadening recruitment pools through communications targeted to minority groups or offering test-taking skills training. But he said race-neutral means failed to reach a substantial number of qualified or qualifiable minorities and simply enlarged the competitive pool of minorities and nonminorities without in any way addressing the necessity of changing the rules and standards of the competition.[50]

In the fields of education and employment, some progress was made when goals and timetables were established in the workplace to recruit and hire minorities. In the broadcast industry, race-conscious affirmative action programs contributed to diversity in that field.[51]

According to Dr. Jacobs, the most entrenched discrimination has been in the construction industry.[52] Systemic discrimination in that industry has been nearly impervious to enforcement of antidiscrimination laws. Established contractors and craft unions have such control of the industry that minority employees and business enterprises are effectively locked out. He contended that because the industry had for so long adhered to racially exclusionary policies and practices, the adoption of neutral policies and practices after enactment of Title VII of the Civil Rights Act of 1964 and governmental imposition of affirmative action duties merely perpetuated the prior discrimination.[53] Dr. Jacobs stated that Congress realized the fundamental injustice of spending tax dollars to fuel an industry permeated by racism and imposed a minimal set-aside requirement which was upheld against constitutional challenge in *Fullilove*. That same realization by the States and their political subdivisions produced parallel set-aside programs in all categories of public works.[54]

Dr. Jacobs explained that *Croson* identified four reasons why racial classifications are unacceptable: 1) stigma may arise from their use regardless of the motive; 2) notions of racial inferiority are promoted; 3) racial hostility may be incited by those not given preferential treatment; and 4) race-neutral classifications will generally suffice because anti-discrimination laws can prevent racism.[55] He argued that these reasons are bankrupt in the context of both *de jure* and *de facto* racism in the United States. He stated that to suggest to a victimized group that a stigma is attached to them because of remedial efforts is hypocritical. He believes that the stigma of victimization is so great a problem that its removal by an effective remedy would be destigmatizing, especially when government recognizes that the origin of the stigma is a direct result of racism. Moreover, Dr. Jacobs said that while a knee-jerk reaction to set-asides may suggest that the preferred minorities are inferior and unable to compete on their own, the enlightened reaction must be that a qualified or qualifiable MBE is inferior only with regard to overcoming decades of victimization. He contended that solutions to these misconceptions can be helped through educating the public about set-asides, current and past systemic discrimination in the construction industry, and about the able capabilities of MBEs if given a chance.[56]

[47]Ibid., p. 4.
[48]Ibid., pp. 4-5.
[49]Jacobs Statement, pp. 1-12.
[50]Ibid.
[51]Ibid.
[52]Ibid.
[53]Ibid.
[54]Ibid.
[55]Ibid., pp. 5-6.
[56]Ibid, pp. 5-6.

In *Croson*, Dr. Jacobs indicated that remedying prior discrimination in the construction industry is recognized as a compelling governmental interest.[57] The prior discrimination in the industry must, however, be specifically identified; a set-aside may not be justified by "an amorphous claim that there has been past discrimination in a particular industry."[58] Simply announcing a remedial purpose is also inadequate; instead, "a strong basis in evidence for its conclusion that remedial action was necessary" must be the motivating force for adopting the set-aside.[59]

To make a case, Dr. Jacobs said, anecdotal evidence should be collected.[60] For example, hearings eliciting testimony from minority victims in the industry should be conducted. In addition, reports from antidiscrimination enforcement officials regarding the type, amount, and persistence of complaints about racism should be detailed. The lack of deference accorded State and local governments under the *Croson* standard requires that these governmental entities secure historical evidence to support claims of discrimination. In addition to a statistician, the governing entity should consider obtaining evidence from academicians and experts in the field about known discriminatory practices of the particular industry.[61]

Dr. Jacobs said that to be narrowly tailored, the set-asides must directly remedy the perceived discrimination.[62] The amount or degree of set-asides is a crucial factor. In *Croson*, the City of Richmond committed a fatal error by tying the percentage set aside to the minority group population. Based on established employment discrimination standards, the proper source from which to calculate or determine a set-aside percentage is the number of qualified minority business enterprises in the particular industry and locale. Use of the number of qualified or qualifiable MBEs should be the benchmark for determining the amount or degree of set-asides. Dr. Jacobs indicated that maintaining the remedial focus of the set-aside should require a waiver provision, opportunity to appeal, and some standard to exclude successful MBEs, that is, those that were not victimized by present discrimination and which therefore need no remedy. Other groups that should be excluded are false fronts for nonminorities and those whose bids are high beyond any explanation tied to victimization. Finally, narrow tailoring includes consideration of the least drastic alternatives or remedies.[63] Thus, *Croson* listed race-neutral means that should at least be considered and perhaps tried before resorting to race-conscious means. Courts have differed over whether total exhaustion is required, and the most persuasive analysis is that "*Croson* does not compel the government entity to consider every imaginable race-neutral alternative, nor to try alternatives that would be plainly ineffective."[64]

Dr. Jacobs concluded that, with some difficulty, set-asides can be constitutionally constructed. Therefore, States and their political subdivisions should be encouraged to renew their commitment to such programs.[65] He is convinced that set-aside programs can be revived to pass constitutional scrutiny if they remain within the boundaries set by *Croson*.[66]

Dr. Harry Clor, Professor of Political Science, Kenyon College

Dr. Harry Clor told the Committee that the reason the affirmative action issue is so difficult is because there is a "collision between two sets of moral concerns and principles, both of which are legitimate and important."[67] One is the concern to redress old wrongs and promote the integration of disadvantaged minorities into the mainstream of American life. On the other hand, "We support a fundamental principle that benefits and burdens should not be distributed by government on the basis of race and ethnicity. Therefore, in a liberal society, it is the individual as such who is entitled to equal rights or recognition regardless of race or ethnicity."[68]

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[57]Ibid.
[58]Ibid.
[59]Jacobs Statement, pp. 7-8.
[60]Ibid.
[61]Ibid.
[62]Jacobs Statement, pp. 8-9.
[63]Ibid.
[64]Ibid.
[65]Jacobs Statement, p. 10.
[66]Jacobs Statement, p. 3.
[67]*Transcript*, p. 59.
[68]Ibid.

Dr. Clor stated that the *Croson* decision does not fully resolve this matter, but it represents a reasonable and respectable effort to accommodate the principles at stake.[69] The decision defines constraints that will preclude the most dubious forms of racial preference, while providing some latitudes for genuine remedial programs.[70] He said:

> I guess it means that there is now a clear Court majority for the application of strict scrutiny in cases of remedial racial preference by State and local governments. Government will have the burden of demonstrating that its racial classification serves a compelling State interest and that its means are precisely tailored to its legitimate end.[71]

Dr. Clor continued:

> Since 1975 Richmond had an antidiscrimination ordinance targeting the construction industry and public contracts, yet it provides no evidence that its officials or its contractors had violated the ordinance. It provided no enforcement record.[72]

He said that a set-aside program conferring benefits on the basis of race must be narrowly tailored to remedy identified past discrimination.[73] In addition, Dr. Clor noted that Richmond's 30 percent quota was not tied to a specific injury, but was tied to racial balancing. Dr. Clor interpreted the Court to be saying, "Do not pick a number that seems to be based on an assumption of an entitlement to racial or ethnic proportional representation."[74] He said that if qualified minority enterprises constituting 30 percent of the city's contractors were regularly receiving 0.6 percent of the contracts, that would warrant a 30 percent quota. He further stated that, "If the legitimating goal is to remedy the general effects of 200 years of societal discrimination, why not an 80 percent quota and why not forever, or until proportional representation has been achieved conclusively, which might be forever? And why only blacks, Orientals, Indians, and Eskimos? What about claims to entitlement of other minorities who have been subject to much prejudice and exclusion?"[75]

Dr. Clor expressed his view that the *Croson* decision sent three messages: (1) The cities and States should "pay attention to the enforcement of their antidiscrimination statutes."[76] (2) "Preferential treatment is acceptable only as a precise remedy for demonstrated racial discrimination."[77] (3) "The concept of identified discrimination in the case is broad enough to make room for carefully designed and limited remedial policies."[78]

Dr. Clor suggested that some of the constraints of the *Croson* decision are reasonable. He said, "I think the point here is that a general ideological opinion about the conditions of societies and social groups is not an appropriate basis for government preferential quotas."[79]

4. The Community Forum

Based on information provided during background investigation and the proceedings of the community forum, the following provides an overview of the MWBE programs of Ohio and selected cities of Columbus, Dayton, Cincinnati, and Cleveland.

At the time of the community forum, there were principally three different types of minority and female business enterprise programs operated by government agencies in Ohio. They were:

Set-Aside Program—A policy whereby a certain percentage of contracts are set apart from the normal competitive bidding process. These set apart contracts are then competitively bid on by designated groups of minority suppliers.[80]

Goal Oriented Program—Uses a "best effort" approach for minorities and can be utilized in any area of the bid-on contract to reach a designated goal for the

[69] *Transcript*, p. 60.
[70] *Transcript*, p. 60.
[71] Ibid.
[72] *Transcript*, p. 61.
[73] *Transcript*, pp. 62-64.
[74] Ibid.
[75] *Transcript*, p. 64.
[76] *Transcript*, p. 68.
[77] *Transcript*, p. 69.
[78] *Transcript*, p. 69.
[79] *Transcript*, p. 64.
[80] Irie Turner, director, Office of Equal Opportunity, City of Cleveland, memorandum, "Consolidated Briefing Package on the Elements of *Croson* and the Need for a Disparity Impact Study," July 20, 1990, pp. 3-4.

contract services. This approach has no enforcement mechanism.[81]

Goals Program—Program which preference feature designed to encourage joint ventures and to assure participation of economically disadvantaged businesses. Cost preference typically is 5 percent to minority firms regardless of size, ethnicity, or sex and an additional 5 percent preference for women-owned firms. Some programs have a set-aside and a preference feature.[82]

State of Ohio

According to the 1990 census, Ohio had a total population of 10,847,115.[83] Of that population, 9,521,756 or 87.8 percent was white; 1,154,826 or 10.6 percent was black; 20,358 or 0.2 percent was American Indian, Eskimo, or Aleut; 91,179 or 0.8 percent was Asian; 139,696 or 1.3 percent was Hispanic; and 58,996 or 0.5 percent was other race.[84]

The State's minority business enterprise program was created by Ohio House Bill 584, approved by the Governor on December 17, 1980, which provides for minority participation in the State contract bidding process. The program is a set-aside program. The purpose of this program is to promote minority business growth by ensuring that contract awards in construction and goods and services are available to minorities. Blacks, American Indians, Hispanics, and Asians are the eligible participants.[85] Female businesses are not eligible to participate in the program unless they are minority. According to the State director of equal employment opportunity, a legislative decision was made to exclude females due to problems associated with setting separate goals for females and minorities.[86] The Division of Equal Employment Opportunity certifies minority businesses and monitors agency compliance with the State's MBE utilization goals. There are four components of the legislation commonly referred to as "The Set-Aside Law." They are:

—At least 5 percent of the State's construction contracts shall be set aside for competitive bidding by certified minority contractors.

—Construction contractors are required to award at least 7 percent of their subcontracts to certified minority contractors and, when possible, construction contractors should award 10 percent of their subcontracts to qualified minority contractors.

—At least 15 percent of all State purchases of equipment, materials, supplies, and contracts of insurance or services shall be set aside for competitive bidding by certified minority suppliers.

—Minority business firms are not limited to those contracts specially set aside. They are encouraged to bid on all State contracts.[87]

House Bill 584 was challenged shortly after the statute was enacted in a case entitled *Ohio Contractors' Association v. Keip*.[88] The MBE program was challenged as violating majority contractors' equal protection rights under the 14th amendment. The Sixth Circuit Court of Appeals found that the program was lawful and that the State and majority contractors had in fact engaged in discrimination against minority businesses.[89]

Although the State program has been challenged, the original goals and program activities have virtually been unchanged. In 1989 Ohio Attorney General Anthony Celebrezze indicated that the State MBE program was strong enough to meet the *Croson* test. He stated:

To paraphrase Mark Twain, reports of the death of MBE set aside laws are much overstated. While the Supreme Court has plainly made it more difficult to enact and implement such programs, it has not killed them. Some plans, such as Ohio's can withstand even *Croson* scrutiny. Others which cannot pass the current test can be replaced with set aside plans which are supported by evidence of discrimination in contracting and which are demonstratively narrowly tailored to address that discrimination. . . .*Croson* does not and should not be read as requiring government to abandon this critically important

[81]Ibid.
[82]Ibid.
[83]U.S. Bureau of the Census, 1990 Ohio Census and Population Characteristics.
[84]Ibid.
[85]*Ohio Minority Business Enterprise Pamphlet*, State of Ohio, Department of Administrative Services, Division of Equal Employment Opportunity (August 1989) (hereafter cited as *Ohio Minority Business Pamphlet*).
[86]*Transcript*, pp. 120-21.
[87]State of Ohio Amended Substitute House Bill 584, Dec. 17, 1980.
[88]713 F.2d 167 (6th Cir. 1987).
[89]Anthony J. Celebrezze, Jr., "The Future of MBE Programs," *Cities and Villages, The Journal of the Ohio Municipal League*, October 1989, pp. 11-12 (hereafter cited as Celebrezze article).

method of carrying out its obligation to ensure equal opportunity for all of its citizens.[90]

In spite of the *Croson*-related lawsuits, spending with minority businesses in State procurement activities have increased. In fiscal year 1990, Ohio contracted with minority businesses in the amount of $59 million, more than 10 percent of the State's total expenditures for goods and purchases.[91] During the same period, the Department of Administrative Services awarded 6 percent of construction purchases to minority businesses.[92]

Loren L. Braverman, Deputy Chief Counsel, Ohio Attorney General's Office

Loren Braverman spoke about the National Association of Attorneys General Report on set-aside programs. He reported that:

> . . .after *Croson* was issued. . . .and after we got a chance to sit down and fully analyze it and fully digest its import, it was apparent to us that maintaining set-aside programs in the face of the Supreme Court's brand new standards would be much more difficult than it was prior to *Croson*. . . .[93]

He continued:

> . . .under the aegis of the National Association of Attorneys General, Attorney General Celebrezze and nine other State attorneys general formed what they called a Civil Rights Working Group on Set-aside Programs to study the issue.[94]

Mr. Braverman said that the group had hoped to draft a model set-aside statute to distribute to the States and various localities. However, after meeting with the other State representatives and putting in a great deal of study it became apparent, he said, that a model statute would not work. He explained:

> As you know, under *Croson*, and perhaps even before *Croson*, set-aside programs must address specific market discrimination, not just general discrimination, but specific types of market discrimination. . . .a general plan which was not geared towards that specific type of discrimination, in all probability in my estimation, would not pass judicial muster. Rather, we concluded that each jurisdiction had to carefully tailor its program to address the discrimination that existed in its particular marketplace. . . .[95]

Mr. Braverman reported that the group believed that it could still provide valuable assistance to State governments and other jurisdictions by giving some practical advice on how to establish a viable set-aside program that would survive a court challenge. As a result, they developed a "how to" manual.[96]

The manual starts with an analysis of *Croson*, said Mr. Braverman, explaining what we believe to be its holdings and also analyzing what we believe to be its flaws. The manual discusses how to gather evidence of discrimination and establish a statistical basis for set-aside programs.

Mr. Braverman stated that the manual advises:

> government agencies how to conduct the *Croson* hearing; how to choose a forum or forums for that hearing; how to elicit relevant information through testimony regarding such things as past and present discrimination; past and present contracting practices which keep minority business enterprises from participating fully in the government purchasing or contracting environment; how to gather evidence that benefits existing MBE programs.[97]

Mr. Braverman told the Committee that the post-*Croson* environment has "made it more difficult, but not impossible, to maintain in place a viable minority business enterprise set-aside statute."[98]

Gilbert S. Price, Former State EEO Coordinator, Ohio Department of Administrative Services

Gilbert Price discussed Ohio's minority business program and the successes and problems encountered in the wake of *Croson*. Mr. Price stated that

[90]Celebrezze article, p. 13.
[91]Gilbert Price, written statement submitted to the Ohio Advisory Committee community forum, Sept. 24, 1990, p. 3 (hereafter cited as Price Statement).
[92]Ibid.
[93]*Transcript*, p. 216.
[94]*Transcript*, p. 217.
[95]Ibid.
[96]*Transcript*, p. 218.
[97]Ibid., p. 219.
[98]Ibid., p. 226.

although the State's program was challenged by a white contractor, the program was continued and spending with minority businesses increased.[99] On the other hand, he is convinced that the climate created by *Croson* injured minority contractors.[100] He said the post-*Croson* attitude among many white contractors was that they no longer have to do business with minority firms. Mr. Price reported that he is hearing that, even in the private sector which is unaffected by *Croson* requirements, procurement agents are asserting that they no longer have to implement the voluntary programs they have established. To the extent that these attitudes are prevalent, Mr. Price is convinced they can create untold injury for minority businesses.[101]

According to Mr. Price, there are many reasons why minority set-aside and other such programs should continue. Blacks are less than one-third as likely as whites to enter into business, and when they do, the overwhelming majority of their businesses have only themselves as employees; historically, there are barriers to preparatory fields or apprenticeship programs in the construction trades, there is the barrier of acquiring access to capital to maintain growth, and barriers created by various procurement policies and structures that effectively lock out minority businesses from competing. He went on to say:

> In many fields, particularly the construction industry, the road to business development begins with on-the-job training and skill development. We have found, sadly, that minorities were often the victims of discrimination in these areas. . . . In the past, courts have taken judicial notice of the history of discrimination in the craft unions, and the problems in Ohio were no different. I have heard that at least one union in the State in the mid-1960s was comprised almost solely of members of four families. These patterns of exclusion of minority workers affect their ability to gain employment in the industry. And, even when they were allowed into the industry, they often were unable to gain the hours of employment which would allow them to successfully build the financial independence needed to develop a business.[102]

Another problem causing barriers for minorities in entering business are union policies and practices. Mr. Price stated that, in Cleveland, black journey workers reported that the union failed to meet its goals for the admittance of blacks under a consent decree entered into by the union in the early 1970s.[103] The journey workers also charged that while they represented more than 11 percent of the workers in the union, they had worked only 4.7 percent of the hours and some workers had not worked in several years.[104] Mr. Price indicated that in another situation, a union in northeastern Ohio required blacks to pay initiation fees, but they were never referred out for jobs. When a black union member challenged this practice, he was physically attacked and later "blackballed."[105]

Mr. Price indicated that minority contractors also have to contend with false fronts.[106] Although many majority contractor organizations publicly attack false fronts, they still continue to create and utilize fronts.[107] Mr. Price mentioned a case in which the State had a contract with a majority contractor who wanted to use a company that the State rejected. The State was able to prove without a doubt that the work on the job was going to be done by a white subcontractor. The case went to court, and the judge gave the contractor a stay, which "forced us to allow this contractor to be used on the project."[108] Meanwhile, Mr. Price continued, they told the prime contractor that this company was going to be decertified. The State succeeded in holding them off.[109] "The prime contractor then brought in a legitimate minority company to work on the project. It cost the majority contractor about $3,000 more on a $3 million project." Mr. Price said that his department tries to identify and reject front companies, but is not always successful.[110]

According to Mr. Price, another well-known problem for minorities is acquiring capital and

[99]Price Statement, p. 1.
[100]Ibid.
[101]Ibid.
[102]Ibid., p. 2.
[103]Ibid.
[104]Ibid.
[105]Ibid. and *Transcript*, pp. 113-14.
[106]*Transcript*, pp. 106-08.
[107]Ibid.
[108]Ibid., p. 108.
[109]Ibid.
[110]Ibid.

bonding.[111] His office receives many complaints from minority businesses charging that they have not received business loans even when they have the financial capacity to repay.[112]

Another problem cited by Mr. Price is procurement practices. He stated that one of the barriers that minority firms face is their inability to gain access to manufacturer lines.[113] For example:

> We have been told by numerous minority firms that manufacturers will refuse to quote prices for work, or will quote an exorbitant price. In one instance, a State university sought to set aside a bid on furniture for minority business. The university contacted the manufacturer for a price, and received their quote. However, when the project was set aside, the bids came in far too high. The university found that the manufacturer had quoted the minority firms a different and higher price. Sadly, this is not an uncommon practice. We have seen it on numerous procurements and we believe it to be widespread. Thus, minority firms can be legitimately locked out of business opportunities because their prices are higher—without anyone examining the discrimination which causes the higher price.[114]

Ohio has consistently met the requirement for awarding construction contracts to minority businesses, reaching a high of 17 percent in 1988. While the goal for procurement of goods and services has been more difficult to attain, steady progress has been made. Since 1988, expenditures with minority firms rose 88 percent, while overall procurement expenditures have risen only 7 percent. Mr. Price said these facts, however, do not eliminate the need for minority programs, but demonstrate their value. He indicated that in many instances, State government has been the only employer of minority businesses.[115] For example:

> the State's newly constructed William Green Center was built with well over 20 percent minority business participation on both prime contracts and subcontracts. At the same time, no other private building in downtown Columbus has been built with anything more than token minority business participation. . . .In many cases we have found that minority firms have not even been given the opportunity to bid on construction projects in the private sector. Thus, they are locked out of markets without any opportunity to get in.[116]

Mr. Price concluded that in the absence of a formal set-aside program, the weight of all these combined barriers will effectively lock out even the most qualified minority businesses from participation in the marketplace. Since the *Croson* decision, on a scale of 1 to 10 with 1 being poor and 10 excellent, he rated the level of minority business opportunities as 1.[117]

Dana Mattison, Executive Director, Black Elected Democrats of Ohio (BEDO)

Dana Mattison stated that BEDO is a political group governed by an executive committee comprised of African American members of the Ohio General Assembly.[118] Its purpose is to develop a network designed to inform and support the development of black issues.[119] BEDO is Ohio's black State-level political caucus and has been involved in numerous legislative and social accomplishments, one being the passage of House Bill 584.[120]

Mr. Mattison stated that Ohio House Bill 584 is probably the most far-reaching minority set-aside law in the United States.[121] The set-asides provide minority businesses vital incentives and needed capital that would not be possible without this support.[122]

Mr. Mattison said:

> the triumphant of strict scrutiny under the *Croson* decision has been met here in Ohio. Clearly the State legislature in matters of State dollars has the jurisdiction and responsibility to appropriate those State funds. Because we had judicial findings of discrimination in procurement practices in the State of Ohio prior to passage of House Bill 584, the issue of documentation of discrimination has been addressed.[123]

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[111]Ibid., pp. 108-09.
[112]Ibid.
[113]Ibid. and Price Statement, pp. 2-3.
[114]Ibid.
[115]Ibid.
[116]Ibid.
[117]*Transcript*, p. 141.
[118]*Transcript*, p. 142 and Black Elected Democrats of Ohio, "The Black Agenda 86 Issues and Answers" (1986), p. 2.
[119]Ibid.
[120]*Transcript*, p. 143.
[121]Ibid.
[122]Ibid.
[123]Ibid., p. 145.

However, Mr. Mattison stated that in spite of documentation showing past discrimination, *Croson* has caused some State legislators to attempt to gut House Bill 584 by excluding major portions of State dollars from set-asides. He contended that:

> without the specter of *Croson*, such legislation would never have seen the light of day. We now find ourselves having to fight to convince bureaucrats that our law still applies. The disinformation campaign that was conducted to suggest that the *Croson* decision killed set-asides has had an effect. Those who were always reluctant to implement the law now feel that they have sufficient reason to do nothing. . . .I believe that the major impact of *Croson* goes beyond the issues of law and reaches into the hearts of those affected. Clearly, the courts have been the place that were the last bastion of equal and fair treatment, or so perceived. . . .The expectation that we document our own victimization is perhaps the most dehumanizing aspect of this discussion. . .[124]

Mr. Mattison also said that mentoring programs with majority organizations have not been effective.[125] He stated that it is unrealistic to expect majority companies to provide all the information needed for a minority company to be competitive in the marketplace. A more viable approach to mentoring is for minority businesses to unite and establish the mentoring programs that will allow them to compete in the marketplace and become members of such organizations like the chambers of commerce.[126] Mr. Mattison said that providing a single set-aside to minority business people who have been locked out of competing will not solve the problem. According to him, education about apprenticeship programs, access to the marketplace, and how to make money are crucial issues that must be taught to developing minority businesses.[127]

COLUMBUS

According to the 1990 census, the metropolitan area of Columbus had a total population of 1,377,419.[128] Of that population 1,184,770 or 86.0 percent was white; 164,602 or 12.0 percent was black; 2,880 or 0.2 percent was American Indian, Eskimo, or Aleut; 21,059 or 1.5 percent was Asian; 11,363 or 0.8 percent was Hispanic; and 4,108 or 0.3 percent was other race. In comparison to the metropolitan area, the city of Columbus' racial composition was 74.4 percent, white; 22.6 percent, black; and 3 percent, other races.[129]

In 1990 and 1991, the Federal district court in the Southern District of Ohio invalidated Columbus' application of 21 percent minority and 4 percent female business enterprise participation goals in city contracts and in the Ameriflora construction contracts.[130] Since that time, the city of Columbus has operated without a minority and business enterprise program. Studies conducted by the city concluded that there has been a continuous and steady decline in the participation and utilization of minority and female business enterprises in city contracts.[131]

The city of Columbus began its formal affirmative action efforts in May 1975 with the enactment of Ordinance 810-75. This ordinance created Title 39 of the Columbus City Code.[132] The specific requirements of the ordinance were outlined to satisfy the following conditions:

> The final goal for the utilization of minorities shall be a percentage of minority employees in each job classifications not less than the percentage of the minority population in the total population of the Standard Metropolitan Statistical Area. The final goal shall be achieved within five years following the adoption of an accepted Affirmative Action Plan.[133]

Chapter 3909 of the ordinance also required contracting agencies to insert an equal opportunity clause into all contracts entered into by the city. This clause included language prohibiting discrimination by contractors in hiring and advancement because of race, color, religion, sex, or national

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[124]*Transcript*, pp. 145-46.
[125]*Transcript*, pp. 154-55.
[126]Ibid.
[127]Ibid., p. 139.
[128]State of Ohio, Department of Development, 1990 Census of Population and Housing.
[129]Ibid.
[130]*Ohio Contractors' Ass'n v. City of Columbus*, 733 F.Supp. 1156 (S.D. Ohio, 1990).
[131]Minority Business Enterprise Legal Defense and Education Fund and BBC, Inc., "Predicate Study, City of Columbus, Ohio," August 1992, pp. 8-9 (hereafter cited as Predicate Study).
[132]Predicate Study, pp. 22-24.
[133]Predicate Study, p. 23.

origin. In July 1991, the city council enacted Ordinance 2337-81, which thoroughly overhauled the program.[134] The ordinance was expanded to include female participation in the city's goals and enumerated specific goals regarding minority/female work force and expenditures. The new Chapter 3907 established a goal for construction contractors doing business with the city to maintain a work force with at least 10.6 percent minority and 6.9 percent female employment. Nonconstruction contractors were to maintain a work force with at least 15 percent minority and 20 percent female employment.[135] The ordinance also established goals for dollar expenditures in construction and nonconstruction contracts in subcontracting: 10 percent for MBEs and 2 percent to FBEs in construction subcontracting, and for nonconstruction contracts, city agencies were to utilize MBEs for at least 10 percent and FBEs for 2 percent.[136] The program was goal oriented, and contractors and city agencies were strongly encouraged to meet these established goals.[137] In May 1983, the Division of Minority and Female Business Development was created to replace the Office of Contract Compliance.[138]

On Jan. 23, 1989, Ordinance 28-89 increased the goal percentages. The new ordinance:

> directed city contracting agencies to utilize construction contractors with at least a 21 percent minority and 10 percent female workforce. For nonconstruction contracts, city agencies were to utilize minority business enterprises for at least 21 percent and female business enterprises for at least 4 percent of total dollars expended. On all contracts less than $5,000, city agencies were directed to increase MBE/FBE participation to 21 percent.[139]

Information provided during interviews with city officials and contractors indicates that the numerical goals were changed to increase minority and female participation in Ameriflora, a major city project. White contractors became gravely concerned when the city increased the numerical goals in that:[140]

A lawsuit challenging the constitutionality of Ordinance 29-89 was filed by the Associated General Contractors against the city of Columbus in Federal district court. On January 25, 1992, Judge Graham issued an order declaring that ordinance to be unconstitutional and maintaining jurisdiction over the case to review any future preferences instituted by the city.[141]

At the time of the Advisory Committee's community forum, the city of Columbus' Office of Minority and Female Business Development had a budget of more than $500,000 and employed 13 people. The office has undergone significant staff turnover and turmoil. Since 1983 the office has been served by four different directors; investigated for fraud and mismanagement, spent nearly $700,000 on two disparity studies to justify its minority and female business development program, and still was embroiled in a 4-year lawsuit questioning the program.[142] Columbus has been without an established minority and female business program since September 1989.[143]

Over the course of the last 4 years, the city of Columbus has collected and analyzed evidence from numerous sources, including, but not limited to, internal city reports and studies, judicial determinations regarding discrimination in construction trades, and seven city council public hearings (conducted on January 18, and March 8, 1990; October 28, and 29 and November 18 and 19, 1992; and October 28, 1993). Several commissioned studies have been conducted, including "Predicate Study, City of Columbus," submitted by BBC, Inc., and MBELDEF in 1992; "Predicate Study Supplement, City of Columbus Construction," submitted by BBC, Inc., in 1993; the "Columbus, Ohio Disparity Study and Recommen-

[134]Ibid.
[135]Predicate Study, p. I-23.
[136]Predicate Study, pp. I-24-25.
[137]Predicate Study, p. I-27.
[138]Ibid.
[139]Predicate Study, pp. I-27-28.

[140]Ben Espy, *Transcript*, pp. 230-31; Lewis Smoot, *Transcript*, pp. 199-201; Susan Kyte, executive assistant, Office of Management and Budget, City of Columbus, interview, July 23, 1990; Randall Edwards, "Judge Temporarily Halts Ameriflora Project," p. B-1, *The Columbus Dispatch*, Nov. 15, 1989.
[141]Predicate Study, p. I-28.
[142]Ben Espy, *Transcript*, p. 233; Mary Sanchez, "Report on Discrimination Study Long Overdue, Leak Angers Some," *Kansas City Star*, Apr. 4, 1994, p. B1-2.
[143]Predicate Study, pp. I-28-29.

dations," submitted by Beatty & Roseboro in 1991 (the "Beatty Study"); and "Disparity in Public Contracting, Columbus, Ohio, Economic Evidence and Recommendations," submitted by William Bradford, Ph.D., in 1991 (the "Bradford Study").[144]

The city also conducted studies on utilization of minority- and female-owned firms for construction contracts from June 1991 through May 1993. These studies (Predicate Studies) examined data on utilization of MBEs and FBEs in construction for the period after the city suspended its former minority and female business enterprise participation goals program. The studies concluded that there has been a continuous and steady decline in participation and utilization of minority and female business enterprises in city construction and goods and services contracts.[145]

For example, for goods, services, and construction, city utilization of MBEs and FBEs fell below availability. In the area of construction, 3.0 percent of Columbus SMSA construction firms in 1987 were minority owned, yet from 1983 to 1991 only 2.3 percent of construction prime contract dollars went to MBEs or female-owned businesses.[146] This is not only below the availability pool but below the city's established goals program of 21 percent. In the area of goods, the studies also found statistically significant disparities between utilization and availability.[147] Elements of the city's ordinances to encourage utilization of MBEs in goods purchases were either not implemented or were ineffective.[148] (See appendix E.)

For female-owned businesses, in the area of construction, only 1.4 percent of prime contract dollars went to female firms from 1983 through July 1991; yet in 1987, there was a 4.8 percent available pool.[149] For goods purchases, only 2.1 percent of total dollars went to female businesses, while they comprised 15.9 percent availability. In the area of services, only 2.8 percent of city services went to females, while in 1987 they comprised 29.8 percent of the available pool. Similar to minority businesses, the evidence showed that elements of the city ordinances to encourage utilization of FBEs were either not implemented or were ineffective.[150]

In sum, the city concluded that the disparities between utilization and availability for MBEs and FBEs quantitatively and qualitatively could not be explained by random events and that discrimination is an important factor causing the disparities.[151]

Columbus has now developed proposed legislation called the Equal Business Opportunity Code to create a remedial program for minority and female business enterprises in the area of construction and goods and services based on the findings documented in these studies.[152] In mid-1994, the proposed legislation was being reviewed by the Federal district court for compliance with *Croson* requirements.[153]

The legislation details significant changes in the operation of the program. A 12-member commission will be established to be known as the Equal Business Opportunity Commission to review and monitor the program. Minority and female business participation goals will be established on an annual basis. If the legislation is approved by the courts, the initial annual participation goals will be 10 percent for minorities and 7 percent for females in the area of construction; 4 percent for minorities and 6 percent for females in the area of goods; and 7 percent for minorities and 9 percent for females in the area of services. The annual goal of 10 percent for minorities in the area of construction in the new legislation is a significant decrease from the goals of 21 percent. For females, the participation goal in the area of construction increased from 4 to 7 percent.[154]

[144]Draft, City of Columbus, Equal Business Opportunity Code of 1993, Oct. 20, 1993, p. 3.
[145]Ibid. and Gwendolyn Rogers, legislative analyst, Columbus City Council, letter to Farella Robinson, civil rights analyst, USCCR, Oct. 26, 1993.
[146]Predicate Study, pp. I-26, 30-34.
[147]Ibid.
[148]Ibid.
[149]Predicate Study, pp. I-36-37.
[150]Ibid.
[151]Ibid., p. I-39.
[152]Draft, City of Columbus, Equal Business Opportunity Code of 1993, Oct. 20, 1993.
[153]Gwendolyn Rodgers, legislative analyst, Columbus City Council, telephone interview, Apr. 19, 1994.
[154]Draft, City of Columbus, Equal Business Opportunity Code of 1993, Oct. 20, 1993, p. 15.

Similar to the qualitative information gathered and reported to (forum transcript, interviews, etc.) the Ohio Advisory Committee in 1990, the information retrieved during the Predicate Study listed some of the same barriers or disadvantages faced by MBEs/FBEs. They are:

- Lack of information about bid opportunities.
- Difficulty in obtaining bonding, insurance, and financing.
- Price advantage.
- Stereotypical attitudes.
- Exclusion from the "good old boy" network.
- Unfair denials of contract awards.
- MBE/FBE fronts.[155]

Ben Espy, Columbus City Councilman

Ben Espy, then city councilman and chair of the Economic Development Committee, stated that Columbus had goals in place for minorities and females many years prior to the *Croson* decision.[156] According to Mr. Espy, the city of Columbus does not foster a climate of economic growth for minority businesses. Since 1969, the city has spent $2.5 billion in contracts. Of this, $22 million was awarded to minority and female businesses. Based on these numbers, Mr. Espy believed that a good case had been shown to justify strengthening minority participation.[157] The city attorney at that time advised that Columbus would be in compliance with *Croson* because its program was based on goals rather than set-asides.[158]

Mr. Espy said that *Croson* has reaffirmed to the majority community that there is no need to do business with minorities in the city.[159] This is evidenced by minority and females being underrepresented in city projects immediately following the *Croson* decision.[160] He reported that evidence provided to the city council showed that at that time Columbus contracted with minority firms at the amount of approximately 1 percent and that the city had not done very much to encourage minority participation in the economic mainstream of Columbus.[161]

Mr. Espy said that 90 percent of the business of the three largest minority firms in Columbus is in public contracts. He stated that without public contracts these businesses would not exist because they are locked out of the private sector.[162] He further related:

> As much as Columbus has grown in the past years, of all the private projects you see in downtown Columbus, very rarely will you see any major minority involvement. . . .*Croson* is now the justification used not to utilize minority business in the public sector. . . .It's a mindset, at least in Columbus, in my opinion, that there's no need to use minorities. You hear that the old boy network is the most effective means to keep minorities out of business.[163]

Mr. Espy reported that problems still exist in the bidding process, bonding, and financing. He stated that special emphasis must be placed on the city's bidding process to ensure that it is conducted in a fair manner.[164]

Terry A. Boyd, Administrator, Minority and Female Business Development Division

Mr. Boyd stated that Columbus has experienced tremendous economic growth in the past few years and has been identified as one of only four cities in the Midwest showing a positive growth pattern that will continue over the next 5 years.[165] However, he said, all segments of the community have not benefited from the prosperity of that growth.[166]

Mr. Boyd admitted that the Minority and Female Development Program had suffered internal management problems that have affected the division's ability to substantiate the need for set-asides. He indicated that both the city administration and city council have not been prudent in their responsibility toward minority and female businesses, thus causing loopholes and weaknesses in the program

[155]Predicate Study, pp. I-41-42, I-50-51 and *Transcript*, pp. 158-95, 230-76, 284-300, 333-45.
[156]*Transcript*, pp. 230-32.
[157]Ibid.
[158]Ibid.
[159]Ibid.
[160]Ibid.
[161]Ibid.
[162]*Transcript*, pp. 236-37.
[163]Ibid.
[164]Ibid.
[165]*Transcript*, pp. 247-48.
[166]Ibid.

that circumvent the purpose of the ordinance.[167] According to Mr. Boyd, majority contractors have taken advantage of these legislative loopholes. For instance, language in the ordinance provides a mandate to approve bids, contracts, etc., but there is nothing that says the division shall disapprove.[168] He stated the ordinance gave no clear indication of what criteria to use to disapprove a contract.[169]

Mr. Boyd contended the most visible effect of the *Croson* decision has been a change in the attitude of majority contractors.[170] For instance, during pre-*Croson*, there was an environment that encouraged collaboration between majority and minority companies. Since *Croson* such cooperation has ceased. Mr. Boyd cites the following as examples of this change.[171]

Mr. Boyd spoke to the Advisory Committee about a project that involved a battle between the county of Delaware County and the city of Columbus. When meetings were held and decisions were made, there were no minority or female representatives involved. He added that, in the past, majority contractors felt some pressure to solicit minorities to bid whether or not they used them.[172]

Mr. Boyd gave another example:

> The. . . .township of Dublin put out bids for. . . .a high school to be built. Moody & Nolan (minority contractors). . . .purposefully undercut themselves and said that they were willing to take a slight loss just to get the job to show that they had versatility in designing various structures. The bid process was a two-part process. One was based on the concept of the building. One was based on design. Moody & Nolan came in number one in the concept of the building. When it was time to bid, again Moody & Nolan came in number one in the bidding. At the bid opening, the committee called an emergency meeting. They went into another room. When they returned, they explained that for some reason they had changed the specs according to some fault that they suddenly discovered. Officials of Dublin did not choose Moody & Nolan as the designer of the building and chose someone else.[173]

Mr. Boyd described another situation that occurred after the city council signed a multimillion dollar contract with an Ameriflora project manager:

> when *Croson* happened, and Columbus' participation goals were suspended, suddenly this project manager dropped some minority contractors. They asked, "What's going on?" His off the record discussion with them was that, "I'm no longer mandated to meet a certain percentage for minorities, so you're history."[174]

Another problem cited by Mr. Boyd is use of the term, "Disadvantaged Business Enterprise (DBE)." Similar to other parts of the country, in Ohio the use of the term is a source of much contention among minority business people. He said that the use of this term and the criteria used provides persons who have not been discriminated against an opportunity to qualify for the program.[175] He explains:

> A majority contractor came up with this term for a program in Milwaukee. It defined any disadvantaged business as one that is owned by a member of an ethnic group who has been socially, educationally and/or economically deprived in one way or other. . . .Anybody could show the possibility of qualifying under one of these three areas. Consequently, it did not give minority or females any economic advantage.[176]

Mr. Boyd indicated that the city did rephrase parts of this term by dropping educational deprivation as a criteria for qualification. Columbus now also requires proof showing anecdotal evidence of discrimination for its disadvantaged business program.[177]

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[167]*Transcript*, pp. 249-50, 257-58.
[168]*Transcript*, pp. 262-63.
[169]Ibid.
[170]*Transcript*, pp. 250-53.
[171]Ibid.
[172]*Transcript*, pp. 251-52.
[173]*Transcript*, p. 253.
[174]*Transcript*, p. 267.
[175]*Transcript*, pp. 259-61. (DBE is a small business program for which social and economic disadvantage are requirements for eligibility. Social disadvantage is defined as persons who have been subjected to racial, ethnic or cultural prejudice because of their identities as members of groups without regard to their individual qualities. Factors that are considered are denial of educational and employment opportunities and unequal access to credit or capital. Economic disadvantage is defined as socially disadvantaged persons whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same or similar line of business and competitive market area who are not socially disadvantaged. Small Business Administration Regulation 13 CFR Part 124.105 and 124.106, vol. 54, no. 160, Aug. 21, 1989.)
[176]*Transcript*, pp. 260-61.
[177]Ibid.

Overall, Mr. Boyd said that the economic condition of minority and female businesses in Columbus has worsened since the *Croson* decision. He contended that if city decisionmakers want to make Columbus the best it can be, they must create a business environment that will allow everyone to share in the economic structure.[178]

Cheryl Lovely, Director, Columbus Minority Business Development Center (Center)

Cheryl Lovely stated that the center has been operated by the Columbus Chamber of Commerce since 1989 and is funded by a grant from the U.S. Department of Commerce. Ninety percent of the center's program is federally funded, so very little financial support comes from the local chamber of commerce.[179] The center was previously operated by the city of Columbus, but the contract was terminated because the city failed to fulfill established goals of the grant and to administer the program adequately. Ms. Lovely said the center provides professional management and technical assistance to minority and female businesses. These services include help to prepare loan proposals, bonding assistance, financial planning, and accounting services. Only businesses that are at least 51 percent minority owned and operated are eligible for assistance. Although white females are not designated as qualified applicants for service, the center still provides services to them.[180]

Ms. Lovely believes that the *Croson* decision has contributed to the instability of minority business in Columbus in the areas of bidding and procurement of public contracts. She reported that, in Ohio, less than 10 percent of State agencies have failed to comply with House Bill 584 that mandates set-asides for goods and services contracts. In general, she believes the State has done a poor job of promoting economic development for minorities. Ms. Lovely said that a report showed that only 1 percent of State contracts actually went to minorities, while 5 percent of construction contracts and 15 percent of procurement contracts are mandated to minority businesses.[181] This demonstrates that the State does not follow its own laws.[182]

Ms. Lovely indicated that the city of Columbus' economic development programs for minorities and females were fraught with problems even before the *Croson* decision. She pointed out that there is a lack of leadership on economic development, too much politics, and inadequate support from financial institutions.[183]

Ms. Lovely reported that some of the barriers faced by minority businesses are:

> minority firms being chosen as the lowest bidder but never receiving any work. And even worse, having their contracts revoked based on subjective reviews of alleged inadequacies in staff, equipment, financing, etc.[184]

> Even in cases where minority firms have been awarded contracts, poor management and reckless job monitoring by government officials has resulted in minority firms being paid late, last, or never.[185]

Ms. Lovely described a case in point:

> There was a very reputable masonry contracting company. . . .It was a husband and wife ownership. The husband died a year ago. The wife, who's been working in this company for 7 years alongside her husband, suddenly had to step in and take over. When she did this, the bonding companies decided that she could not run this business as well as her husband, so they cut off her bonding. On top of that, the bank that they did business with decided to call in a $300,000 note. She's being told that she must pay this note by the end of the month or go out of business. It will bankrupt her company. . . .She doesn't have that much cash flow to pay a $300,000 note.[186]

Another case in point is:

> a small minority-owned janitorial service. The firm was selected as a subcontractor to provide janitorial services on the site of our beautiful new city center mall when it was under construction. Prime contracts were paid millions to build and erect this development. But the janitorial firm had to wait more than 120 days for payment

[178] *Transcript*, pp. 249, 273.
[179] *Transcript*, p. 276; Cheryl Lovely, interview, July 24, 1990.
[180] *Transcript*, pp. 276-77.
[181] *Transcript*, pp. 277-78; Cheryl Lovely, interview, July 24, 1990.
[182] *Transcript*, p. 281.
[183] *Transcript*, p. 280.
[184] *Transcript*, p. 278.
[185] Ibid.
[186] Ibid.

of services rendered. Not only did this cause the minority firm payroll problems, but cash flow problems.[187]

Ms. Lovely further stated that many prime contractors complain that minority firms do not have the personnel or financial support to complete a job satisfactorily and that they lose money when they hire them. She added, "Even worse, majority contractors complain that they can't locate any minority firms. It's the same old story."[188] One of the most persistent barriers, for minority firms, she reported, is obtaining bonding and lines of credit.[189]

Ms. Lovely remarked that although the local chamber of commerce has not taken a position on the issue of set-asides, the center is making efforts to alleviate some of the barriers faced by minorities.[190] The center established a pilot project to provide minority females opportunities to expand their businesses. This project addresses the needs of very small businesses, which are either new businesses or already established but need further development. Minority females who apply and are accepted into the program must enter a 6- month internship program at Columbus State University. Following completion of the program, participants receive a $10,000 grant to establish the business of their choice. The center has set a goal to reach at least 20 minority female businesses. In addition, for 1990-91 the center set a goal to allocate at least $2 million in loans and provide at least 112,000 billable hours in counseling and technical assistance to minority businesses. Ms. Lovely stated that one of the benefits of the local chamber of commerce's involvement is that the local banks will more likely handle financial deals for minority firms than they would have under other circumstances.[191]

In conclusion, Ms. Lovely recommends some possible solutions to minority business problems:

- Institute more construction training programs so that minority firms are more qualified to bid.
- Develop more apprenticeship joint ventures to train minorities in construction trades.
- Increase the budgets in government agencies so that divisions are staffed properly and can do a better job of monitoring.
- Produce business directories to identify minority firms and where they are located.
- Create more private sector loans and bond programs with less stringent conditions for financing so minority firms can compete.
- Enforce set-aside rules. Prime contractors and responsible government agencies should be penalized when set-aside requirements are not met. This recommendation can only be accomplished by legislative mandate at all levels of government.
- Minority firms should be incubated off set-asides at some point. Too many firms rely solely on government contracts to survive. Minority firms should work harder to bring about equilibrium and balance between the number of public and private contracts performed.[192]

Lewis Smoot, Sr., President and Chief Executive Officer, Smoot Construction Company

Smoot Construction has been in the construction business for 44 years and is the oldest black-owned construction company in Ohio.[193] Mr. Smoot is a second-generation family owner and has been in the business for 32 years. He started out as a masonry contractor and subcontractor. Today the company has expanded to include construction managers and developers. The company benefited from the Federal 8(a) program of the Small Business Act and the Ohio set-aside program. A measure of the company's success is that Mr. Smoot graduated from the 8-a program and moved from subcontracting to being a major general contractor. The company renovated the Ohio Statehouse, which is reported as the first time in the history of

[187]Ibid.
[188]Ibid.
[189]Ibid.
[190]*Transcript*, pp. 283-84 and Cheryl Lovely, interview, July 24, 1990.
[191]Ibid.

[192]*Transcript*, pp. 281-82.
[193]*Transcript*, p. 195.

Ohio that a contract of that size was awarded to a black contractor.[194] Today, the company continues to have an excellent business reputation and is viewed as a successful business.[195] Smoot Construction Company offices are located in Columbus, Ohio, and Washington, D.C. Eighty percent of the company's business is in the public sector. Mr. Smoot reported that, with the exception of the Mason Contractor Association of America, he is not a member of any trade association. He is a past member of AGC but withdrew because of its opposition to minority set-aside programs.[196]

Mr. Smoot stated that, because of his success, he has been asked by majority businesses and other organizations to serve on boards and participate in mainstream business ventures that other minority businesses have not been invited to participate in. He described this as "being the token one."[197] Mr. Smoot said that, in spite of his success, he still faces barriers of a racial nature that he would not experience if he were white.[198] He explains further:

> But here we are, a company of 44 years in existence, and as I tell most people, the only difference between my problem and the guy starting out yesterday or in business for a year is the magnitude of it. I have to give everything that I've got to get my lines of credit with the bonding company and with the banks. And people say that in today's marketplace, that is typical. But I say in today's marketplace, that is not typical, not with all contractors. . . .The biggest problem that we (Smoot) have along with trying to grow after having been in business that length of time, and over and above the financial requirements of bonding and financing, is the ability to always get the right price from other subcontractors. . . .The prices that I get from various subcontractors vary greatly due to race. I'm not always given the same price that other majority contractors are given. . . .That sometimes makes it difficult for me to be as competitive as everybody else in the arena. But, nevertheless, we continue to prevail. And as I have said we have been in business 44 years. My concern really is not about Lewis Smoot or Sherman Smoot, my father, who is still living at 84. It's a concern for the third generation of this company, that does not have the experience that we have had over this period of time, who are trying to gain a foothold in the marketplace. . . .[199]

Mr. Smoot believes that the timing of the *Croson* decision had a detrimental effect upon minority business in Columbus.[200] When the *Croson* decision was handed down by the U.S. Supreme Court, two very visible moneymaking projects were up for construction: the Convention Center and Ameriflora. It was anticipated that both projects would not only provide economic opportunities for minority businesses, but for the black community as a whole. There were high expectations because the Ameriflora project was being built in a predominately black neighborhood. In the case of the Convention Center, the politicians had promised economic benefits to the community because of the overwhelming political support provided by blacks in the election to get the bond passed to build the Convention Center.[201] In anticipation of increased economic opportunities, the city of Columbus increased minority participation in city contracts from 10 percent to 21 percent. Unfortunately, Mr. Smoot stated, the *Croson* decision was handed down, and AGC filed a lawsuit challenging Columbus' set-aside program, thus affecting minority participation on both projects.[202] Although Mr. Smoot's company won 45 percent of the management and 50 percent of the construction on the Convention Center project, he says other black businesses did not benefit as they would have if the *Croson* decision had not been in effect. He further stated:

> It isn't ethically right that we go out and tell 17 percent of the voting constituency, in the black community, what we're going to do, and then we can't do it because of a decision in Richmond and a decision that was rendered here as a result of it.[203]

Mr. Smoot concluded that the *Croson* decision not only adversely affected minority participation in Ameriflora and the Convention Center, but minority business in general, and dissipated a

[194] *Transcript*, pp. 195-96, 206.
[195] Ibid.
[196] Ibid., pp. 195-96.
[197] *Transcript*, p. 199.
[198] Ibid., pp. 197-199.
[199] Ibid.
[200] *Transcript*, pp. 199-201.
[201] Ibid.
[202] Ibid.
[203] *Transcript*, pp. 199-201, 210.

climate of cooperation and goodwill in the marketplace.[204]

Mr. Smoot reported that in the construction arena there is a very sophisticated type of racism that keeps most black businesses from advancing. One of the code words or reasons used for not providing access to minority businesses is "qualifications." This is used to deny financial and bonding assistance and job opportunities. According to Mr. Smoot, another obstacle is the attitude of middle managers in majority firms who influence the major decisions on qualifications. They make the decisions for the chairman and the president, write the reports, do the reviews, and decide if you are qualified. Finally, Mr. Smoot stated that because of *Croson*, the industry is operating in a mentality of "why should minorities get a better opportunity than I get?"[205]

Mr. Smoot offered the following recommendations for increased minority participation in the marketplace:

- Make collective efforts to solve longstanding problems associated with financial and bonding services to minority businesses.
- Establish legislation to promote and encourage minority business participation in both the private and public sectors.
- Encourage successful minority businesses to educate and reach out to other black businesses through comprehensive mentorship programs. Mentorship programs should also include participation by successful majority businesses.[206]

David Harris, Director, Equal Opportunity Programs, Turner Construction Company

David Harris stated that Turner is one of the largest builders in the United States and does both private and public sector jobs.[207] Turner is based in Columbus but also has offices in at least 21 other cities. Mr. Harris' job is to involve minorities and females as workers and as business partners in Turner Construction projects. The firm's equal opportunity program began in 1968. In 1989-90 Turner did approximately $3.5 billion of work. Of that amount, almost 10 percent was awarded directly to subcontracts with minority and female businesses.[208]

Mr. Harris stated that prior to the *Croson* decision, both the State of Ohio and the city of Columbus had established goals to afford economic opportunities to minorities.[209] He said that up until that time most majority contractors had accepted city and State minority participation requirements.[210] Turner Construction Company has maintained a proactive and positive approach to affirmative action.[211]

Mr. Harris said:

> I would say that the effects of *Croson* on the atmosphere for implementation of minority and female business programs in Columbus has been devastating in that if for no other reason, it is the perception that the programs are wrong. They are not wrong. They are remedies.[212]

Joseph Dudley, General Superintendent, Aries Construction, Inc., Columbus, Ohio

Mr. Dudley is co-owner of Aries Construction with a black female. The company is 11 years old. He is an active member of the National Association of Minority Contractors and is one of the founders of the Columbus Chapter.[213]

Mr. Dudley indicated that he started Aries Construction out of frustration with the lack of union work. At the time there were 45 minority members of the union and at least $2 to 3 million worth of work available, but minority members were never called.[214]

Mr. Dudley said that he knew there was a law requiring a percentage of minorities on a job if public funds were involved, but it did not work out that way. He said that no one took the time to let

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[204]*Transcript*, p. 201.
[205]*Transcript*, pp. 205-06, 212-14.
[206]*Transcript*, pp. 207-09.
[207]*Transcript*, p. 171.
[208]*Transcript*, p. 170; David Harris, written statement submitted to the Ohio Advisory Committee community forum, Sept. 24, 1990 (hereafter cited as Harris statement).
[209]Harris statement.
[210]Ibid.
[211]*Transcript*, pp. 171-72.
[212]Harris statement.
[213]*Transcript*, pp. 285-86.
[214]Ibid.

them know their responsibilities, and that there was a lot of collaboration between the unions and white contractors to keep the minority members uninformed about the procedures and requirements for getting union work.[215]

He continued:

> Of course the unions alleged they did not do this, but, in fact, they did.... You just get tired of hearing those same stories: "We can't find them, they are not there, they don't have the experience," as to why they don't use minorities. Well, that's not true.[216]

Mr. Dudley could not recall ever having won a city project in Columbus. He said the only jobs Aries had bid on and won were State jobs. However, even these jobs, if they were not closely monitored by the State for compliance, usually did not last long. He said that some jobs were more closely monitored than others. If the jobs were not monitored, they only lasted a couple of weeks or maybe a month.[217]

According to Mr. Dudley, 80 percent of the work Aries performs is public contracts. In 1989 the company made approximately $1.7 million, but the majority of the work was the result of one contract with the Ohio Bureau of Worker's Compensation. He points out how this job serves as a good example of the importance of a set-aside. He stated:

> The project started off as a joint venture. My majority partner got into trouble and went bankrupt halfway through the job. We, at that point, had to pick up the job and carry it the rest of the way through....This venture pushed us up into a completely different league....So there's just no doubt in my mind that without that program (set-aside), that would not have happened. Because we would have not gotten the opportunity to bid that job....The chance to break into the big league or to the bigger jobs usually comes when there is a set-aside....At that point, you begin to make relationships with majority contractors.[218]

Mr. Dudley said that, on the State level, business opportunities have been made available to minorities, but in Columbus the opportunities are very limited. One major area of concern expressed by Dudley is obtaining bank loans.[219] He provided the following to the Advisory Committee:

> Aries Construction, Inc., was unjustifiably denied a mortgage loan on income producing property which we were more than qualified for. As per the loan officers we meet all the requirements. According to the senior loan officer/vice president involved, the appraisal was good; Aries' credit rating was excellent, the personal credit rating was excellent, Aries cash position, cash flow, and growth potential were excellent; and overall performance history and profit and loss statements were impressive; but he said just did not feel comfortable with us. When we questioned what that meant, the bank vice president could not explain or justify his position. During the course of our questioning, he indicated that because we were black and asking for an unusually large mortgage, he needed to feel comfortable because he would be required to be personally responsible for our mortgage. The vice president concluded by asking us to lower our goals to some smaller projects in the range of $40,000 to $50,000. He said, he would definitely approve those types of number for us.[220]

Mr. Dudley believes that the above incident typifies the practices and attitudes of most banking officials in Columbus.[221]

Barbara Stewart, Business and Marketing Consultant and Owner of Stewart Group

Barbara Stewart spoke about the attitude of the nonminority business community in Columbus.[222] She reported that there are all types of disparities occurring, such as not allowing MBEs to have bid packages and accepting majority contractor bids after the cut-off time. When the city suspended its goals program for minorities and females, it also stopped sending notices to minority contractors about city contracts that were up for bid, and city officials stopped responding to requests by majority contractors for listings of minority contractors

[215]Ibid.
[216]*Transcript*, pp. 286-87.
[217]*Transcript*, pp. 287-88, 296.
[218]*Transcript*, pp. 294-95.
[219]*Transcript*, pp. 287-90 and Joseph Dudley, letter to Walter Cates, Main Street Business Association, Jan. 27, 1993.
[220]Joseph Dudley, letter to Walter Cates, Main Street Business Association, Jan. 27, 1993.
[221]*Transcript*, pp. 289-91.
[222]*Transcript*, pp. 338-40.

qualified to perform subcontracting jobs. She estimated that there had been a 35 percent drop in business for minority businesses.[223]

Ms. Stewart also complained about the concept of "Disadvantaged Business Enterprise (DBE)." She said that the concept is degrading and inappropriate. To qualify for this program, she said that a business would have to be absolutely unqualified to perform the work. Ms. Stewart reported that for example, the criteria requires one to be a high school dropout, or 90 percent of your income must come from welfare.[224] She further contended that:

> MBEs are disadvantaged by way of discrimination. . . .Nothing in that program (DBE) is preferenced on qualification. It doesn't say anything about you having been trained. There is nothing to say that you have to be licensed. . . .[225]

Kevin Williams, Financial Consultant and Owner of Williams & Associates

Kevin Williams expressed concerns about the dollar amount and percentage of State contracts afforded to minority businesses. He stated:

> In looking at the reports generated by the State, although there are some areas in which they exceeded their goals, there are many areas in which they do not even come close to meeting their goals. . . .And when percentages are placed on reports, we need to go back and look at the real numbers. Let's determine what those percentages really mean in dollars.[226]

One particular problem cited by Mr. Williams was in the area of goods and services. He reported that over the last 3 years about $150 million dollars in goods and services had been lost by minority businesses in Ohio due to failure by some State agencies to meet minority participation goals in accordance with State contracts. Although some State agencies have met or exceeded their goals, many more have fallen way short. In some instances, some agencies have no minority participation.[227]

According to Mr. Williams, another significant problem is contract waivers, whereby companies such as Croson Construction ask for and get approved waivers to exempt minority participation in projects because they are unable to find qualified minority contractors to perform a particular job. He stated:

> You could not make me believe by any stretch of the imagination that an $8,000 electrical contract cannot be performed by a minority firm. . . .When you begin to grant waivers on things like that, there is a real problem. . . .[228]

DAYTON

According to the 1990 census, the metropolitan area of Dayton had a total population of 951,270. Of that population 811,393 or 85.3 percent was white; 126,238 or 13.3 percent was black; 1,915 or 0.2 percent was American Indian, Eskimo, or Aleut; 9,278 or 1.0 percent was Asian; 7,254 or 0.7 percent was Hispanic; and 2,446 or 0.3 percent was other race. In comparison to the metropolitan area, the city of Dayton's racial composition is 58.4 percent white, 40.4 percent black, and 0.2 percent other races.[229]

The Dayton Human Relations Council is responsible for the operation of the city's minority and female economic development program. Before the *Croson* decision, the city's Minority Business Enterprise/Female Business Enterprise program was described as a set-aside program with goal-oriented features.[230] Dayton's original sheltered market and goals program for minorities and females stipulated construction subcontractor contracts for MBEs at 20 percent and 2 percent for FBEs. In the area of goods and services, the goals for MBEs was 5 percent and 2 percent for FBEs. Under the sheltered market program for construction, MBEs were afforded at least 15 percent as prime contractor and FBEs, 1 percent. In the area

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[223]Ibid.
[224]*Transcript*, pp. 342-43.
[225]Ibid.
[226]*Transcript*, pp. 333-34.
[227]Ibid.
[228]*Transcript*, pp. 335-36.
[229]Dayton Area Chamber of Commerce, Department of Economics and Research, Selected Population Data, 1990.
[230]Jerald L. Steed, director, Human Relations Council, Dayton, Ohio, letter to Melvin Jenkins, regional director, USCCR, Sept. 19, 1990 (hereafter cited as Steed letter).

of goods and services, MBEs were provided 2.5 percent and 1 percent for FBEs.[231]

Dayton's program was challenged in 1989, when John R. Jurgenson Company filed a lawsuit challenging the legality of the program based on the standards cited in the *Croson* decision.[232] The Association of General Contractors also joined in the suit with Jurgenson. In September 1989, the Federal District Court for the Southern District of Ohio invalidated Dayton's MBE/FBE Goals Program and the Sheltered Market Program.[233]

Dayton city officials moved quickly to conduct a disparity study to determine the nature and extent of discrimination against minority and female businesses in Dayton. D.J. Miller and Associates completed its study and concluded that, based on statistical and anecdotal evidence presented, discrimination had occurred primarily against blacks and females in the marketplace in the area of goods and services and in construction.[234] In 1991, the city enacted ordinances to ensure fair and equitable procurement opportunities for blacks, females, and small and disadvantaged business enterprises under the program called the Procurement Enhancement Program (PEP).[235]

Significant restrictions were made in the Dayton program based on *Croson* and the subsequent disparity study. The original Dayton program called for set-asides for women and minorities. City funds for set-asides are only allocated to women and blacks in the area of goods and services. City construction contracts are now allocated based on the criteria set out by the concept of Small and Disadvantaged Programs. The data also showed that overall participation goals for minorities decreased but increased for females. Specific duties on the PEP are as follows:

- *Preferred Choice Program for Goods and Services.* On an annual basis, the city will make available for competitive bidding only among minority and female-owned businesses, specified percentages of the total expenditure by the city for the procurement of goods and services. At this time, annual percentages are 5 percent for minority businesses and 2 percent for female businesses.[236]
- *Preferred Choice Program for Construction.* Similar to the goods and services contracts, on an annual basis, the city will make available for competitive bidding only among minority and female-owned businesses specified percentages of total expenditure by the city for Federal and/or State funded construction projects. In the event there are no clear or direct percentages established by the Federal and/or State government, the Procurement Enhancement Review Board will establish the percentages. The major change in the area of construction is that pre-*Croson*, minority and female businesses had access to city construction funds at established percentages.[237]
- *Small and Disadvantaged Business Program* provides contracts with the city on construction projects. This program will consist of three components: the Preferred Choice Program for construction, the Outreach Program and the Bonding and Insurance Assistance Program. To qualify for this program, a business must be independent; in existence for at least one year; have specific annual gross avenues; a citizen who is black, Hispanic, Native Americans, Asian-Pacific, Asian-Indian or any other minorities or individuals found disadvantaged by the Small Business Administration pursuant to 8(a) of the Small Business Act; and individuals who are not included in aforementioned groups are disadvantaged by reason of having been deprived of the opportunity to develop and maintain a competitive position in the economy because of social and economic disadvantages.[238]

Jerald L. Steed, Executive Director, Human Relations Council, City of Dayton

Jerald Steed described the city's minority and female business program before *Croson*. He said that from the early 1980s until about 1986, the city was fairly successful in moving minority and female businesses into the subcontracting area. By 1986 the city was beginning to get bona fide minority and female businesses. As a result of the success of the program, there were continual efforts

[231]Ibid.
[232]*John R. Jurgenson Co. v. City of Dayton*, No. C-3-89-295, slip op. (S.D.Ohio Sept. 1989).
[233]Ibid.
[234]*Transcript*, p. 310 and City of Dayton Human Relations Council, Ordinance Enacting The Procurement Enhancement Program (PEP), Dec. 31, 1991 (hereafter cited as PEP Ordinances).
[235]PEP Ordinances, Nos. 28461, 28462, and 28463 (Dec. 31, 1991). These ordinances enacted sections 35.30 to 35.68 of the City of Dayton's Revised Code of General Ordinances.
[236]PEP Ordinance, sec. 35.36.
[237]PEP Ordinance, sec. 35.56-35.68.
[238]PEP Ordinances 35.49-35.52.

made by the city to enhance minority and female business opportunities as prime contractors.[239]

Mr. Steed reported that the city began to get minority and female contracts in areas they had not been able to bid before. Minority and female contractors were able to solicit bids and do everything that prime and general contractors did:

> We enhanced the bonding. We had, at the time of the enactment of the sheltered market program, the ability to waive bonds up to $75,000. . . .But bonding concerns kept coming up. . . .so we also enhanced our ordinances to include the waiving of bonds up to $200,000. . . .[240]

According to Mr. Steed, although the city always received some level of opposition from associations representing majority contractors, efforts were made to work with them and at the same time ensure that minorities and females gained access to city contracts. In the effort to get feedback and participation by all parties interested in the construction and trade industry, the council reached out to such organizations as the Urban League, Association of General Contractors, and nonunion contractors.[241]

Prior to *Croson*, Dayton had successfully met the goals for minority participation, but had not yet reached the goals set for female business enterprises. Overall, the city's program was working and minority and female contractors were able to bid and win city contracts.[242]

According to Mr. Steed, absent MBE/FBE programs and initiatives, MBE/FBE participation becomes dismal.[243] For example, from 1983 to 1989, Dayton awarded over $58,000,000 in construction contracts to MBEs for a yearly average of over $8,000,000 or 20.96 percent of all construction dollars. In 1990, when the program was suspended, MBEs only received $726,964 or 5.6 percent of the total construction budget.[244] Mr. Steed describes this as a drastic decrease. From 1983 to 1989 female businesses received a total of $12,694,808 in construction contracts for a yearly average of $1,813,544 or 4.5 percent of the total dollars for construction. When the program was suspended, female businesses received $759,690, well under the previous yearly averages.[245] Overall there was a significant decline in the utilization of minority and female contractors.[246]

Mr. Steed reported that minority contractors have traditionally had problems in the areas of bonding, insurance, bid gouging, and the "old buddy network."[247] However, when the Dayton program was suspended, calls from majority contractors regarding joint ventures/subcontracting jobs also stopped.[248] Mr. Steed described the work climate after *Croson*:

> The biggest concern is that they (minority contractors) have just been shut out. They aren't getting any calls. And they aren't getting a chance to participate. And they aren't getting very many bids coupled with the other areas discussed earlier. So what we're having is the domino effect. If you don't have a good financial statement, if you don't have an experience rate, then you can't get bonding, you can't get insurance, then problems are escalated. Without the opportunity to participate, they are running against a headwind for the other things that makes a business a solid and sound enterprise.[249]

According to Mr. Steed, to overcome the requirements of *Croson*, minority groups, particularly Hispanics and Asians, should now be documenting their lack of participation and receipt of city contracts.[250]

Warren Wise, President, Wise Construction Company, Dayton, Ohio

Warren Wise at the time of the community forum was president of the Dayton chapter of the National Association of Minority Contractors. Wise Construction is a commercial and industrial contractor specializing in structural concrete. The company was started over 10 years ago. The company's work has been primarily in the Dayton

[239] *Transcript*, pp. 302, 305.
[240] *Transcript*, pp. 308-09.
[241] *Transcript*, p. 309 and Jerald L. Steed letter to regional director, USCCR, Sept. 19, 1990.
[242] *Transcript*, pp. 308-09.
[243] Ibid. and Steed letter.
[244] Steed letter.
[245] Ibid.
[246] Ibid.
[247] *Transcript*, p. 314.
[248] *Transcript*, p. 314-15.
[249] Ibid.
[250] Jerald L. Steed, telephone interview, Aug. 8, 1994.

and Cincinnati markets, but it has also performed work in Indiana and Kansas. According to Mr. Wise, the company is rated as one of the 10 fastest growing minority contractors in the Nation.[251]

Mr. Wise reported that one of the high hurdles he had to face before becoming successful was overcoming the bonding and financial backing problems. He stated that without the MBE and FBE set-aside programs, there would not be a Wise Construction Company. He said:

> None of our subcontractor work was bonded because we could not get a bond. I had a laundry list of approximately 10 items to fill before we could get a bond. Then when I finished that list, there was another list. Then I didn't have enough experience as a company to get a bond. The personnel in our company had combined construction experience of 60 years. However, that didn't count. After 2 years of completing bond forms, we could only get a bond if we were identified by a majority contractor. However, we wanted Wise Construction's name to be on our bonds and not be co-signed by some majority contractor. If we did not agree to do that, we would not be supported by a bonding company. Because of the set-aside program in the State of Ohio and the sheltered market program in Dayton, we were able to convince a bonding company to support us.[252]

Mr. Wise said that the banking institutions also were not supportive. He explains why:

> It was basically the same story with the bankers. Initially the bank wanted us to pledge all of the company's assets and receivables, plus my personal assets and property. I didn't have a problem with that at first because I thought that was the price of doing business. However, 2 years later and a paying customer with the bank worth $3 million in transactions, we still had to pledge all of our collateral and we could not get one dollar of a line of credit. They said that we hadn't been in business long enough for them to take a chance with us.[253]

Although Mr. Wise was finally able to get a ($30,000) line of credit from another bank, he attributes this to the set-aside program.[254] He contends that the bonding company and later the bank recognized that the set-aside program was a viable market. According to Mr. Wise, in 1984 and 1985, all of the company's work was 100 percent subcontracted, but in 1986 the company was able to enter the prime contracting position through the State's set-aside program and Dayton's sheltered market program. These programs allow minority contractors the opportunity to bid in a prime and open market, and win contracts. Mr. Wise said that since *Croson*, city projects are not there for minority contractors to bid on as prime contractor, and there is essentially no subcontracting work to speak of. He indicated that he is limited to bidding only on State and Federal set-aside projects.[255]

Mr. Wise said that prior to *Croson*, there was a sense of cooperation among some majority contractors; *Croson* changed that as well. He related the following incident to describe this change in attitude:

> Prior to *Croson* there was a general contractor in Dayton that we had done joint venture work with. I think we had done probably three or four proposals together. . . .After *Croson* there was another project in Dayton. I called the contractor to ask if he would be interested in a joint venture. He called back 3 days later and said he was not interested. . . .Since the suspension of the program, I can count the times on one hand that they [majority contractors] have called to solicit our bids on projects.[256]

Mr. Wise indicated there must be goals and set-aside programs to ensure minority participation as prime contractors.[257]

CINCINNATI

According to the 1990 census, the metropolitan area of Cincinnati had a total population of 1,452,645. Of that population 1,246,169 or 85.8 percent was white; 190,473 or 13.1 percent was black; 2,078 or 0.1 percent was American Indian, Eskimo or Aleut; 11,601 or 0.8 percent was Asian; 7,909 or 0.5 percent was Hispanic; and 2,324 or 0.2 percent was other races. In comparison to the metropolitan area, the city of Cincinnati's racial

[251] *Transcript*, pp. 315-16.
[252] *Transcript*, pp. 316-18.
[253] *Transcript*, pp. 317-18.
[254] *Transcript*, p. 318.
[255] *Transcript*, pp. 318-20.
[256] *Transcript*, pp. 320, 322.
[257] *Transcript*, p. 321.

composition was 60.5 percent white, 37.9 percent black, and 1.6 percent other races.[258]

The Cincinnati minority business enterprise program was enacted in 1987 to promote and assist minority businesses in the procurement process. The program had two major features, the Set-Aside Program and the Subcontractor Preference Program. Cincinnati established annual goals of 20 percent of the total construction procurement dollars for MBEs. MBEs also would receive 7 percent of supply/nonprofessional services dollars and 5 percent of professional service dollars. White females were not qualified participants.[259] To meet the goals set forth, at the beginning of each year each department reviewed the projects planned for the year and identified projects for the set-aside program.[260]

Soon after the *Croson* decision was handed down, Cincinnati's minority business program was sued in Federal court by RKR, Inc., an electrical contracting firm owned by a white female.[261] RKR, Inc., alleged that the program was unconstitutional based on the *Croson* decision. From February 1989 to August 1990 the city continued to maintain the minority business program in accordance with the established ordinance. However, the city law department conducted a review of the program and determined that the program suffered some of the same flaws as the city of Richmond's set-aside program.[262] The law department found the following:

- Program participation was not limited to Cincinnati area MBEs. It allowed MBEs from all over the county to participate.
- The Federal definition of minority group member was adopted instead of establishing what minority groups in Cincinnati had suffered discrimination.
- The program was not "narrowly tailored," in that a disparity study was not conducted to establish that discrimination against minorities had actually existed at the time the program began. Although information was gathered as evidence of discrimination, the information was considered to be anecdotal in nature and not specific enough to establish a justification for a race-based program.[263]

In August 1990 an out-of-court settlement was reached between the city and RKR, Inc. The conditions of the settlement were that RKR, Inc., would be allowed to participate in the MBE program and the plaintiff received approximately $30,000. Since the lawsuit was not a class action, the right of participation in the minority business program was limited to RKR, Inc. As of this report RKR, Inc., had not participated in the program.[264]

Throughout this process Cincinnati continued its program but also obtained the services of the University of Cincinnati, Institute of Policy Research, to conduct a disparity study. The study indicated that discrimination did exist in the city's procurement practices and a race-based program was justified. The study also included statistical data regarding firms owned by nonminority females and made the recommendation that a Women Business Enterprise Program also be established.[265]

The city made concerted efforts to continue a viable program and has done so by involving the community and consulting with experts on what type of MBE/WBE program would be most effective. The city also consulted with the Minority Business Enterprise Legal Defense and Education Fund to formulate a MBE/WBE program.[266]

Cincinnati has now established a new MBE/WBE program that includes several modifications. The most significant of these modifications is the creation of a WBE component. The program is goal oriented. At this time, contract percentage goals for MBE/WBEs have not been established. The annual total dollar expenditure goals shall be set within 15 months of the effective date of the ordinance. The city will keep the current goals in

[258]State of Ohio, Department of Development, 1990 Census of Population and Housing.

[259]Betty Watson, contract compliance officer, Department of Purchasing, Cincinnati, Ohio, letter to Farella Robinson, civil rights analyst, USCCR, Sept. 10, 1990 (hereafter cited as Watson letter) and *Transcript*, p. 326.

[260]*Transcript*, p. 323.

[261]*RKR, Inc. v. City of Cincinnati*, et al., No. C-1-89-025 (S.D. Ohio Oct. 1989).

[262]Watson letter.

[263]Ibid.

[264]Ibid.

[265]Ibid. and Ann de Groot, director of purchasing, city of Cincinnati, memorandum to Cincinnati City Council, "Equal Business Opportunity Program: Revised MBE/WBE Ordinance," Mar. 23, 1994 (hereafter cited as de Groot memorandum).

[266]Ibid.; Betty Watson, telephone interview, Jan. 31, 1994.

place (20 percent construction, 7 percent supplies/services, and 5 percent professional services) until a certification data base can be established within the 15 months. The formula for setting the goals shall be:[267]

- the number of certified MBE/WBEs located in Hamilton County in each area of business, such as construction, supplies/services, and professional services;
- divided by the number of firms located in Hamilton County in each area of business registered in the city's financial system vendor file; and
- equals the number of dollars paid firms divided by the dollars paid to firms in each area of business for MBEs/WBEs.[268]

Betty C. Watson, Contract Compliance Officer, City of Cincinnati

The Economic Development Department and the Purchasing Department are responsible for the implementation and enforcement of the program in accordance with the city ordinance.[269]

According to 1989 figures released by the city, for the first time, the city exceeded its construction procurement goals for minorities. Minority procurement spending increased 3 percent from 1988. The city aimed at spending 20 percent of its $81 million in construction dollars with minority business enterprises last year but actually spent 21 percent, which represented $16,867,000. According to Ms. Watson, 7.7 percent of that was set aside with $10 million of it in open procurement and subcontracting. As in previous years, the city also exceeded its goal for supplies/nonprofessional services and for professional services. Watson reported that the goal for supplies and services was 7 percent, and the city achieved 16.5 percent, which represented $3,276,000. The goal for professional services was 5 percent, and the city achieved 5.2, which represented $508,000. Ms. Watson said that overall program participation for minority businesses amounted to $20,657,000. She attributed the success of the Cincinnati program to the city's strict enforcement of the law.[270]

Some of the concerns expressed by minority contractors in Cincinnati about the *Croson* decision include a fear that the program will be discontinued or replaced with a "disadvantaged business enterprise" type program. Ms. Watson indicated that there is considerable opposition to this type of program because it undermines the qualifications of minority businesses and many of them would not be eligible based on the DBE requirements.[271]

Overall, Ms. Watson said, the post-*Croson* business climate has been difficult for minority contractors. Without a mandated program, she is of the opinion that many majority contractors will not voluntarily use minority businesses.[272]

CLEVELAND

According to the 1990 census, the metropolitan area of Cleveland had a total population of 1,831,122. Of that population 1,435,768 or 78.4 percent was white; 355,619 or 19.4 percent was black; 3,038 or 0.2 percent was American Indian, Eskimo, or Aleut; 20,528 or 1.1 percent was Asian; 33,921 or 1.9 percent was Hispanic; and 16,169 or 0.9 percent other races. In comparison to the metropolitan area, Cleveland's racial composition was 49.5 percent white; 46.6 percent black; and 3.9 percent other races.[273]

The Minority and Female Enterprise Program was first established in 1984.[274] Its purpose was to encourage majority contractors to employ minorities and women and to promote minority and female business participation in public contracts. The program was goal oriented, meaning the city used a "best effort" approach to utilize minorities and females in any area of the contract to reach a designated goal for the contract services.[275]

Prior to *Croson*, from 1984 to 1990, participation goals were established based on the dollar percentage and dollar amount of contracts and

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[267]de Groot memorandum.
[268]Ibid.
[269]*Transcript*, p. 323.
[270]Thomas Olson, "City Exceeds Goal for Minority Construction Firms," *Cincinnati Business Courier*, Apr. 16-22, 1990, p. 3; *Transcript*, pp. 325-26.
[271]*Transcript*, pp. 328-29.
[272]Ibid.
[273]State of Ohio, Department of Development, 1990 Census of Population and Housing.
[274]Donald Murphy, director, Office of Equal Opportunity, "Cleveland Set Aside Survives the Test," *Corporate Cleveland*, January 1993.
[275]Ibid.

subcontracts awarded in the previous quarter to MBEs and FBEs. Each contracting department was to use its best efforts to utilize certified MBEs and FBEs for contracts in excess of $3,500 in accordance with the following annual goals:

	MBE	FBE
Construction	30	10
Services	20	16
Professional services	30	8
Supplies	20	15
Concessions	15	5[276]

Following the *Croson* decision, in April 1991 the Contractors Employers Association (CEA) (associated with AGC) filed a lawsuit against the city of Cleveland. In their lawsuit, the plaintiffs alleged, among other things, that preferences for minority- and female-owned businesses specifying a certain percentage of funds for city construction and procurement contracts were unconstitutional because they violated the rights of nonminority and male contractors.[277]

In 1990 the city conducted a review of procurement participation by minorities and females. The data showed that the level of participation dropped from 38.54 percent in 1988 to 10.58 percent in 1989. While total dollar amount for minority and female businesses remained the same, the total procurement dollars for the city rose nearly 362 percent, from $224 million in 1988 to $811 million in 1989. City officials concluded that the *Croson* decision significantly decreased minority and female participation in city contracts.[278] Moreover, they surmised that the *Croson* decision probably affected the voluntary compliance efforts of majority white firms once it was determined that the program did not have the support needed to enforce legally its goals.[279]

Following the *Croson* decision and related lawsuits, Cleveland passed an Ordinance No. 1186-92 in 1990, which adopted findings made in the disparity study regarding past and current discrimination and underutilization of minority and female businesses.[280] Donald Murphy, the current director of the Cleveland's minority and female business program, reported that in conjunction with the disparity study, the city conducted public hearings to determine to what degree, if any, discrimination existed against minority and female contractors in their efforts to do business with the city.[281] According to Mr. Murphy, during the hearing minority and female contractors reported the following barriers to their full participation in the marketplace:

- that the minority and female businesses currently operating in Greater Cleveland depend too much upon the public sector. Ninety to 98 percent of their work is in or from the public sector;
- that the size of this figure is due directly to the fact that the public sector has laws such as Chapter 187 of The Codified Ordinances of Cleveland, Ohio, which provides for MBE/FBE programs utilizing only good-faith efforts to attain goals and timetables;
- that access to the private sector—both before and after implementation of the city's MBE/FBE program—is unattainable due largely to discrimination against minority- and female-owned firms;
- that majority contractors who utilize minority- and female-owned companies as subcontractors for public-sector work refuse to use those same companies as subcontractors when working in the private sector. Majority contractors readily admit that they won't use these minority and female firms in the private sector because they don't have to do so;[282]
- that even the larger, more successful minority- and female-owned businesses who have been

[276]City of Cleveland Minority Business Enterprise and Female Business Enterprise Program, Ordinance No. 1660-85, June 19, 1984.
[277]Murphy, "Cleveland Set-Aside," January 1993.
[278]Irie L. Turner, director, Office of Equal Opportunity, memorandum to Cleveland City Council, "Consolidated Briefing Package of Elements of *Croson* and the Need for the Disparity Impact Study," July 20, 1990.
[279]Ibid.

[280]Ordinance No. 1186-92, Cleveland Office of Equal Opportunity and the Minority Business Enterprise and Female Business Enterprise Program (June 18, 1990) (hereafter cited as Ordinance No. 1186-92).
[281]Donald Murphy, *Corporate Cleveland*, "Cleveland Set-aside Survives the Test," January 1993.
[282]Ibid.

around for as long as 35 years still find it nearly impossible to perform work in the private sector despite continuous efforts to do so; and

• that the problem is perpetuated by past racism and discrimination among the various trade unions. For years, minorities and women were not permitted to join the trade unions.[283]

Mr. Murphy reported to the Advisory Committee that there was also testimony from representatives of large majority companies that voluntarily use minority- and female-owned businesses. They said that without the ordinance minority firms would not only have a bleak future, but in many cases would cease to survive.[284] For those minority and female businesses that have attained a measure of financial stability and success, there is still a need for a city ordinance. Mr. Murphy believes that without the force of a law to ensure that MBE/WBEs get a piece of the economic pie, they will not exist.[285]

Mr. Murphy wrote in an article that:

> as a result of the disparity study (which satisfied the court's requirement of statistical evidence) and the public hearings (which satisfied the court's requirement of anecdotal evidence) and the subsequent approval by Cleveland City Council of an amended ordinance that had been fine-tuned to withstand court scrutiny as set forth in the *Croson* case, U.S. District Court Judge Paul Matia dismissed the lawsuit against the city, declaring that the plaintiff's position was moot.[286]

Significant modifications were made in the way participation goals are established and the level of minority and female participation. Now, the Cleveland program uses its best efforts to utilize certified MBEs and FBEs for all contracts in excess of $10,000. Appropriate annual city-wide goals for MBE and FBE participation for each type of city contract and type of work performed are based on the availability of certified MBEs and FBEs in the Cleveland contracting market and within range of annual goals fixed by the council. For MBEs the range is 15 to 30 percent. Another significant modification affected by Ordinance No. 1186-92 was the removal of the Alaskan Native category from the protected classes.[287]

Irie Turner, Director, Office of Equal Opportunity, City of Cleveland

At the time of the community forum, then director of the Office of Equal Opportunity, Irie Turner, provided a brief overview of the business climate pre- and post-*Croson*. Mr. Turner told the Committee that, when the city's program began, Cleveland spent $100 million in contracts, of which $1.6 million, or 1.6 percent, went to minority entrepreneurs. In 1988 Cleveland spent $224 million in procurement; $68 million or 30.4 percent went to minority businesses and $18 million or 8.8 percent went to female businesses. He said this represented 28 percent of the city's procurement dollars. According to Mr. Turner, during the very first full year of *Croson*, Cleveland increased its procurement from $200 million to roughly $800 million. Yet after *Croson*, minority business dollars dropped from 30.4 percent to 8.4 percent and female spending only increased by a dismal $500,000. He concludes that these statistics show the devastating effect *Croson* had on the award of city contracts to minority and female businesses. He says the effect can be seen in other ways, such as neighborhood revitalization and economic well-being of minority families.[288]

Mr. Turner reported that the city has taken the position that if a lawsuit is filed by majority contractors on the constitutionality of the program, Cleveland would not seek contracts from any business except for what is essential to the operation of the city.[289]

According to Mr. Murphy, Cleveland is the first city in Ohio to withstand successfully a challenge against its minority and female business program.[290]

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[283]Ibid.
[284]Ibid.
[285]Ibid.
[286]Ibid.

[287]Ordinance No. 1186-92.
[288]*Transcript*, pp. 346-47.
[289]Ibid., pp. 351-52.
[290]Donald R. Murphy, letter to Farella E. Robinson, civil rights analyst, USCCR, Apr. 29, 1993 and Murphy, "Cleveland Set-Aside."

As the city concluded the third quarter of 1992, it had awarded more than $50 million in contracts to minority and female businesses, up substantially from 1991, when the year-end total stood at $42 million. Mr. Murphy also submitted information showing that at the end of 1992, $114 million dollars were awarded to MBE/FBE companies, 34 percent of the contracts awarded by the city and the highest amount awarded since the program was formed in 1982.[291] (see appendix H.)

5. Summary

The information contained in this report does not result from an exhaustive review of the effect of the *Croson* decision on minority and female business utilization in Ohio, but does identify problem areas and concerns which the Advisory Committee concludes require further investigation. Among the findings and recommendations offered by participants, they determined that there is a need for set-aside and goals policies that set apart a certain portion of public and private contracts for minorities and females. Community forum participants also concluded the following to overcome barriers and discrimination in the marketplace:

- Develop collective efforts to solve longstanding problems associated with financial and bonding services to minority businesses.

- Establish legislation to promote and encourage minority business participation in both the private and public sectors.

- Enforce set-aside rules. Prime contractors and responsible government agencies should be penalized when set-aside requirements are not met. This recommendation can only be accomplished by legislative mandate at all levels of government.

- Local governments should establish specific guidelines to identify and screen out ineligible companies that are not independently owned by minorities and women.

- Increase the budgets in government agencies so that divisions are staffed properly and can do a better job of monitoring.

- Create more private sector loans and bond programs with less stringent financial requirements so minority firms can compete.

- Establish procedures to incubate minority firms off set-asides. Too many firms rely solely on government contracts to survive. Minority firms should work harder to bring about equilibrium and balance between the number of public and private contracts performed.

- Institute more construction training programs so that minority firms are more qualified to bid.

- Develop more apprenticeship joint ventures to train minorities in construction trades.

- Encourage successful minority businesses to educate and reach out to other minority businesses through comprehensive mentorship programs. Mentorship programs should also include participation by successful majority businesses to train other minority and female businesses on the most innovative and effective means to conduct business in the global economy.

- Produce business directories to identify minority firms and where they are located.

[291] Ibid.

OHIO ADVISORY COMMITTEE
TO THE
U.S. COMMISSION ON CIVIL RIGHTS

HYATT REGENCY HOTEL
350 NORTH HIGH STREET
COLUMBUS, OH

"IMPACT OF RECENT U.S. SUPREME COURT DECISIONS ON CIVIL RIGHTS IN OHIO"

SEPTEMBER 24, 1990

AGENDA

OPENING REMARKS

8:00 a.m. --Lynwood L. Battle, Chairperson
Ohio Adviszory Committee

--Melvin L. Jenkins, Director
Central Regional Division, USCCR

WHAT IS THE IMPACT OF RECENT SUPREME COURT DECISIONS ON EMPLOYMENT IN OHIO?

8:15 a.m. --Alexander M. Spater (Plaintiff)
Attorney at Law
Spater, Gittes, Schulte and Kolman
Columbus, OH

8:40 a.m. --Tom Barnard (Defendant)
Attorney
Duvin, Cahn and Barnard Law Firm
Cleveland, OH

9:05 a.m. --Richard C. Pfeiffer, Jr.
State Senator
Ohio Senate

WHAT IS THE IMPACT OF CROSEN DECISION ON MINORITY SET ASIDE PROGRAMS IN OHIO?

Legal Analysis of Crosen Decision

9:30 a.m. --Dr. Harry Clor
Professor of Political Science
Kenyon College
Gambier, OH

9:55 aa.m. --Dr. Louis Jacobs
College of Law
Ohio State University
Columbus, OH

10:20 a.m. BREAK

State Perspectives

10:30 a.m. --Gilbert S. Price
State EEO Coordinator
Ohio Department of Administrative Services
Division of Equal Employment Opportunity

10:55 a.m. --Dana Mattison
Black Elected Democratics for Ohio

12:10 p.m. --David Harris
EEO Compliance Officer
Turner Construction Company
Columbus, OH

12:35 p.m. LUNCH

1:50 p.m. --Lewis R. Smoot
Smoot Construction Company
Columbus, OH

CIVIL RIGHTS WORKING GROUP ON SET-ASIDE PROGRAMS FOR MINORITIES AND WOMEN, REPORT TO THE NATIONAL ASSOCIATION OF ATTORNEY GENERAL: STATE AND FEDERAL OPTIONS AFTER CROSEN

3:05 p.m. --Loren L. Baverman
Deputy Chief Counsel
Attorney GEneral's Office of Ohio

IMPACT OF CROSEN ON LOCAL COMMUNITIES

3:30 p.m. --Ben Espy, Councilman
Columbus City Council

3:55 p.m. --Terry A. Boyd, Administrator
Office of Management and Budget
Minority and Female Business Development
Columbus, OH

4:20 p.m. --Cheryl Lovely, Director
Minority Business Development Center
Columbus Chamber of Commerce

4:45 p.m. --Joseph Dudley, General Superintendent
Aries Construction, Inc.
Columbus, OH

5:10 p.m. BREAK

5:20 p.m. --Jerold L. Steed, Executive Director
Human Relations Council
City of Dayton

5:45 p.m. --Warren Wise, President
Wise Construction Company
Dayton, OH

6:10 p.m. --Betty C. Watson
Contract Compliance Officer
City of Cincinnati

6:35 p.m. --Walter Cates, President
Main Street Business Association

7:00 p.m. --Irie Turner, Director
Equal Opportunity and Minority Business Office
Cleveland, OH

7:25 p.m. OPEN SESSION

8:00 p.m. ADJOURNMENT

MBELDEF
Minority Business Enterprise Legal Defense and Education Fund, Inc.

Parren J. Mitchell
Founder and Chairman

Anthony W. Robinson
President

November 3, 1993

VIA FACSIMILE: (816) 426-2233

Ms. Farella E. Robinson
Civil Rights Analyst
Central Regional Division
U.S. Commission on Civil Rights
Old Federal Office Building
911 Walnut Street, Room 3103
Kansas City, Missouri 64106

Dear Ms. Robinson:

The President of MBELDEF, Anthony Robinson, Esquire, has directed your correspondence of October 22, 1993, to me for response. The following responses and information are provided in answer to your questions regarding the effects of the Croson decision:

1. In general, the Croson decision and its progeny of litigation have severely reduced the level of minority participation in local government contracts across the nation. (A detailed memorandum regarding the effects of the Croson decision is enclosed.)

2. Many various forms of marketplace discrimination have been identified through the collection of anecdotal evidence from minority businesses in the course of disparity studies. Such forms of marketplace discrimination have included the following:

(a) Stereotypical attitudes

(b) Discrimination in previous employment

(c) Unequal access to financing

(d) Unequal access to bonding

(e) Price discrimination by suppliers and unequal access to supplies

(f) Refusals to work for MBEs by majority employees

(g) Unnecessarily restrictive contract specifications and bidding procedures

(h) Denials of opportunities to bid

(i) Exclusion from "Good Old Boy" networks

(j) Bid shopping

(k) Bid manipulation

(l) Unfair denials of contract awards

(m) Double standards in evaluating performance

(n) Harassment

(o) Slow payment and non-payment

(p) Utilization of MBE fronts

(q) Governmental resistance to MBE participation

3. Disparity studies have been fairly successful in defending MBE programs that have come under legal challenge. Several recent court decisions have addressed the adequacy of factual predicates for MBE programs. (Enclosed for your review are copies of the following legal opinions: Concrete Works v. City and County of Denver, Coral Construction v. King County, AGC v. San Francisco II, Contractors Association of Eastern Pennsylvania v. City of Philadelphia, and RGW v. Bay Area Rapid Transit.)

4. Some jurisdictions have resorted to race and gender neutral remedies in an effort to improve minority business participation in state and local government contracts in the wake of Croson. Some of these race neutral measures have included disadvantaged business enterprise programs; local disadvantaged business enterprise programs; small business enterprise programs; enhanced outreach efforts to solicit bids from MBEs; technical and management assistance; bonding assistance; financial assistance and loan guarantee programs; on-the-job training programs; and disaggregation of contracts. While such alternative remedies have been somewhat helpful, in general, they have not been nearly as effective in increasing MBE contract participation as mandatory race conscious affirmative action remedies have been.

5. There were some efforts to introduce federal legislation to overcome the effects of Croson sponsored by Senator Simon and by Congressman Conyers. Some hearings were held before the Senate Committee on Governmental Affairs, and the House Committee on Government Operations. Proposed legislation would have insulated local governments from factual predicate requirements of Croson

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through the federal delegation of authority to the states to assist in the elimination of marketplace discrimination. However, due to the anti-affirmative action political climate in the early 1990s, this legislation was never brought to a vote.

6. Federal legislation of the nature previously described would be ideal to overcome the negative effects of Croson. Failing that, the federal government should provide funding to state and local governments to assist them in undertaking disparity studies as required under Croson.

If further clarification of these responses or information is required, please contact me at (202) 543-0040. Thank you for this opportunity to express our opinions. Please keep us informed of whatever action the Commission decides to take with respect to this issue.

Very truly yours,

Franklin M. Lee

Franklin M. Lee
Chief Counsel

FML/smb

cc: Anthony W. Robinson

Original Correspondence and Enclosures to follow via Priority Mail.

FROBINSON.FML

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MBELDEF

Minority Business Enterprise Legal Defense and Education Fund, Inc.

Parren J. Mitchell
Founder and Chairman

Anthony W. Robinson
President

MEMORANDUM

TO: MBE/WBE/DBE Program Compliance Officers
Other Interested Parties

FROM: Tyrone D. Press
Chief, Investigations & Research
Office of Chief Counsel

DATE: March 31, 1993 - Update

RE: The Effect of Richmond v. Croson and Similar Attacks on Federal, State and Local M/W/DBE Programs Nationwide

Introduction

The Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF") is a national non-profit public interest law firm and membership advocacy organization founded in 1980 by former U.S. Congressman Parren J. Mitchell (D-Md.) for the purpose of providing for the legal defense of the class interests of the minority business enterprise ("MBE") community.

MBELDEF considers integration of the marketplace to be the final phase of the civil rights struggle. Economic development of the minority community is essential to equality of opportunity and justice in America. We have found that the creation and development of legally defensible M/W/DBE programs for the benefit of racial/ethnic minorities and women are effective in eradicating racial and gender discrimination from the public and private sectors of the marketplace.

MBELDEF's activities on behalf of MBEs are comprehensive in nature including litigation, testimony before legislative bodies, legal guidance, technical assistance to federal, state and local M/W/DBE programs, and training.

Background

On January 23, 1989, in what is perhaps the best known case, City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989), the Supreme Court struck down the City of Richmond's MBE Ordinance as violative of the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. For the first time, in a six-to-three majority decision authored by Justice O'Connor, the Court applied a strict scrutiny standard to reject Richmond's affirmative action program for minority businesses.

The Court held that state and local governments may implement MBE programs, provided they demonstrate a compelling governmental interest justifying the program (i.e., the present effects of past discrimination in the marketplace), and if they "narrowly tailor" the programs to remedy the discrimination identified.

The Richmond MBE Ordinance failed under both prongs of the test. Richmond's generalized assertions of discrimination and broad statistical comparisons of disparities in contract awards to minorities versus percentages of minorities in the general population were found to be not probative of discrimination. Moreover, Richmond's program was not narrowly tailored because it benefitted classes of minorities for whom there are no specific evidence of discrimination. Similarly, the Court found no rational basis for the size of the set-aside goal, no logical ending point for the program, and no consideration given to the use of less restrictive race-neutral remedies.

The Court reaffirmed, however, the less strict application of the standard as enunciated in Fullilove v. Klutznick, 448 U.S. 448, 65 L.Ed. 2d 902, 100 S. Ct. 2758 (1980) pertaining to federal MBE initiatives. There, the Court accorded great deference to Congressional findings of past societal discrimination and the "unique remedial powers of Congress under Section 5 of the Fourteenth Amendment." Justice O'Connor distinguished this power from the constraint on state power found at Section 1 of the Fourteenth Amendment.

The Croson decision has opened the floodgates to additional litigation and has adversely affected many state and local programs seeking to improve access to the marketplace for businesses owned by minorities (MBEs), women (WBEs) and other disadvantaged persons (DBEs). In addition, the decision has affected the administration of federally-authorized initiatives at the state and local level where such jurisdictions utilize federal funds on various public works projects.

But the Croson case was not the first (nor shall it be the last) legal attack on such programs. Opponents of M/W/DBE initiatives have waged a long and sustained attack throughout the nation.

The following information is provided for those persons who may not be familiar with the amount of litigation instituted against MBE, WBE, and DBE programs throughout the nation and the effect such litigation is having upon the MBE, WBE, and DBE communities:

Section A - Jurisdictions Under Siege: Past and Present Litigation
Section B - Voluntary Terminations and Suspensions
Section C - Programs Under Re-Evaluation
Section D - Profiles of the Marketplace
Section E - The Efficacy of Race and Gender-Conscious Programs
Section F - The Adverse Impact of Croson on the M/W/DBE Community

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SECTION A
JURISDICTIONS UNDER SIEGE: PAST AND PENDING LITIGATION

ALABAMA

Associated General Contractors of America, Alabama Branch, Inc., et al. v. City of Birmingham, et al., Case No. CV 77 506 014 WAT, Circuit Court for the Tenth Judicial Circuit of Alabama, Equity Division (1989). On March 31, 1989, the Circuit Court declared as unconstitutional and invalid a 1981 City Ordinance and Executive Order providing for 35% MBE participation on City contracts. The Court further preliminary enjoined the City from requiring the submission of MBE utilization firms in connection with bids on City contracts, as well as from obtaining information concerning MBE participation of bidders on any City contract by any other means prior to the time of contract award. The Court did not find as persuasive, the City's argument that its program had voluntary goals. Efforts by the City to encourage increased MBE participation prior to the time of contract award were deemed by the Court to be "coercive". The City is also reported to have "submitted evidence in the form of testimony by statisticians and statistical analyses as evidence seeking to prove that the low percentage of MBEs in Birmingham was the direct result of past discrimination and that the City's MBE participation plan was designed and needed to remedy the effects of past discrimination". Without even discussing the nature of the statistical evidence or why the Court found the evidence unpersuasive, the Court went on to note in its Opinion and Order:

"There is no doubt that Birmingham and other cities in the South has a sorry history of both private and public discrimination. Happily, that era is long past. It is impossible to locate and compensate the victims of such past discrimination, and the fact that there was past discrimination cannot now justify reverse discrimination in favor of other minorities unrelated to the past acts."

For the Alabama Circuit Court, the City had pointed to no evidence that qualified MBEs had been "passed over for City contracts or subcontracts, either as a group or in any individual case. There is then no basis for the City's conclusion the remedial action was necessary."

Arrington v. Associated General Contractors, 403 So.2d 893 (Ala. 1981). In an earlier case, the Supreme Court of Alabama permanently enjoined the City of Birmingham from enforcing the provisions of a 1977 ordinance providing for mandatory 15% MBE participation. The Court concluded that the 1977 ordinance was invalid because it violated both the State's competitive bid law

and state and federal statutes, as well as the U.S. and Alabama constitutions.

CALIFORNIA

AGC v. State of California, Case No. 502753, Superior Court of California (1988). Now terminated, this case involved a constitutional attack against a future state program.. The litigation was instituted prior to the law's effective date. The plaintiffs alleged harm even though the program did not yet exist. Filed on June 9, 1988, the AGC alleged that California violated the Equal Protection Clause of the 14th Amendment by enacting an affirmative action program for MBEs in March 1988. The State of California filed a demurrer on the grounds of uncertainty of the claim and the fact that the law was not scheduled to have gone into effect until January 1, 1989. California also sought sanctions against the AGC for filing sham litigation falsely alleging harm from implementation that had not yet occurred. The court has sustained California's demurrer and ordered the AGC to amend its complaint. However, California's request for sanctions was denied.

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Associated General Contractors, et. al. v. The City and County of San Francisco, 813 F. 2d 922 (9th Cir. 1987); petition for mandamus dismissed, __ U.S.__, 110 S. Ct. 296 (1989). ("AGCC I") In this protracted litigation, a City ordinance providing for 10% MBE and 2% WBE utilization goals, bidding preferences and set-asides was declared unconstitutional on March 29, 1987. The Court also found the law to be violative of the City's Charter. On September 27, 1989, this case finally ended when the 9th Circuit Court of Appeals dismissed, as moot, the City's Petition for Rehearing en banc because the ordinance had expired. The District Court was directed, however, to award attorneys' fees to the AGC.

Associated General Contractors of California v. Coalition for Economic Equity, 950 F.2d 1401 ("AGCC II"). Having failed to deter San Francisco's efforts to remedy marketplace discrimination through their legal assault against San Francisco's 1984 MBE ordinance, the AGC filed this complaint attacking the new revised MBE ordinance enacted in May 1989. The AGC filed a motion for a temporary restraining order to prevent enforcement of the new set-aside ordinance pending outcome of this case. However, the federal district court denied the AGC's motion, ruling that the AGC failed to meet its burden of proof for injunctive relief. A separate hearing on a motion for preliminary injunction was held July 11, 1990. On October 9, 1990, Judge Henderson denied the AGC's motion for preliminary injunction on the grounds that the AGC was unlikely to prevail on the merits and that the balance of the hardships did

not tip in the favor of the AGC. This case is significant because it is the first test of a post-Croson disparity study. The court examined - and viewed favorably - both the statistical data and anecdotal evidence gathered by the city to serve as the factual predicate for the ordinance.

U.S. Housing Corp. v. California Dept. of Trans. and California Dept. of Housing & Community Development, et. al., Case No. ___ (JRX), U.S. District Court for the Central District of California filed September 11, 1989. This action also alleged violations of the 14th Amendment and civil rights laws against an M/WBE program implemented by the Defendants. Plaintiffs assert that the record does not support the need to implement such a program. We have no record of any ruling in this matter.

COLORADO

Concrete Works of Colorado, Inc. v. The City and County of Denver, Case No. 92-F-21, U.S. District Court for the District of Colorado. On February 26, 1993, the Honorable Judge Sherman G. Finesilver issued an Order on Motion for Summary Judgement in which he found that the City's M/WBE program applying to City-funded public works projects was "a modest, flexible, and historically supportable response to what the Denver City Council reasonably believed to be discrimination in contracting." After reviewing the City's two disparity studies, the Court concluded that the City's Ordinance No. 513 (Sept. 1990) did not establish a quota or set-aside. Rather, at most, the ordinance established "non-binding, good-faith aspirational goals to encourage participation of minority subcontractors"; and that "the ordinance respond[ed] to a compelling and established governmental interest." Although Denver's program is not an aggressive one, this case is significant because it is the one of the first to rely heavily on Coral Construction v. King County to fully examine a multiplicity of important issues including: (a) the quality and quantity of evidence supportive of a finding of "compelling interest" (i.e., the adequacy of the factual predicate including many sub-issues relating to the validity of statistical data); (b) the relevance of "extrajurisdictional evidence of discrimination"; (c) the utility of evidence gathered after enactment of the M/WBE law; (d) the relevance of other disparity studies; (e) application of "narrow tailoring"; and (f) the authority of a jurisdiction to address discrimination in the private sector. "Must" reading.

CONNECTICUT

AGC of Connecticut v. City of New Haven, 791 F. Supp. 941 (D. Conn

1992), U.S. District Court for the District of Connecticut. The City commissioned a small factual predicate study to support its earlier set-aside law. The Court criticized the study effort quite extensively and particularly the sparse anecdotal evidence produced (15 anecdotal examples). The City terminated its MBE program, replacing it with a race and gender-neutral "Small and Disadvantaged Business Program."

DISTRICT OF COLUMBIA

O'Donnell Construction Company v. District of Columbia, et. al., 963 F.2d 425 (1993). In this challenge to the D.C.'s Minority Contracting Act and the 1989 D.C. Department of Public Works Disadvantaged Business Enterprise Program, violations of the 14th Amendment and other civil rights laws were alleged and proven. Although the City was successful in its earlier efforts to stave off a preliminary injunction, the plaintiff ultimately prevailed. Citing plaintiff's contention that roughly 90% of the city's road construction projects were reserved for minority firms, the Court reserved for future consideration a "substantial question" about how the program was actually applied. The Court later ruled against the City finding, among other things, that the City's "observation about society-wide discrimination, regardless of its truth, could not be relied on to enact a racial preference. Moreover, the Court found "constitutionally meaningless" certain statistics used by the City in support of its program. The statistics were found to be flawed: lacking specificity, an overly small sample size, covered only one year's worth of contracts, did not show discrimination in the local construction industry, and did not discern among qualified and unqualified MBEs.

FLORIDA

Cone Corporation v. Florida Department of Transportation, 921 F.2d 1190, (11th Cir. 1991); cert. denied ___ U.S. ___, 111 S.Ct. 2238 (1991). Multiple plaintiffs (white highway construction prime contractors and subcontractors) filed suit attacking the constitutionality of the Florida Statute authorizing implementation of a 10% DBE goal patterned after the federal DBE program for highway construction. On August 1, 1989, an Order was entered in response to plaintiffs' motion for summary judgment which ruled that certain provisions of the Florida code violated the Equal Protection Clause of the 14th Amendment. With the exception of Florida highway construction contracting funded by federal funds, the 10% DBE goal was found to be unconstitutional. The program was struck down as applied to state-funded projects.

Capeletti Bros., Inc. et. al. v. Broward County, et. al., __ F. Supp.___, Case No. 90-6204-CIV-JAG, (S.D. Fla.; Fort Lauderdale Div.). This constitutional challenge attacking Broward County's Small and Disadvantaged Business Enterprise Program was dismissed because the plaintiffs could not demonstrate injury-in-fact. The plaintiff contractors failed to allege that they had ever lost a single contract as a result of the DBE program. Therefore, on June 28, 1990, the case was dismissed for lack of ripeness, standing, and a case and controversy.

South Florida Chapter, AGC v. Metropolitan Dade County, 552 F. Supp. 909 (1982); aff'd in part, rev'd in part 723 F.2d 846 (11th Cir. 1984); cert. denied 469 U.S. 871 (1984). In this pre-Croson case, the Court upheld Dade County's (Miami area) affirmative action ordinance authorizing a set-aside competition solely for black contractors and the development of goals for the utilization of black subcontractors by majority primes on County contracts.

M.K. Porter Co., Inc. v. Metropolitan Dade County, 825 F. 2d 324 (11th Cir. 1987), vacated and remanded, 489 U. S. 1062, 109 S. Ct. 1333 (1989). In an ominous move, the U. S. Supreme Court vacated the Eleventh Circuit's decision upholding the constitutionality of a 5% M/WBE program imposed upon the County by the federal Urban Mass Transit Administration. The Supreme Court remanded this case to the Eleventh Circuit in light of Croson.

Capeletti Bros., Inc. et. al. v. Metropolitan Dade County, et. al, 90-0678-CIV (S.D. Fla.); 1990 U.S. Dist. LEXIS 5545, filed April 13, 1990.

Barcorp, Inc. v. Duval County School Board, et. al., Case No. 89-258-CIV-J-16, (M.D. Fla.; Jacksonville Div.) In this companion case to Northeastern Florida Chapter of AGC v. Jacksonville, infra, white contractors filed suit attacking the constitutionality of a Jacksonville ordinance and the Duval County School Board's rules establishing MBE programs. The Florida federal district court consolidated these two cases and issued a preliminary injunction enjoining the City of Jacksonville and its Duval County School Board from implementing the MBE programs. In doing so, the Court held that the white contractors were likely to prevail on the merits in the final determination of this case, in part, because the Croson decision requires contemporaneous findings of discrimination which the defendants admitted were lacking. See Northeastern, at Page 8, infra, for disposition.

Cone Corporation v. Hillsborough County, 908 F.2d 908 (11th Cir.

1990); cert. denied ___ U.S. ___ (1990). A preliminary injunction was granted by the District court on October 16, 1989 at the request of Plaintiff. The Court stated that strong parallels existed between this case and Croson. It implied that Rule 11 sanctions might have been appropriate because defendant actively opposed the relief sought. However, on August 13, 1990, the Eleventh Circuit Court of Appeals reversed this district court ruling and remanded the case on the basis that summary judgment was inappropriate where a material issue of fact existed with regard to whether the County had adequate evidence of discrimination to justify its MBE Program. The Circuit Court therefore dismissed, as most, the County's appeal from the grant of preliminary injunction. This Appellate Court pointed out strong differences between the facts in the Croson case and the facts in this case. Plaintiff Cone Corporation then filed a petition for Writ of Certiorari to the U.S. Supreme Court, which was denied. This case is significant because the Circuit Court concluded that the County's voluntary program was constitutionally valid. Program reinstated.

Northeastern Florida Chapter of AGC v. City of Jacksonville, 951 F.2d 1217 (11th Cir. 1992), cert. granted, ___ U.S. ___, 113 S.Ct. 50 (1992). A preliminary injunction had been granted following an action filed challenging a city ordinance which allocated a (10%) portion of city contracting dollars to MBEs. The District Court (Middle District of Florida) ruled that a continuation of the MBE program itself would result in irreparable harm to the plaintiff. The Court of Appeals disagreed with this finding and, consequently reversed and remanded, ruling that the preliminary injunction was granted in error. Upon review of Croson, the court expressed doubt whether the ordinance could withstand a direct challenge. However, strictly on the subject of the extraordinary remedy of preliminary injunction, plaintiff failed to demonstrate irreparable injury. Review on certiorari granted to address issue whether "an association challenging a racially exclusive government ordinance [can] establish standing by showing that its members are precluded from bidding on certain municipal contracts" or whether it must "show that its members actually would have received one or more of those contracts absent set-aside provisions."

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GEORGIA

American Subcontractors Association, Georgia Chapter v. City of Atlanta, 376 SE 2d 662 (1989). In the aftermath of the U. S. Supreme Court's declsion in Croson, the Supreme Court of the State

of Georgia reversed the trial court's summary judgment and struck down Atlanta's MBE and WBE programs for virtually identical reasons stated by the Supreme Court in Croson. Among the flaws found by the Georgia Court were lack of an expiration date, lack of geographic limits to participation, inadequacy of evidence of discrimination, lack of consideration of race neutral remedies, and over-inclusion of various ethnic groups without consideration of whether recipient groups have suffered effects of past discrimination. (PROGRAM STRUCK DOWN)

S. J. Groves & Sons Company v. Fulton County, Georgia, 920 F.2d 752 (11th Cir. 1991), cert. denied, 111 S.Ct. 2274 (1991). The federal District Court for the Northern District of Georgia ruled on summary judgment that a federal Department of Transportation regulation requiring recipients of DOT funds to establish MBE percentage procurement goals was in violation of the 5th Amendment. Fulton County appealed this decision to the 11th Circuit Court of Appeals and instituted an interim race-neutral DBE program. On January 7, 1991, the Circuit Court vacated the decision of the District Court holding that Fulton County's 1982 MBE Program, adopted in compliance with the United States Department of Transportation regulations, was valid. The Court remanded this issue for reconsideration by the District Court based on the application of a less stringent standard of review than strict scrutiny. The Eleventh Circuit directed the District Court to reconsider the constitutional validity of the DOT regulations under an "intermediate level of scrutiny". Under this ruling, these programs would be held valid if it is shown that they serve an important governmental interest and the means chosen are substantially related to the achievement of that objective.

The case may establish that regulations and statutes adopted by the federal government that require local and state programs in order to receive federal grants, if challenged, will be considered under a less rigorous level of scrutiny than the Supreme Court announced in the Croson case.

ILLINOIS

Illinois Road Builders Assn., Inc. v. City of Chicago, et. al., Case No. 90C0623, (N.D. Ill., Eastern Div.), filed February 2, 1990. This action sought declaratory relief to cease enforcement of the set-aside provisions of the City's 1983 and 1989 Executive

Orders. Violations of the 14th Amendment and civil rights laws were alleged. The challenges were ruled moot when the city enacted a 1990 ordinance following the post-Croson study and recommendations of a Blue Ribbon Committee appointed by the Mayor. The plaintiff has threatened to challenge the new ordinance as well.

Underground Construction Association v. Chicago Metropolitan Water Reclamation District, Case No. _____. Challenge to new program enacted in March, 1990 pursuant to disparity study. Program provides for 20% MBE, 10% WBE and 10% Small Business goals.

INDIANA

Hunt Paving Co. v. City of Indianapolis, Case No. IP90-1578C (S.D. Ind.) filed July 11, 1990.

KANSAS

Laforge and Budd Construction Companies. v. SBA, Case No. ___,(Kan. 1986). Now terminated, this pre-Croson suit challenged a $6 million award of contract by the Army Corps of Engineers to an MBE firm under the Small Business Administration's "8(a) Program". Initiated by non-minority construction firms and financially supported by the AGC, the suit alleged that the award was made without adequate consideration the adverse economic impact on non-8(a) small construction firms in the area. In dismissing the complaint, the U.S. District Court ruled that the plaintiff did not have standing to challenge SBA actions.

KENTUCKY

J. Edinger & Son., Inc. and Dealers Truck Equipment, Inc. v. City of Louisville, 802 F.2d 213 (6th Cir. 1986). In this pre-Croson suit, Louisville's program was struck down under Wygant analysis.

George B. Stone, et. al. v. Elizabeth Dole, et. al., Case No. 86-108, (E.D. Ky.). Now terminated, this case involved a challenge to the DBE provisions of Section 105(f) of the Surface Transportation Assistance Act (STAA), enacted in 1982. The plaintiff subsequently voluntarily dismissed the complaint.

LOUISIANA

ABC and AGC v. The Orleans Parish School Board, 919 F.2d 374 (1990) initially filed on September 13, 1988. Now terminated, this action challenged the constitutionality of a local program providing for MBE and WBE subcontracting goals. The New Orleans MBE program mandated that 35% of the value of all construction be designated for MBE/WBE firms. Moreover, subcontracting requirements mandated at least 25% of subcontracts to be awarded to MBEs and 7% to WBEs. The Associated Builders and Contractors of Louisiana, the Louisiana AGC, and ASA of Louisiana joined forces with several other trade associations and white contractors to file suit attacking the constitutionality of the Orleans Parish School Board's MBE Program. The suit was dismissed after the district implemented an interim DBE program.

Beauregard Development Group v. State of Louisiana, (Case No. C-366156) (9th Judicial Dist. Ct., filed February 8, 1991). A female-owned building contractor that was denied certiflcation as an MBE by the State of Louisiana, filed suit attacking the constitutionality of the State's MBE program on its face, and as applied on a particular contract. Plaintiff Beauregard was the low bidder on a project to build the Clark Hall Administration Annex at Southern University. However, a minority-owned firm, Honore Construction, was within 5% of Beauregard's bid. Under the State MBE program, the MBE was offered the contract if he agreed to accept it at the price of the low-bidder, which he did. The plaintiff sought damages for lost profits and injunctive relief.

Louisiana AGC v. Neil Wagoner, Case No. 90-0393JB (M.D. La.) filed August 27, 1990. The AGC obtained a copy of a report issued by the Governor's Task Force on Disparity and State Procurement that concluded there was no statistical evidence of systematic discrimination against minority firms on state-funded projects. The AGC promptly filed suit attacking the Louisiana DOT's DBE Program and Louisiana promptly withdrew a restrictive bid for DBE participation. Accordingly, the AGC withdrew its motion for preliminary injunction. This case is significant because there is some question as to the adequacy of the study performed by the State.

MARYLAND

Maryland Highway Contractors Association v. Md. Department of Transportation, et. al, Case No. R-89-2410, ___ F. Supp. ___ (D.Md. 1990). Filed on August 22, 1989, this case was brought by a predominately white organization of contractors seeking an injunction and alleging violation of the 14th Amendment and civil

rights laws. Citing Croson criteria, it asserted that the State legislature failed to make prerequisite findings of identified evidence of discrimination in the construction industry. On June 19, 1990, the Court dismissed the suit for lack of standing. The Association could show no injury suffered by its members.

State v. Taylor, et. al., Cases Nos. 36,709-714, Circuit Court for Anne Arundel County. In this case, 6 defendants, including an MBE "front" (indicted on criminal charges of theft, and fraud and conspiracy in connection with a roofing contract at BWI Airport) challenged the constitutionality of Maryland's 12-year old minority procurement law. On February 28, 1989, the Court denied defendants' motion to dismiss the indictment. This case is significant because the Court examined the quantum and nature of the evidence the legislature had before it when the law was enacted. The Court found the State's procurement law to be constitutional under Croson, permitting the State to proceed with the criminal charges. Unknown whether appeal taken.

Danis Industries Corp. v. City of Baltimore, No. 89-311-013/CE105072 (Circuit Court for Baltimore City). This cause of action was initiated by plaintiff to overturn a decision by defendant to award a $25 million contract to the second lowest bidder. Plaintiff was the lowest bidder, but it did not achieve the City's goal of 20% MBE subcontractor participation. The winning bidder met that goal. The complaint, citing Ordinance No. 790, alleged that the 20% goal violated the Charter of Baltimore City as well as the Equal Protection Clause of the U. S. Constitution and 42 U.S.C. 1983. The relief requested by plaintiff was denied because there was already in existence an adequate remedy at law. The Court ruled that since an appeal to EPA had already been filed, it was unnecessary to grant the extraordinary relief of a preliminary injunction. (EPA ruled that defendant had acted appropriately.) Although the issues in this case include those previously mentioned, this case was more procedural than substantive in that plaintiff was only able to show 14% minority participation in its bid. Plaintiff attempted to persuade the Court that in reality, it had reached the 20% goal. State court action dismissed. Unknown whether appeal noted.

Friends Medical Laboratory v. Mayor & City Council of Baltimore, Case No. JFM-89-30460, (D.Md.) filed November 3, 1989. Now terminated, plaintiff challenged Baltimore City's 1986 MBE law (Code, Article 1, Section 217-226) which provided city-wide goals of not less than 20% MBE and 3% WBE. Plaintiff performed forensic drug testing services; 40% of its business funded by the City of Baltimore. Citing Croson, plaintiff alleged violations of the Equal Protection Clause of the 14th Amendment and other federal civil rights statutes Additionally, plaintiff asserts that there

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was insufficient documentation of discrimination with reference to the City's ordinance.

Keister v. Mayor & City Council of Baltimore, Case No. ____ (Md.). In this unusual case, the plaintiff, a 640 lb. white male, sued the City for its refusal to certify his firm as an MBE. Plaintiff claimed that by virtue of his weight he was handicapped and entitled to certification under the program. The plaintiff is certified under the Maryland State program which does include handicapped business owners as MBEs.

Concrete General, Inc. v. Washington Suburban Sanitary Commission, CA No. PN 88-1356, (D. Md.) Filed in 1988, a white roadbuilder filed this lawsuit in the federal district court for Maryland attacking the constitutionality of the MBE program of the Washington Suburban Sanitary Commission, an inter-jurisdiction compact. In 1992, the U.S. District Court for the District of Maryland struck down the Commission's program finding that the agency had no legal authority to enact its program.

MASSACHUSETTS

Fairview Construction v. City of Boston, Case No. 88-6880, Superior Court. Now terminated, this case challenged Boston's MBE Program. Plaintiff had submitted a proposal to construct a police station. Subsequently, defendant awarded the contract to plaintiff. Another company named Sciaba filed a bid protest causing plaintiff to lose the contract. The Court dismissed the suit on June 2, 1989, holding that the constitutional issues raised were premature. The Court found as persuasive the argument of the Defendant that there existed unresolved issues as to whether the Plaintiff's bid was defective. The ruling was appealed on June 29, 1989 to the Appeals Court of the Commonwealth of Massachusetts, but later withdrawn on September 22, 1989.

MICHIGAN

Milliken v. Michigan Road Builders Assn., 834 F. 2d 583 (6th Cir. 1987); aff'd. without opinion, __ U.S.__; 109 S. Ct. 1333 (1989). On May 11, 1988, the State of Michigan appealed a Sixth Circuit decision to the Supreme Court. Michigan had asked for consolidation with the Croson case (discussed herein). The split decision of the Sixth Circuit Court of Appeals held that a Michigan statute which "set aside" a portion of state contracts for

minority-owned businesses (MBEs) and women-owned businesses (WBEs) was constitutionally invalid, "imping[ing] upon the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution." The decision reversed an earlier district court ruling upholding the statute's validity. Critical to the court's conclusion was its application of the Supreme Court decision in Wygant. The Sixth Circuit ignored the district court's findings of discrimination on Michigan's part, and instead found that Michigan lacked a compelling governmental interest for its MBE program. However, dissenting Chief Judge Lively noted the extensive record developed by the Michigan Legislature (beginning in 1971), and concluded, "that the state had chosen to remedy its own past discriminatory practices by means of a program which imposes relatively light burdens on the majority group." Michigan appealed to the U.S. Supreme Court. In March, 1989, the Supreme Court summarily affirmed the Sixth Circuit's decision without discussion. Accordingly, it is impossible to tell on what basis the Supreme Court deemed the 6th Circuit's judgment to be correct. Thankfully, a summary affirmance by the Supreme court affirms only the judgment of the lower court, not necessarily that court's reasoning.

Gregory Construction Co. v. Blanchard, 691 F. Supp. 17 (W.D. Mich. 1988); 879 F.2d 864 (6th Cir., July 17, 1989). Following Milliken, plaintiff in this case also challenged the constitutionality of Michigan's Act for State Procurement for Minority and Women Owned Businesses. In light of Milliken, the defendants sought a dismissal of counts as moot, for that the program had already been declared unconstitutional. The District Court held that the principles of stare decisis and collateral estoppel required it to hold that the Act is unconstitutional and that the Plaintiff was entitled to summary judgment awarding the requested declaratory, injunctive relief and attorney's fee. The Court reasoned that Milliken compelled it to grant the relief sought. The prior adjudication did not render the instant claims moot.

Michigan Road Builders Association v. Blanchard, et al., Case No. 5: 90-CV-37 (W.D. Mich.) filed May 8, 1990. Here, the Michigan State Transportation Commission's goal of 15% M/W/DBE set-aside is being attached as violative of the 14th Amendment; 42 U.S.C. 1981, 1985, 1988 ad 2000 (d); 23 U.S.C.; and the Michigan Constitution.

MINNESOTA

Sorensen Bros., Inc., et al. v. Levine, et al., C.A. No. CX-89-3463, (Minn. Dist. Ct., County of Ramsey, 2nd Jud. Cir.) (1989) Court-approved stipulation and order of dismissal entered resulting in indefinite suspension of Minnesota Dept. of Transportation DBE program.

NEW MEXICO

Rio Grande Underground Contractors Assn. v. City of Albuquerque, Case No. CIV 88-0393 JB (N.Mex.). On March 26, 1990, this U.S. District Court refused to grant a preliminary injunction against the City's program. Plaintiff failed to meet any of the legal requirements for the injunctive relief. The Court found that the white contractors provided no proof that they had been harmed by the continued implementation of the City's 10% MBE program.

NEW YORK

Harrison & Burrows Bridge Constructors, Inc., et al. v. Cuomo, 743 F. Supp. 977 (N.D.N.Y. 1990). On July 31, 1990, the U.S. District Court struck down New York State's program, but upheld the state's enforcement of the federal DOT program. The Court granted plaintiff's motion for preliminary injunction with respect to the State's MBE Program as applied to this single plaintiff on projects funded solely with State funds. The State failed to produce any evidence of discrimination to justify its State MBE initiative.

Rex Paving Corporation v. Franklin E. White, 139 A.D. 2d 176 (1989). In an earlier case, the New York State Supreme Court (Appellate Division) held that the State Commissioners of Transportation and General Services are now empowered by state and federal law to promulgate and implement affirmative action programs in favor of DBEs. The Court, however, remanded the case to the trial court to reexamine whether there was a sufficient factual predicate of discrimination by the State in implementing affirmative action programs with respect to projects funded solely with state dollars. The court noted, however, that the ultimate burden of proof would rest with the plaintiff to establish the unconstitutionality of the challenged programs. Moreover, the court held that the State's programs were narrowly tailored. The State Constitution's Equal Protection Clause was interpreted by the Court to impose the same standards as its federal counterpart. Moreover, the Court held that findings of discrimination need not be contemporaneous with the implementation of the program.

Callahan Industries, Inc. v. Franklin E. White, involved a challenge to the Department of Transportation's DBE requirements. The case was settled while on appeal before the New York Supreme Court. A white construction firm that was found to be intentionally circumventing contractual provisions imposed by the

New York State Department of Transportation that required compliance with DBE utilization programs. In fact, the firm was found to be using a front company which existed "principally on paper" to meet its DBE goals. The Commissioner of New York DOT consequently barred the firm from any further contract awards for a period of thirty months. The white construction firm attacked the authority of the Commissioner to enforce DBE requirements. The trial court held that the Commission was powerless to enforce statutorily required affirmative action provisions contained in contracts with the New York Department of Transportation. On appeal before the State Supreme Court the parties settled the case. Under the terms of the agreement, Plaintiff Callanan was required to pay $300,000 to the State's DBE Program to assist new DBEs. The firm was also required to boost its recruitment of minority and female subcontractors. In return, the state dropped its appeal of the state court's decision and has revoked the disbarment of Callanan to permit it to proceed on $6.5 million in roadwork.

Morton Mfg. Co. v. Metropolitan Transportation Authority, CA No. 87-4028 (S.D. N.Y.). On June 10, 1987, a white-owned manufacturer of subway car doors filed suit against the New York Metropolitan Transportation Authority and a minority-owned competitor named Ebonex for violation of its civil and constitutional rights. The plaintiff alleges that MTA regulations requiring certain levels of DBE/WBE participation in subcontractors were invalid and unconstitutional on their face and as applied. Plaintiff further alleges that defendant Ebonex was nothing other than a broker and was not capable of manufacturing subway car doors, and that MTA officials required prime contractors on subway car refurbishment contracts to use Ebonex instead Morton for subcontract work on subway doors. MTA denies these allegations. The court recently denied plaintiff's motion for summary judgment and held that the MTA program is constitutional on its face. No information as to hearing on the issue of the program's application.

McRoberts Protective Agency, Inc. v. Port Authority of New York & New Jersey, Case No. 89 CIV 6800 (S.D. N.Y.) filed October 17, 1989. This case was filed by a security services provider citing violation of the 14th Amendment and other federal civil rights laws. Plaintiff was advised that it would be unable to bid on a contract with the World Trade Center because defendant was limiting bids to MBEs. Plaintiff sought injunctive relief and money damages.

United Fence & Guardrail Corp. v. Cuomo, et. al., 878 F. 2d 588 (2d Cir. 1989). Here, a New York state affirmative action program to

increase M/W/DBE participation in federally and state-funded highway construction prospects is being challenged in both state and federal courts. Under the Pullman Doctrine, the district court abstained, deferring to the state court. The Second Circuit Court of Appeals and remanded the case for consideration on the merits.

NORTH CAROLINA

Carpenter v. Barnhart, Case No. 88-3578; 894 F. 2d 401 (4th Cir. 1990) (unpublished); vacating Carpenter v. Dole No. 85-527-Civ.-5, (E.D. NC) filed March 9, 1987 (1988 W.L. 156282). Now terminated, this case involved an unsuccessful challenge to the DBE provisions of the STAA and its successor, STURAA. On January 16, 1990, the U.S. Court of Appeals for the 4th Circuit vacated the District Court decision finding constitutionality and further instructed the lower court to dismiss the complaint solely for lack of standing.

OHIO

Ohio Contractors v. Keip, 713 F.2d 167 (6th Cir. 1983). This is the case which the U.S. Supreme Court in Croson pointed to as instructive on the issues of (1) acceptable statistical evidence of discrimination; and (2) the nature of relevant discriminatory practices such as "passive participation". "Must" reading.

RLRK, Inc. v. City of Cincinnati, Case No. C-1-89-784 (S.D. Oh. Western Div.), filed November 21, 1989. This is another case citing violations of the 14th Amendment and civil rights laws. Citing Resolution 32-1983, plaintiff seeks injunctive and declaratory relief as well as damages. Plaintiff, an electrical contracting company, alleged that it made good faith efforts to comply with EEO requirements, but had fallen short. Subsequently, it received notice that it would be disqualified unless it signed an agreement to increase its minority and women numbers. It was unable to keep that agreement but still filed suit. On June 11, 1990, we learned that this case was dismissed, apparently without prejudice.

RRR, Inc. v. City of Cincinnati, et. al., Case No. C-1-89-025, (S.D. Oh., Western Div.). Plaintiff's motion for partial summary judgment denied. (Decision October 3, 1989). This attack upon

Cincinnati's set-aside program was filed by plaintiff, a white WBE electrical contracting company, citing alleged violations of the Equal Protection Clause. Plaintiff had been excluded from bidding on a contract because it was not an MBE. In interpreting Croson, the Court addressed two issues: whether there was a compelling interest in establishing the program and whether the program is narrowly tailored. Unlike Croson, this case showed that defendant had established an extensive legislative history. On motion for summary judgment, the court ruled that plaintiff had not sufficiently addressed the issue of the program's compelling interest. Nonetheless, in September, the case was settled out of court. The City of Cincinnati paid the Plaintiff $10,000 and permitted this white female firm to bid on all contracts, including those set aside for minorities.

AGC of America, Central Ohio Chapter, et. al. v. City of Columbus, Ohio, et. al., Case No. C2-89-705 (S.D. Oh., Eastern Div.). In response to this suit, the City's MBE program goals were reduced to zero.

Ohio Contractors Assn., et. al. v. City of Columbus, Ohio, et. al., Case No. C2-89-936 (S.D. Oh., Eastern Div.). As a result of this suit, MBE construction goals on a $2 million City project to promote the floral industry ("Ameriflora 1992") were abandoned.

John R. Jurgensen Co. v. City of Dayton, Case No. C-3-89-295, (S.D. Oh., Western Div.). On July 19, 1989, a temporary restraining order was granted prohibiting defendants from beginning work on the Community Development Area Streets City-Wide 1989 Inner Ring Project, and from enforcing Dayton's MBE and EEO requirements (Ordinance, Sections 35.30 through 35.47).

F. Buddie Contracting Company v. City of Elyria, et al., Case No. 1:90 CV 1067 (N.D. Oh., Eastern Div.) filed 6-19-90.

Reynolds v. Montgomery County, Ohio, et. al., Case No. C-3-89-423 (S.D. Oh., Western Div.) filed October 24, 1989. This case involved an attack against the County's WBE goal. Plaintiff, a majority water and sewer contractor from Indiana, challenged the County's award of a contract to an Ohio WBE. Citing Croson, plaintiff alleged violations of the U. S. Constitution. The District Court dismissed, as moot, plaintiff's constitutional challenges inasmuch as the defendant Montgomery County had

voluntarily suspended its program by previously reducing its M/WBE goals to zero.

OREGON

L. D. Matson, Inc. and AGC v. Multnomah County, C.A. No. 88-414-RE, (D. Oreg., Nov. 22, 1988) Relying upon the decision in "AGCC I", the federal District Court in Oregon struck down Multnomah County's M/WBE program, holding that the county failed to make the requisite findings of discrimination either on the part of the government or in the private sector. Moreover, the program was not narrowly tailored because it lacked a provision for periodic review, and it also lacked findings that less restrictive alternatives were inadequate. The Multnomah County program required contractors to subcontract 10% of publicly-funded construction to MBEs and 2% to WBEs.

PENNSYLVANIA

Associated Pennsylvania Contractors, et. al. v. D. L. Jannetta, Case No. CV-89-0427, (M.D. Pa.), filed March 23, 1989. Several construction trade associations have joined forces to attack the constitutionality of a Pennsylvania Executive Order and subsequent State DOT regulations establishing M/WBE participation objectives. Plaintiffs claim these regulations were improperly adopted according to procedural rules, and that there has been no evidentiary basis established for concluding that there is an under-representation of M/WBEs in State contracting that is the result of discrimination. As usual, the plaintiff's claims are brought under the Equal Protection clause of the 14th Amendment, and Sections 1981 and 1983 of the Civil Rights Act of 1866. A pendant claim was also brought under Pennsylvania state law.

Main Line Paving Co., Inc. v. Board of Education, School District of Philadelphia, 725 F. Supp. 1349 (E.D. Pa. 1989). On stipulated facts clearly demonstrating discrimination on the part of the School District, the Court found the factual predicate for the race and gender-conscious program to be inadequate because it did not focus on discrimination in the local construction industry; and further failed to contain any specific evidence of current discrimination against those benefitted by the affirmative action policy. The court found the basis of the program to be no more than generalized assertions of discrimination. Moreover, the Court held that the School District's program was not narrowly tailored. The governmental entity had not considered race and gender-neutral means to remedy its own discrimination. Nor did the program seek

to limit the remedies only to identified victims. In essence, the court ruled that Croson requires that affirmative action be limited only to victim specific relief.

Contractors Association of Eastern Pennsylvania, et. al. v. City of Philadelphia, 945 F2d. 1260 (3rd Cir. 1991). Riding the coattails of Croson, eight associations of majority construction contractors filed this lawsuit against the City of Pennsylvania alleging reverse discrimination under the City's M/WBE program, claiming that the law in question mirrored Richomnd's ordinance in Croson.. The City moved for Judgment on the Pleadings (citing lack of plaintiffs' standing and injury), while Plaintiffs moved for Summary Judgment (citing insufficiency of a legislative record proving discrimination). The Court's grant of a Permanent Injunction on April 5, 1990 was successfully appealed by the City before the Third Circuit. The City's subsequent conversion to a DBE program was struck down on September 22, 1992, which the City has also appealed to the Third Circuit (Case No. 92-1887).

Rocks v. City of Philadelphia, Appeal No. 88-1616 ___ F.2d ___ (3d Cir. 1989); appeal from Civil No. 88-5041 (E.D. Pa. 1988). Now terminated, this early case involved five local non-minority politicians who brought a "taxpayer's suit" attacking the City's 35% M/WBE goals applying to the construction of a Criminal Justice Center. The Third Circuit Court of Appeals affirmed the district court's dismissal of the case for lack of standing and for failure to state a claim for violation of substantive due process.

RHODE ISLAND

Rhode Island Steel Erector's Assn., et. al. v. State of Rhode Island and Providence Plantations, et. al., Case No. 89-4949, R. I. Superior Court and Providence Plantations. On July 5, 1990, the Court dismissed this case for lack of standing. Plaintiffs failed to prove any injury-in-fact (economic or obtrusive) allegedly suffered from discriminatory treatment under the State's MBE Act.

TENNESSEE

Tennessee Asphalt Company v. Robert E. Farris, Case No. 3-85-1176, (M.D. Tenn.) 883 F.2d 76 (Table), unpublished disposition filed April 21, 1987. This case represented yet another challenge to the preferences created by a federal DBE program. Recently, the U. S. Court of Appeals for the 6th Circuit vacated the findings of the lower court and remanded the matter for a reconsideration of the facts in light of Croson. On June 14, 1990, the lower Court dismissed the action with prejudice finding no genuine issue of material fact and finding plaintiff's constitutional and statutory challenges to be without merit as a matter of law. The Court held that the program was a "subsidiary of the federal government under the Surface Transportation Assistance Act; and that the State could rely on Congressional findings.

AGC of Tennessee v. County of Shelby, Tennessee, Case No. 88-2834-4, (W.D. Tenn., Western Division) Filed on October 21, 1988. In this suit, the AGC attacked a local ordinance in Shelby County, Tennessee requiring 10% of the construction costs on county projects in excess of $100,000 to be awarded to small economically disadvantaged businesses. On August 8, 1990, the Court entered an Order declaring the County's ordinance unconstitutional both on its face and as applied because it uses race as a criteria for program eligibility. On August 27, 1990, the County Board of Commissioners passed a resolution not to appeal the decision and to direct the County Attorney's Office the research the availability of other constitutional programs to increase MBE participation.

UTAH

Ellis v. Skinner, Case No. 87-C-0616-G, ___ F. Supp. ___ (1990); 1990 WL 201573. Here the plaintiff, a white male landscape contractor, challenged the constitutionality of the federal STAA, the STURAA and the Utah Department of Transportation's Minority & Disadvantaged Business Program under the 5th and 14th Amendments to the U. S. Constitution, respectively, as well as 42 U.S.C., Sections 1983 and 2000(d). Utah's program provided for 10% MBE and 1% WBE goals. Filed before Croson, cross motions for summary judgment were held in abeyance pending the Croson decision. On October 15, 1990, plaintiff's motion was denied and defendant's motion was granted, upholding the constitutionality of the DBE

Program. The Court held that Fullilove not Croson, was controlling; and that under Fullilove, the State of Utah was a "junior partner" of the federal DOT and could properly rely on the findings of Congress.

WASHINGTON STATE

Coral Construction Company, et. al. v. King County, 941 F.2d. 910 (9th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 875 (1992). This case represents the first post-Croson trial court decision upholding the constitutionality of a local MBE program on the merits. The Court held that based upon affidavits and statistical analysis, there was ample evidence of discrimination in King County's marketplace to establish a compelling interest for an MBE program and that the program was narrowly tailored. A detailed post-Croson fact-finding study was completed by King County which confirmed the court's conclusions, but was not relied upon by the judge in reaching his decision. Coral Construction appealed to the Ninth Circuit, with subsequent appeal to the Supreme Court which was denied. "Must" reading.

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WISCONSIN

Milwaukee County Pavers Assn. v. Fiedler et. al., 922 F. 2d 419 (7th Cir. 1991). On February 27, 1989, the federal district court for the Western District of Wisconsin issued a preliminary injunction at the request of plaintiff white contractors enjoining the Wisconsin Department of Transportation from letting contracts under its DBE program. The court reasoned that presumptive disadvantaged classes under the program were race-conscious and therefore prohibited under Croson because the strict scrutiny standard would not be met by the State. However, on April 7, 1989, the Court reversed itself and modified the injunction on the grounds that the State represented a subsidiary of a federal DBE program, and as such, was insulated from the harsher standards set forth in the Croson decision. Accordingly, the injunction was removed with respect to all DBE contracts involving primarily federal funds. Unknown whether State funded projects remain subject to the injunction.

American Sewer Services, Inc. v. John R. Bolden and The City of Milwaukee, Case No. 90-C-0872 (E.D. Wisc.) filed August 31, 1990.

SECTION B
VOLUNTARY TERMINATIONS AND SUSPENSIONS

In the aftermath of Croson, the following jurisdictions and governmental entities were reported as having taken steps to voluntarily dismantle their race and gender-conscious MBE policy and programs without any litigation having been filed:

1. Colorado (abolished)
2. Connecticut, City of New Haven (DBE program adopted)
3. Delaware, City of Wilmington (adoption of voluntary goals)
4. Delaware, New Castle County (suspended)
5. Florida, City of Fort Lauderdale (suspended)
6. Georgia, Albany - Dougherty County Inter-City Authority Band (DBE program adopted under threat of litigation)
7. Georgia, Columbus Water Works
8. Georgia, Fulton County (DBE program adopted)
9. Indiana, South Bend (suspended)
10. Illinois, Greater Chicago Water Reclamation District (numerical goals suspended)
11. Louisiana, New Orleans Parish School Board
12. Michigan, Genesee County (set-aside initiatives suspended; voluntary, good faith effort required under contract provision)
13. Minnesota, City of Minneapolis (terminated)
14. New York & New Jersey - Port Authority (Mandatory goals removed; all other initiatives remain operational)
15. New York, City of Buffalo

16. New York, Buffalo School Board

17. North Carolina, City of Durham (DBE program adopted)

18. North Carolina, Guilford County

19. North Carolina, City of Wilmington (DBE program adopted)

20. Oregon (goals removed and replaced with good faith effort and new race-neutral "Emergent Small Business Program" targeted to economically depressed areas.

21. Oregon, Portland Public Schools (terminated)

22. Oregon, Lane County (terminated)

23. Oregon, Salem County (terminated)

24. Texas, City of Fort Worth (interim DBE policy adopted)

25. Texas, Houston Housing Authority (voluntary 20% goal adopted)

26. Virginia, Richmond School Board

27. Virginia, Richmond Development & Housing Authority

28. Washington State, City of Yakima

29. Wisconsin, City of Milwaukee (DBE ordinance enacted)

SECTION C
JURISDICTIONS WHOSE PROGRAMS ARE UNDER RE-EVALUATION

In response to Croson, jurisdictions across the country are undertaking action to examine the presence of racial and sexual discrimination in the public and private sectors of the marketplace. The following list of jurisdictions and governmental entities have or are presently reviewing and re-evaluating their respective programs by, inter alia, conducting studies and/or holding public hearings:

1. Arizona, Maricopa County

2. Arizona, City of Phoenix

3 California, Contra Costa and Alameda Counties

4. California, East Bay Municipal Utility District

5. California, Hayward

5. California, Los Angeles

6. California, Los Angeles County Transportation Commission

7. California, Oakland

8. California, Regional Transit Association of the Bay Area (joint study of 7 transit authorities)

9. California, Sacramento

10. California, Sacramento Municipal Utility District (SMUD)

11. California, San Francisco

12. California, San Diego

13. California, San Jose

14. Colorado, Denver

15. Connecticut, State of

16. Connecticut, New Haven

17. District of Columbia

18. District of Columbia, Metro Washington Airports Authority

19. Florida, State of (Department of General Services)

20. Florida, Dade County

21. Florida, Dade County Public Schools

22. Florida, Hillsborough County

23. Florida, Hillsborough County School District

24. Florida, Jacksonville (joint study with Duval County, the Electric Authority, the School Board and the Port Authority)

25. Florida, Orange County

26. Florida, Palm Beach County

27. Florida, St. Petersburg

28. Florida, Tallahassee
29. Florida, Tampa
30. Georgia, Atlanta Public Schools
31. Georgia, City of Atlanta & Fulton County (joint study)
32. Georgia, Metropolitan Atlanta Regional Transit Authority
33. Illinois, Chicago
34. Illinois, Chicago Board of Education
35. Illinois, Chicago Park District
36. Illinois, Chicago Transit Authority
37. Illinois, Metropolitan Chicago Water Reclamation District
38. Louisiana, State of (Department of Economic Development)
39. Louisiana, New Orleans Water & Sewerage Board
40. Maryland, State of
41. Maryland, City of Baltimore
42. Maryland, Baltimore County
43. Maryland, Maryland-National Park and Planning Commission
44. Maryland, Prince George's County
45. Maryland, Prince George's County School Board
46. Maryland, Washington Suburban Sanitary Commission (WSSC)
47. Massachusetts, State of
48. Massachusetts, Boston
49. Massachusetts, Water Resources Authority
50. Michigan, State Housing Development Authority
51. Michigan, Grand Rapids
52. Minnesota, State of
53. Mississippi, State of

54. Mississippi, Jackson
55. Missouri, Kansas City
56. Missouri, St. Louis
57. Nevada, Clark County
58. New Jersey, State of and N.J. Transit Authority (joint study)
59. New Jersey, Atlantic City
60. New Jersey, Newark
61. New York, State of
62. New York, City of New York
63. New York, New York City Housing Authority
64. New York, Metropolitan Transit Authority
65. New York, City of Rochester and Monroe County
66. New York, Syracuse
67. North Carolina, State of
68. North Carolina, Durham County
69. North Carolina, Greensboro
70. Ohio, Cincinnati
71. Ohio, Cleveland
72. Ohio, Columbus
73. Ohio, Dayton
74. Ohio, Montgomery County
75. Ohio, Oberlin
76. Pennsylvania, Philadelphia
77. Pennsylvania, South Eastern Pennsylvania Transit Authority
78. South Carolina, Columbia
79. Tennessee, City of Memphis and Shelby County (joint study)

80. Texas, State of (Department of Transportation)

81. Texas, City of Austin and Capital Metro Transit (joint study)

82. Texas, Dallas Area Rapid Transit (DART)

82. Texas, Ft. Worth Transportation Authority

83. Texas, San Antonio (joint study with Water Board, San Antonio Public Services, via Metro Transit, Bexar County and Bexar Hospital District)

84. Virginia, Richmond

85. Washington, City of Seattle, Seattle School District, Port of Seattle, Municipality of Metropolitan Seattle, King County, Pierce County, Pierce Transit, City of Tacoma, Takoma School District, and Metropolitan Park District (two joint studies)

86. Wisconsin, Madison

87. Wisconsin, Milwaukee Metropolitan Sewerage District

88. Wisconsin, City & County of Milwaukee and Milwaukee Public Schools (joint study)

SECTION D
PROFILES OF THE MARKETPLACE

From a review of some of the studies which have been completed, an ominous profile of the climate and circumstances under which MBEs and WBEs must compete are being brought to light:

STATE OF MARYLAND

In 1989, the State of Maryland commissioned a study of its MBE program.[1] The investigators concluded that historical and contemporary discrimination against MBEs exists within the State of Maryland, and especially in the construction industry, the major category of procurement by the State.

The interviews with former and current State officials and

employees, as well as interview and survey responses from MBEs yielded the following anecdotal accounts and characterizations:

- At this time (1960s and early 1970s), minority contractors were so excluded from the general business operations of the industry that they were tacitly barred from joining contractor associations. To join, an applicant needed to obtain the sponsorship of two members of the organization: "we could not even get applications" to apply for membership (Interview with Rev. Douglas Sands, December 19, 1989).

- Henry T. Arrington, now an employee with the Prince George's county State's Attorney's Office and a Commissioner on the Washington Suburban Sanitary Commission, was Director of Maryland Office of Minority Business Enterprise during the 1970s. He said that, during the middle or late 1970s and into the early 1980s, there was considerable "bureaucratic resistance" within some State agencies to open up contracting markets to MBEs. In his view, there also was, and is now, strong resistance by many non-minority contractors to awarding subcontracts to MBEs.

- A WBE writes: "I have been in the construction industry for 16 years. I have seen great advances made but . . . it is still unusual to see women and minorities in supervisory positions in the field . . . There is a constant undertone of subtle and sometimes blatant prejudice."

- An Asian-American woman who has been in the printing business for 15 years writes: We have been certified by [Maryland] DOT for four years and have not been able to participate in any business. We have tried but only to be talking to deaf ears."

- An MBE writes: "When the minority contractor gets a job, most of the time it's the worst phase of the work in your field. And there is always some smart remark of the money you are making, even though you are working at a loss." "State should take over paying . . ."

- An Hispanic MBE writes: "Basically, I get judged first by what somebody perceives me of not being able to perform."

- The Hispanic principal of another MBE also asserted that there is ongoing discrimination in the private, unregulated construction market. This MBE does

approximately 80% of its business as a subcontractor on State and Baltimore City contracts. He claimed that, while the State and City MBE laws have required majority contractors to attempt to use minority subcontractors on government contracts, majority contractors, by and large, simply will not deal with MBEs on private contracts. They did not even consider using MBEs on private contracts. They do not even consider using MBEs in his view. He added that the prime contractors do not treat Hispanic MBEs differently than they do black MBEs in private contracts. They refuse to use either as subcontractors.

Specific patterns and practices of identified past discrimination adversely affecting MBEs included:

1. Refusal by prime contractors who receive State contracts to subcontract with blacks, women and Hispanics, especially in the construction industry;

2. Exclusion of minority workers from union and trade associations;

3. Restriction of minority workers to laborer jobs and the related exclusion of them from jobs involving heavy machinery and the skilled trades;

4. Use of differential pay scales, whereby minority workers received lower pay for the same work; and

5. Bid shopping, whereby contractors required black firms to be low bidder by a significant margin, in order to obtain subcontracts.

This discrimination was found to have limited the formation, success and growth of minority firms within the State in the following ways:

1. Minorities did not have access to jobs which would prepare them to become entrepreneurs;

2. Once in business, blacks, women and Hispanics were not given access to small and medium size profitable construction contracts, which were necessary for them to thrive; and

3. Black and Hispanic firms did not have access to white firms which would have allowed them to form "marriages" as subcontractors by which they could have grown into profitable prime contractors.

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On the issue of the efficacy of race and gender-neutral programs, the Maryland Study determined that several State or State-funded agencies employed race and gender-neutral programs and techniques to remedy the effects of past discrimination on MBEs They included capital assistance, bonding assistance, training assistance, and technical and managerial assistance. But the researchers also found:

1. That race and gender-neutral programs provide assistance, but <u>not</u> market access to a=small businesses;

2. That historically, even with smaller (albeit not as well-developed) programs , MBEs did not have fair market access to State contracts and subcontracts;

3. That Maryland's private, unregulated markets, MBEs appear to be significantly under utilized even though the above programs exist (especially in the construction market); and

4. That following the U.S. Supreme Courts' decision in <u>Croson</u>, in several jurisdictions in which MBE programs were replaced with race and gender-neutral programs, MBEs appear to be, or are likely to be, significantly under utilized.

The Maryland Study concluded that as a result of the historic and contemporary discrimination, there is a continuing need for a race and gender-conscious program. The race and gender-neutral programs and techniques do not provide effective remedies for past and contemporary discrimination. Rather, it is the State's race and gender-conscious MBE program that is the key element increasing the level of business that MBEs obtain from the State.

PALM BEACH COUNTY, FLORIDA

In December, 1990, a disparity study was completed for the County by another consulting firm.[2] Therein, the consultants provided the County with quantitative and qualitative evidence of discrimination as well as an historical perspective on the County's growth and development. The researchers found:

> "Palm Beach County is the largest county in land area east of the Mississippi River. It encompasses 2,578 square miles. A panorama in diversity ... [i]ts differences range from the dairy farms of Jupiter, to the high tech businesses of Boca Raton, and from the high society of Palm Beach to rich agricultural fields of Belle Glade.
>
> The earliest inhabitants of the area now known as Palm Beach County were Native American tribes, traces of which have long

been destroyed ... In the mid 1880s, there were increasing numbers of blacks living in an area known then as Oak Lawn near the present day city of Riviera Beach, and as far to the south as present day Lake Worth. The most controversial community was that of the "Styx", which was located on what is now the island town of Palm Beach ...

Much of the history of South Florida is inextricably wound into the life and activities of Henry Flagler, its first developer. Flagler came to Palm Beach during the time when his railroad was being built south, opening up the remainder of the peninsula of Florida, most of which had been entirely unknown to the rest of the state during the first half-century of Florida's statehood. In addition to completing the railroad, Flagler saw potential for building a large hotel that would draw his friends and other wealthy northerners to Florida during the winter months ...

The story is told that this was a thriving community of men who worked on the railroad that was built by magnate Henry Flagler. Legen[d] has it that Flagler wanted the area inhabited by the blacks, though it was really little more than a mosquito marsh, because of the potential he saw in developing the Royal Poinciana Hotel and the subsequent tourism. Flagler supposedly invited the entire community to a social gathering on the west side of the lake. While they were there he had the town burned, requiring the relocation of the entire community to what is now West Palm Beach.

While local newspapers, in historical accounts of the history of area blacks, have printed this story, they quote a resident who recalls living in the "Styx" as a child but who cannot remember anything about the community being burned. At any rate, it is clear that Flagler saw the need to have settlement moved as he sought the future development of Palm Beach.

When the tourists came to Flagler's hotel, blacks provided transportation in bicycle-chair taxis called "Afromobiles". Several owned bicycle shops and repaired or rented vehicles to visitors and residents of the island. The relationship between the former inhabitants of the island and the new residents is best portrayed by the following description from a recent book by Michael Deer, (1989) Some Kind of Paradise: A Chronicle of Man and the Island of Florida, (NY: William Morrow and Company):

"In Palm Beach, blacks were servants with no chance to become more. The pedaled Afromobiles, cleaned up after the wealthy, waited on them, and every Saturday night entertained them with the "cakewalk", a particularly demeaning, but popular, dance performed for a cake."

It was only within the last decade (1980s) that the town of Palm Beach dropped it[s] overt discrimination against blacks when, in response to legal pressure, ID cards for black workers and servants were no longer required ... (emphasis added)[3]

(Although in its "Guidelines Applying to the Performance of Post-Croson M/WBE Factual Predicate (Disparity Studies)", MBELDEF cautions consultants against relying upon historical accounts of general societal discrimination as the basis for a finding as to a government's "compelling interest", we do believe such evidence is useful for purposes of establishing background and the context against which the veracity of contemporary evidence may be evaluated.)

With respect to the participation of M/WBEs on County contracts, the researchers found, inter alia, that:

- Market area industry practices are discriminatory towards M/WBEs; and that the County has been a passive participant in the discrimination against them.
- There is a disparity between the number of available qualified M/WBEs and the percentage of M/WBEs actually participating. Such disparity was found in County construction contracts, professional services contracts and in the purchasing of goods and services.
- Past discrimination has played a significant role with regard to availability and utilization of minority businesses.[4]

To add insult to injury, upon presentation of the Study to the County Commissioners, the County refused to accept the Study's findings.

MILWAUKEE

In December, 1988, the Milwaukee Metropolitan Sewerage District (MMSD) retained a firm to undertake a study involving the local construction marketplace. The design and execution of the study were strongly influenced by recent federal court decisions including the later Croson case. Throughout the course of the study, the project team uncovered and analyzed a variety of discriminatory practices and discriminatory impacts. The study's major conclusions can be summarized as follows:

a. In Milwaukee, specific economic, educational and social problems experienced by minorities, combined with intentional discrimination and segregation, result in a community that continues to practice and permit pervasive

discrimination. Discrimination, although in many instances, not as intentional or prevalent as in the past, continues as Milwaukee enters the 1990s.

b. This discrimination has established a hostile environment in which minority individuals and businesses must operate daily. Minorities in Milwaukee have been forced to evaluate employment and business opportunities - including opportunities in the construction trades and the construction industry -- within this pervasive discriminatory climate and within the framework of racially motivated educational, employment, housing and business barriers. In the process, many minorities have been deterred or discouraged from seeking training, employment and contracting opportunities in the Milwaukee construction marketplace.

c. The study uncovered evidence that various discriminatory activities have violated the statutory and constitutional rights of minority apprentices and journeymen. These discriminatory activities were pervasive in reach and substantive in effect and imposed significant constraints on minority training and employment opportunities within the construction trades.

d. The growth and development of minority-owned businesses has been severely limited in the Milwaukee construction marketplace due in part, to racial discrimination. Over 75% of the black-owned businesses and 32% of Hispanic-owned businesses contacted during this study affirmed the existence of racially motivated obstacles within the Milwaukee construction marketplace.

e. Through the early 1970s, discriminatory practices and policies by state and local educational institutions barred women from the feeder systems which males used to prepare for skilled craft construction trade employment. As a result, few women entered the skilled trades. In the 1980s, women continue to be substantially under represented in construction trade employment in the Milwaukee area. The few women who have gained entry into the trades experienced gender-based discriminatory treatment from co-workers, journeymen, and employers. Current women business owners reported the existence of discriminatory activities including, sexual harassment and demands [that] they serve as "fronts".[5]

In fashioning their recommendations, the researchers noted the following:

"Evidence of these past and current discriminatory activities and experiences within the Milwaukee community

and in the Milwaukee construction marketplace warrants the District's continuation of current affirmative action efforts and provides a proper basis which the District could use to appropriately tailor new race and gender-conscious training, employment and contracting remedies. The range of discriminatory activities in the Milwaukee construction market is expansive. To address the problems identified, the range of remedial activities will need to be equally expansive.

During the last 25 years, numerous policies and programs have done little to provide minorities and women with equal employment and contracting opportunities within the construction industry. Croson states that race-neutral alternatives should be considered in the process of developing affirmative action programs. The study results reveal that race-neutral programs have not effectively eliminated discrimination from the Milwaukee marketplace." [6]

BALTIMORE

In November, 1989, the Baltimore M/WBE Task Force concluded that,

"There is significant evidence of past discrimination against M/WBEs in the letting of City funded subcontracts. The histories of the 1980 MBE Program and Ordinance 790 indicate that both, in part, were established to remedy the lingering affects of that past discrimination. Moreover, there are consistent allegations of private market discrimination against M/WBEs which indicate that, but for Ordinance 790, there would be continuing discrimination in the letting of City-funded subcontracts today."[7]

Among the evidence examined were the findings of federal agencies, especially the regional offices of the U.S. Departments of Housing and Urban Development ("HUD") and the Environmental Protection Agency ("EPA"). In 1983, HUD found "that prime contractors had discriminated against City MBEs in federally funded projects;[8] and that "the City's failure to apply, monitor and enforce existing provisions designed to assure minority contractor participation in the development contracts has resulted in exclusion of MBEs from this significant aspect of activities funded by or benefiting from use of CDBG (Community Development Block Grant) funds."[9]

MINNESOTA

In a study performed for the State of Minnesota, the researchers concluded, as follows:

> Sufficient evidence of discrimination exists both in the record of government purchasing and in private-sector activities to satisfy the judicial requirements of the Croson decision and subsequent cases. The evidence of public-sector discrimination is based on the statistically significant under-utilization found in the sample. The evidence of private-sector discrimination is based on survey results, which are corroborated both by their comparison to the 1987 New Firms Study results and the wide variation in experience reported by race and gender . . . While the set-aside and preference programs have provided some benefit to women and minority-owned firms, the analysis of awards made under these programs indicates that women and minority-owned firms do not secure a proportionate share of even these set-aside and preference awards."[10]

The researchers went on to recommend, among other things, that "a race and gender-based program to benefit female and minority-owned businesses should be enacted by the legislature."[11]

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SEATTLE

After examining the construction and consulting fields for a consortium of 10 jurisdictions/governmental agencies, the researchers concluded as follows:

> "Discrimination has been and is a serious problem in these local industries. Absent effective remedies, discrimination will continue to result in under-utilization of M/WBEs and will limit the number and success of such firms. Only race and sex-conscious relief promises to be effective. If, after reviewing this report and other materials, the client jurisdictions continue to conclude that discrimination has been and is a pervasive problem that cannot be effectively addressed by other means, then the existing programs comply with the fundamental requirements of Croson."[12]

CHICAGO

Similarly, the Metropolitan Water Reclamation District (MWRD) retained a consulting firm to investigate the scope of past and present racial discrimination in the award of and participation in the District's construction contracts and in the construction industry in metropolitan Chicago, the extent to which such discrimination or the effects thereof denied and continues to deny MBEs and WBEs equal opportunity and the appropriate affirmative action steps to be taken to eliminate any such discrimination and its continuing effects.

By survey, the consultants found the following:

- 37.4% of all MBE respondents believe they have suffered discrimination in the award of private contracts;
- 46.8% of African American contractors held this view;
- 38.9% of all MBEs reported suffering from discrimination in the award of public sector contracts;
- 20.8% of all WBEs reported discrimination in the private sector;
- 24.3% of all WBEs reported discrimination in the public sector; and
- 30.0% of all survey respondents indicated that discrimination remained a continuing problem in their ability to obtain work.[13]

Respondents reporting discriminatory treatment in the award of government contracts cited many specific discriminatory barriers including bonding, financing, bid notification/invitation, contract specification, award procedures, insurance, union relations and material supplier discrimination.[14]

The responses also demonstrated a clear perception of MBEs and WBEs that they continue to be competitively disadvantaged by such barriers resulting in reduced ability to compete (60.7%); hinderance to the formation of their businesses (39.4%); limiting expansion (83.2%) or business failure (26.3%).[15]

Fully 89.2% of all respondents believed that it was important that affirmative action programs include required goals to overcome the effects of discrimination.[16]

SECTION E
THE EFFICACY OF RACE AND GENDER-CONSCIOUS PROGRAMS

Data reported from jurisdictions and from other sources across the country clearly demonstrate that race and gender-conscious programs are successful in creating, developing and expanding participation by minority and female businesses:

ATLANTA

In 1973, MBEs in and around Atlanta received only 0.1% of the contract dollars expended by the City ($41,759 out of $33.1 million).[17]

Beginning with the design, engineering and construction of its mass transit system (MARTA) in the early 1970's, Atlanta, Fulton and DeKalb Counties, provided up to 20% participation for minority-owned and operated businesses. This "fairness doctrine" was carried through to the expansion of Atlanta's Hartsfield Airport and the recent construction work at the famed Atlanta "Underground". As a direct result of the area's MBE initiatives, the utilization of minority-owned businesses has increased dramatically. Since 1982, over 500 MBEs have completed in excess of $200 million worth of business in the public sector. This resulted in thousands of jobs for underprivileged men and women and helped create a new class of entrepreneurs.[18] In 1988, MBEs received 34.6% of the approximately $55 million expended by the City.[19]

WASHINGTON, D.C.

According to the Washington Times, the D.C. Council passed the Minority Contracting Act in 1976. When Marion Barry took office as Mayor in 1978, he had the law amended to require at least 35% of the City's contracting dollars go to minority-owned firms. For the fiscal years 1979 through 1989, the program awarded $52 million in 1979 to MBEs with substantial increases each year culminating in awards to MBEs in 1989 of $221 million.

CHICAGO

From 1985 - 1989, Chicago's aviation industry alone generated more that $307 million for M/WBEs; and proposed new construction projects at O'Hare International Airport represent an additional $180 million in construction opportunities.[20]

RICHMOND

At the inception of Richmond's plan in 1983, MBEs participated in only 2% of the government's contracts. By the time Richmond's plan was initially struck down by a lower court in July, 1987, MBEs were participating on government contracts at a level approaching 40%. During the plan's 3 years of operation, 6 African-American firms grew from small to competitively-viable sizes in the private sector. Prior to the program, only 1 such firm existed.[21]

PHILADELPHIA

Prior to the implementation of Philadelphia's program in 1983, less than 1% of all city contracts were awarded to minorities and women.[22] In 1989, these firms received approximately 25% (or $61.9 million out of $253 million) of the City's contracts. For FYs 1985-1990, the City expanded $1.7 billion in service supplies, equipment and public works of which 25.4% or $432.5 million was spent with M/WBEs. In the next 5 years, the City plans to expend another $2.1 billion in public construction projects.[23]

RHODE ISLAND

In 1984, MBEs received a scant .003% of state contracts. After inception of the State's 1986 statute requiring 10% MBE participation, the share of state contracts going to MBEs increased to 1.37%.[24]

* * *

These data demonstrate that M/W/DBE programs are needed; and when enforced are successful in creating, developing and expanding minority and female businesses. This kind of success, multiplied by the 236 programs in jeopardy, demonstrate the substantial economic opportunities at stake for minority and women-owned

business persons.

SECTION F
THE ADVERSE IMPACT OF CROSON ON THE M/W/DBE COMMUNITY

Many minority business owners as well as M/W/DBE program officers have observed substantial decreases in M/W/DBE participation following the demise of a program:

In Richmond, MBE participation in total city contracts and purchase orders shrank from 11.2% in January, 1989 to less than 6.4% for November, 1989. During the same period, MBE construction firms received less than 13% of the $9.3 million in construction dollars. At the time Richmond's program was initially overturned by a lower court in July, 1987, MBE construction firms were participating at early 40%. Immediately following the lower court action in 1987, the MBE share dropped to 15% and was below 3% during the first 6 months of 1988.[25]

In Atlanta, Program Director Rodney Strong "note[d] a 'drop-off' in awards to minority firms, especially during the third period of 1989, and an absence on new project bids of any minority-majority joint ventures, which were actively promoted under the program."[26] "The cancellation of Atlanta's program is not only resulting in less business for minority-owned firms, it also affects employment. Strong points out that more than 600 minority firms certified to do business with the city employ over 7,200 people, of which upwards of 90 percent are minorities. (Blacks represent 60 percent of city's population, estimated at 432,080 according to Bureau of Planning statistics for 1989.) With less contracts, especially in construction, going to minority firms, a growing percentage of Atlanta's minority workers are finding themselves out of a job.[27]

E. R. Mitchell Construction Company, Inc., a black-owned general construction firm based in Atlanta is reported as having found it necessary to lay-off 20% of its workforce since the suspension of the City's program. The company has lost 50% of its revenues over the past year and is not receiving any new joint venture offers from large majority firms. E. R. Mitchell, Jr., President of the MBE firm, "feels its a trend. 'It's not just a program being suspended, people's attitudes are changing' for the worse . . . [Racism is] probably worse than its ever been."[28]

In Tampa, Florida, the 22% MBE participation level of the previous

fiscal year dropped to 5.2% in the quarter following suspension of its 25% goal in March, 1989.[29] The number of contracts awarded to black MBEs has decreased 99%, while contracts to Hispanic MBEs has dropped by 50%.[30]

Hillsborough County, Florida (which includes the City of Tampa, has seen local government contract awards to M/WBEs drop as much as 99% since the county's program was struck down last October.[31]

Under Philadelphia's old disadvantaged business ordinance, the city required prime contractors to set aside 27% of all contracts for disadvantaged firms, with 15% going to businesses owned by ethnic minorities, 10% to women and 2% to handicapped persons. According to the city's Minority Business Enterprise Council (MBEC), the dollar amount of public works subcontracts awarded to minority or woman-owned firms in May 1990 was 97% less than it was the same month a year ago. May was the first full month since the court overturned the ordinance. In the 6 month period from May 3, 1990 to November 13, 1990, participation by MBE firms dropped to a scant 1.92%.[32]

According to Bayard Fong, a contract compliance officer with San Francisco's Human Rights Commission, MBE subcontracting dropped off substantially since last year, when the City withdrew its 30% subcontracting goal.[33]

Notes

1. State of Maryland Minority Business Utilization Study, Volume I, Final Report, submitted by Coopers & Lybrand and A.D. Jackson Consultants, Inc. (March 15, 1990)

2. "Palm Beach County Disparity Study: Final Report", submitted by MGT of America, Inc. to Clarence Ellington, Director, Office of Equal Opportunity, Palm Beach County, Florida (December 17, 1990).

3. Id., p. 7-23 (For purposes of brevity and ease of reading, the passages presented here have been excerpted and rearranged from the original text without significant detriment to or loss of context.)

4. Id., p. i-iv

5. Conta & Associates, Inc., "A Study to Identify Discriminatory Practices in the Milwaukee Construction Marketplace", Executive Summary to report prepared for the Milwaukee Sewerage District, February, 1990, p. 1.

6. Id., p. ii.

AGC OF OHIO

Associated General Contractors of Ohio

20 SOUTH FRONT STREET • COLUMBUS OHIO 43215
Telephone (614) 464 3364 Fax (614) 464 3226

July 25, 1990

Ms. Farella Robinson
Civil Rights Analyst
Central States Regional Office
U.S. Commission on Civil Rights
911 Walnut St., Room 3100
Kansas City, MO 64106

Dear Ms. Robinson:

It was a pleasure meeting you this morning; if I can be of further assistance, please do not hesitate to call.

I would appreciate if you could do something for me. Could you send me an updated list of the members of the commission, a list of members of the Ohio Advisory Committee, and a brief description of the type of hearing you are contemplating for September, who conducts the hearing, the procedures, the location, etc.

Should you go ahead with your plans to conduct a hearing on the effects of the Croson decision, we will make an effort to furnish witnesses to provide insight. I personally, though, do not feel either the purpose or the results of such a hearing will be either fair or balanced.

The U.S. Supreme Court in Croson found discrimination against the defendant, similarly, in Ohio and elsewhere, where set-aside programs have been overtuned, discrimination has been found on the part of defendant governmental entities. Further, I believe that many elected or appointed officials in Ohio and their attorneys would admit privately that many exisiting programs fail to meet the Croson tests. Nevertheless, these programs are still enforced.

I do not believe the primary purpose of your hearing is to deal with these issues of discrimination. Rather I believe the purpose is to demonstrate that when entitlement programs are elminated those receiving the benefits of those programs are not as well off as before the programs ended.

I accept that as self-evident. Similarly, if farm price supports are lowered or reduced, certain farmers are less well off. But I fail to see what this has to do with the U.S. Commission on Civil Rights.

The real civil rights issue is whether there has been a showing of discrimination against minorities, whether remedial action complies with the Croson tests; if it does, whether it is being implemented, and if it does not, what corrective action is being taken by governmental officials to correct the deprivation of constitutional rights arising from the implementation of an unconstitutional program.

In Ohio and elsewhere, remediation is arising from private actions against governmental entities who, I believe, for socio/economic or political reasons refuse to alter or repeal set-aside ordinances they admit may not meet the Croson tests. The defense or justification of entitlement programs over the civil rights of those negatively impacted is not totally unexpected, particularly because of the equal protection/due process aura surrounding the original enactment of the programs. But a refusal to clearly face both sides of the issue indicates a commitment to social engineering not civil rights.

I believe a report from a hearing on "the effects of recent Supreme Court rulings on civil rights, emphasizing the impact of the Croson decision on construction" will provide nothing but foregone conclusions.

If the Ohio Advisory Committee wishes to provide any legitimacy to a hearing on this topic, at least in the minds of those in the construction industry. I would suggest that they may wish to rethink the issue.

If you have any questions, comments, or concerns, please do not hesitate to call.

Sincerely,

Donn Ellerbrock
Assistant Executive Director

DE/ms
cc: Executive Committee

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Statement By

The Associated General Contractors of America

To

The Subcommittee on Legislation and National Security

of

The Committee on Government Operations

of

The United States House of Representatives

For the Record of

The Oversight Hearing on City of Richmond v. J.A. Croson

On

May 9, 1990

AGC is:

- More than 32,500 firms including 8,000 of America's leading general contracting firms responsible for the employment of 3,500,000-plus employees;
- 102 chapters nationwide;
- More than 80% of America's contract construction of commercial buildings, highways, industrial and municipal-utilities facilities.

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The Associated General Contractors of America
1957 E Street N.W., Washington, D.C. 20006-5199, (202) 393-2040, Fax (202) 347-4004

The Associated General Contractors of America (AGC) requests the Subcommittee on Legislation and National Security of the House Committee on Government Operations to include the following statement and appendices in the record of the "Oversight Hearing on City of Richmond v. J.A. Croson" held on May 9, 1990. Because the Subcommittee provided only three working days notice of this hearing, and AGC, even though an interested party, did not receive notice of the hearing, AGC also requests the opportunity to provide additional information for the record.

AGC is a construction trade association representing more than 32,500 firms, including 8,000 general contracting companies, which are responsible for the employment of more than 3,500,000 employees. These member construction contractors perform more than 80% of America's contract construction of commercial buildings, highways, bridges, heavy-industrial and municipal-utilities facilities.

The first appendix to this statement is a detailed report on the many problems that the Defense Department created when it required the prime construction contractor for family housing at Fort Drum, New York, to meet specific "goals" for "disadvantaged business enterprises." The report provides evidence of the expense and waste that attend all special preference programs imposed upon the construction industry by the government.

The second appendix is a report on the Heartland Institute's study of special preference programs for "disadvantaged business enterprises." The major findings of this report include:

- set-aside programs have not produced significant benefits for minority and women-owned businesses.
- set-aside programs unfairly burden a few non-minority businesses and result in higher public works construction costs for taxpayers.

The third appendix is the final report on a recent study of the construction industry in Louisiana. Louisiana State University and Southern University jointly conducted the study, at the request of a Task Force on Disparity in State Procurement appointed by Louisiana Governor Buddy Roemer. The report is the most comprehensive one of its kind, and the first to cover an entire state. It finds "little or no statistical evidence of discrimination against minority-owned firms in the public works arena in Louisiana." AGC encourages careful review of the entire report.

AGC's position on racial discrimination is clear -- racial discrimination is wrong. It is, in the words of Justice Scalia, "illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society." What the several witnesses promoted during the May 9, 1990, hearing was exactly the opposite view -- that racial preferences are proper, and even in the public interest. All favored plainly unconstitutional racial discrimination in the award of public construction contracts.

The vast majority of AGC members are small, family-owned businesses that depend on fair access to all construction markets for their survival. AGC vigorously supports open, competitive bidding for public construction projects because the competitive bid system provides the best possible protection against not only racial discrimination, but also any other invidious discrimination that might skew the award of public construction contracts. AGC believes that the competitive bid system -- requiring all contractors to submit sealed bids; requiring government bodies to open those bids publicly; and requiring public officials to award contracts to the lowest responsive and responsible bidders -- leaves no room for racial discrimination. AGC believes and regrets that the May 9, 1990, hearing was one-sided, and that it did not address this basic point.

The hearing was restricted to participation by:

- Parren J. Mitchell, Chairman, Minority Business Enterprise Legal Defense and Education Fund, Inc., Washington, D.C.;
- Gloria Molina, City Councilwoman, First Council District, Los Angeles, California;
- Joshua I. Smith, Chief Executive Officer, Maxima Corporation, Rockville, Maryland;
- E. Mitchell, Sr., founder and former President, and E.R. Mitchell, Jr., President, E. Mitchell Construction Company, Atlanta, Georgia;
- Manual Rodriguez, President, R & D Development, Inc., Chicago, Illinois; and
- J. Max Bond, Principal Partner, Bond, Ridder, and Associates, New York, New York.

The hearing provided an opportunity for these proponents of racial preferences for politically favored minorities to level extremely serious and entirely false allegations of racial discrimination against the construction industry, without fear of the contradictions that a balanced hearing would have allowed for. The scheduled witnesses each had a vested interest -- whether political, professional or economic -- in the allegations that were made. None of the witnesses had been excluded from public construction contracting opportunities because of their race.

In short, the hearing lacked any semblance of procedural fairness and it denied the construction industry anything approaching due process. Representative Conyers charged that the construction industry is guilty of racial discrimination "from top to bottom." In fact, the construction industry is far more open to minority businesses than other major industries. Census data that the Commerce Department released in December of 1986 indicated the percentage of minority ownership in the construction industry to be 4.67%. By comparison, the percentage in manufacturing was only 3.94%.

The percentage in the Finance, Insurance, and Real Estate industry was only 2.4%. And the percentage in a residual category of other industries was 1.66%. The construction industry has been heavily burdened by special preference programs solely because it provides the roads, bridges, schools, prisons and other types of needed infrastructure projects that make up the bulk of public procurement, and not because it has excluded minority business enterprises from its ranks.

During the hearing, other unfounded charges were made. Following are those charges, and AGC's rebuttal to each:

CHARGE: The Croson decision is out of line with earlier Supreme Court decisions on civil rights, rolling back years of progress in the fight against racial discrimination.

FACT: The Croson decision is a direct and natural outgrowth of the great civil rights decisions of the 1940s, 1950s, and 1960s. More than 40 years ago, the Supreme Court found racial classifications to be "odious to a free people whose institutions are founded upon the doctrine of equality." Hirabayashi v. United States, 320 U.S. 81, 100 (1943). One year later the Court declared that "all legal restrictions which curtail the rights of a single racial group are immediately suspect," and "subject ... to the most rigid scrutiny." Korematsu v. United States, 323 U.S. 214, 216 (1944). Heeding these principles, the Court proceeded to reject racially restrictive covenants among private property owners, Shelly v. Kramer, 334 U.S. 1 (1948), and racial segregation in elementary public education, Brown v. Board of Education, 347 U.S. 483 (1954). In rapid succession, the court then rejected racial discrimination in access to public beaches, Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955), public golf courses, Holmes v. City of Atlanta, 350 U.S. 879 (1955), public buses, Gayle v. Browder, 352 U.S. 903 (1956), public parks, New Orleans City Park Improvement Association v. Detiege, 358 U.S. 54 (1958) and state courtrooms, Johnson v. Virginia, 373 U.S. 61 (1963). More than 20 years ago, the Court found it "no longer open to question that a state may not constitutionally require segregation of public facilities." Id., at 62. By 1989, it was both logical and necessary for the Court to deplore racial discrimination in the award of public construction contracts, as it did in Croson.

CHARGE: Minority set-aside programs create a situation in which "everyone wins."

FACT: Public officials can set aside public construction contracts for politically favored racial groups only at the expense of all other citizens. It denies logic and reality to suggest anything to the contrary. What the government gives to one, it necessarily takes from another. During the recent legislative debate over proposals to extend Section 1207 of the National Defense Authorization Act of 1987, Congressman Ireland correctly stated that "small non-minority businesses are being sacrificed in order to achieve this arbitrary 5% goal" that Congress has imposed on the Defense Department.

CHARGE: Until Congress ordered the Defense Department to set aside construction contracts for "small, disadvantaged businesses" (under Section 1207), the level of minority participation in military construction contracts was only 1.5% to 2%.

FACT: The percentage of military construction contracts awarded to "small disadvantaged businesses" was 9% in FY 1985. The percentage was 6.77% in FY 1986, 7.05% in FY 1987, and 9.40% in FY 1988. The Defense Department has found that the overall level of minority participation in the construction industry is so high that it has used the construction industry to "compensate" for the lower level of minority participation in other industries. As an example, the Naval Facilities Engineering Command had an interim construction goal of 11% in FY 1987, 26.4% in FY 1988, and 20% in FY 1989.

CHARGE: The proponents of racial preferences for minority business enterprises are merely seeking to redress past discrimination.

FACT: The proponents of these programs cannot even identify the past discrimination that they claim justifies special preference programs. The proponents cite the historical events of the 1940s, and even the 1920s. They add only amorphous claims of current societal discrimination. They argue, in short, for the kind of permanent system that former Justice Powell so greatly feared. "In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." Wygant v. Jackson Board of Education, 476 U.S. 267, 276 (1986), (Powell, J., concurring).

The researchers who conducted the study of the construction industry in Louisiana (Appendix Three) found little or no evidence of discrimination in either contracting or employment. Rather, they found that prime construction contractors are most interested in whether subcontractors "have the experience, work force, and financial

capability to perform the task," and that "very few minority-owned firms...have the size, financial resources, and experience to perform prime contract work...." Under these circumstances, it is outrageous to suggest a racial "remedy."

The witnesses at the May 9 hearing specifically rejected racially neutral measures to increase the level of minority participation in the construction industry, because racially neutral measures "do not give the remedies to the victims." Yet the minority business persons who continue to benefit from special preference programs have never shown themselves to be the victims of racial discrimination in the construction industry, and some are among the larger contractors in the industry. In this regard, it is preposterous for a minority construction contractor with $15 million in revenue in 1989 to accuse the other participants in the construction industry of "greed." This contractor is substantially larger than the average AGC member.

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Witnesses also identified many "opportunities for discrimination" against minority business enterprises in the construction industry. AGC readily concedes that the construction process demands many business decisions by many different businesses -- bonding companies, banks and other financial institutions, insurance companies, equipment dealers, material suppliers, public owners, private owners and licensing boards. At the same time, however, AGC sharply disputes that racial discrimination is even a remote factor in these business decisions. Competition in the construction industry is so keen that anyone who irrationally discriminates against minority business enterprises is likely to find his or her company going out of business as a result.

Despite the rhetoric of those committed to a permanent system of racial patronage, AGC hopes Congress will not lose sight of the fact that minority business enterprises in the construction industry are in the same position as all other firms. All new construction contractors must overcome the "disadvantage" of being unknown, and

without a track record. All new construction contractors must also find ways to access capital, and to obtain bonding. And all construction contractors -- old or new -- must cope with innumerable government regulations and the overwhelming paperwork burden they engender.

AGC requests that it be provided with a copy of the transcript of the May 9, 1990, hearing, for review and further comment. AGC also requests the opportunity to participate in any future hearing on City of Richmond v. J.A. Croson Co.

101ST CONGRESS
1ST SESSION

S. 1235

To amend the Civil Rights Act of 1964 to permit States and political subdivisions to establish minority set-asides, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 22 (legislative day, JANUARY 3), 1989

Mr. SIMON introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

---

A BILL

To amend the Civil Rights Act of 1964 to permit States and political subdivisions to establish minority set-asides, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SET-ASIDES FOR STATES AND POLITICAL SUBDIVISIONS.

Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) is amended by adding at the end thereof the following new section:

"SEC. 719. SET-ASIDES FOR STATES AND POLITICAL SUBDIVISIONS.

"(a) FINDINGS.—Congress finds that—

"(1) there has been a long and continual history of discrimination on the basis of race, color, religion, sex, or national origin by private contractors in employment and subcontracting; and

"(2) such discrimination has been exacerbated by States and the political subdivisions of such States in awarding contracts.

"(b) AUTHORIZATION.—Congress, pursuant to its power to enforce the Fourteenth Amendment to the Constitution, determines that States and the political subdivisions of States may enact reasonable provisions setting aside a percentage of funds for spending on contracts to be awarded to firms that have ownership, control, or employment practices which further the goal of remedying the discrimination referred to in subsection (a).

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Appendix D

STATEMENT OF

SENATOR PAUL SIMON

before the

COMMITTEE ON GOVERNMENT AFFAIRS

regarding

THE CITY OF RICHMOND v. J. A. CROSON

Mr. Chairman, and members of the Committee, I thank you for the opportunity to appear before this Committee on a matter of great interest and importance to me. In January 1989, the Supreme Court issued a decision, The City of Richmond v. J. A. Croson Co., that could have a devastating impact on our nation's efforts to remedy the effects of discriminatory barriers experienced by minority and women-owned businesses. Unless corrected, the Supreme Court's decision in this case will irreparably set back efforts to integrate minority and women-owned businesses into our nation's economic mainstream through their participation in public contracting programs.

The Croson case concerns a minority business enterprise program enacted by the Richmond City Council to remedy the city's failure to award construction contracts to minorities. Under this program, prime contractors receiving city-awarded construction contracts were required to subcontract at least 30% of the dollar amount of the contract to a minority business enterprise.

The Supreme Court ruled by a 6 to 3 margin that the Richmond program violated the equal protection clause of the Fourteenth Amendment of the Constitution. The Court found that the City of Richmond failed to demonstrate a compelling governmental interest justifying the program because it did not adequately document specific and identifiable instances of discrimination. In addition, the Court concluded that the City of Richmond did not "narrowly tailor" the program to remedy the identified previous discrimination.

Mr. Chairman, the Croson case, in particular, marks an ironic and discouraging turning point in civil rights history. Twenty-five years ago, state and local governments were the main challenge to affirmative action programs. Now, the tide has turned and the Supreme Court, long a primary actor in efforts to eliminate discrimination, has become the primary challenge to the voluntary efforts of state and local jurisdictions to eradicate the vestiges of racial and gender discrimination in their communities. Unfortunately, the Croson decision was just the first in a series of devastating decisions issued by the Supreme Court last year that - if not reversed - will make it more difficult for minorities and women throughout this nation to secure fair and equal employment and entrepreneurship opportunities.

As Chairman of the Subcommittee on the Constitution of the Judiciary Committee, I have introduced legislation, S. 1235, to redress the Croson decision. My bill would use Congress' constitutionally granted power to enforce the Fourteenth Amendment to authorize state and local governments to adopt minority business set-aside programs, if they so choose. By introducing this legislation, I want to focus the attention of Congress on the ramifications of this decision, and start Congressional consideration of a legislative remedy to repair its damage.

Under Croson, the Supreme Court has set a daunting hurdle for those state and local jurisdications seeking to remedy past discrimination by enacting a minority business set-aside program. Although Croson did not totally ban state and local minority set-aside programs, the criteria set by the Court will make designing a constitutionally valid program difficult, if not impossible. Moreover, the strict standards state and local governments must now apply to minority business set-aside programs may so dilute the power of such programs that they will no longer serve the needs of minorities and women.

Indeed, Croson decision has already had disastrous consequences throughout the country. There are approximately 236 state and

local jurisdictions that have established minority business set-aside programs. Already, the rigorous analysis set by the Court in Croson has led lower courts to declare unconstitutional several such programs, including those established in Georgia, Michigan, and Florida. Moreover, lawsuits challenging minority-business set-aside programs in jurisdictions in California, Connecticut, Florida, Louisiana, New York, Tennessee, Pennsylvania, and Wisconsin -- among others -- are now pending. In my own state of Illinois, a lawsuit challenging the City of Chicago's minority business set-aside program was filed recently in federal court and is pending. Many other jurisdictions have suspended or are in the process of reevaluating their programs.

The Supreme Court's decision has left state and local government officials, the minority business community, and the civil rights community confused as to how to proceed with present and future minority business set-aside programs. It has had a chilling effect on voluntary state and local actions to redress discrimination. In order to institute a program, under Croson, states and localities must now give a detailed confession of their past discrimination or passive participation in private discrimination. The Court's decision would also tax the resources of those who wish to encourage equality by requiring in

Justice Marshall's words, "unnecessarily duplicative, costly and time consuming factfinding".

To use again the City of Chicago as an example, Mayor Richard Daley is committed to a minority business set-aside program for Chicato. In response to Croson, the Mayor established a Blue Ribbon Panel to develop a plan to meet the standards laid out by the Court. After a year's worth of study, time, and effort, the Blue Ribbon Panel issued a report that concluded that the City's existing goals of placing 25% of its budget with minority businesses and 5% with women-owned businesses are appropriate and necessary to help minority and women-owned businesses overcome the effects of historical discrimination. The Blue Ribbon Panel also concluded that such a program is needed to increase the pool of minority entrepreneurs in the Chicago area.

The Blue Ribbon Panel also found significant economic benefits to minority and women owned-businesses, to their communities, and to the City of Chicago itself. City of Chicago awards to minority and female businesses increased from $132 million in 1986 to $160 million in 1989, or 26% of total awards. Spending with women-owned businesses increased from $34 million in 1986 to $39 million in 1989, or 6% of total awards. Approximately 7,200 to

10,800 new jobs were created from 1985 through 1988 through Chicago's minority business set-aside program.

It is uncertain whether the new minority business set-aside plan recommended by the Blue Ribbon Panel in Chicago will pass the stringent tests laid out by the Court. What we can be certain of, however, is that many state and local jurisdictions will simply terminate their minority business set-aside programs, rather than go through the extensive, detailed and costly factfinding procedures called for under Croson. Other communities may possess the desire, but lack the financial resources needed to conduct the extensive research and documentation that the Court has said must undergird a locality's minority business set-aside plan.

It is now up to Congress to step forward and use its broad remedial powers under section 5 of the Fourteenth Amendment to redress the Croson case. The Supreme Court affirmed the broad scope of those remedial powers in Fullilove v. Klutznick, which upheld the constitutionality of a minority business set-aside program for federal construction grants. The Court also reaffirmed these broad Congressional powers in the Croson decision. As Justice O'Connor wrote in Croson, section 5 is:

> ... a specific constitutional mandate to enforce the dictates of the 14th amendment. The power to enforce may at times also include the power to determine situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.

Congress previously has determined that discrimination both by the government and by private citizens is an important problem and clearly violates principles of equality. Congress has amply documented nationwide findings of discrimination against private contractors in employment and subcontracting. Through the enactment of federal minority business set-aside programs, Congress has determined that such programs are necessary and appropriate tools to confront and remedy the effects of past discrimination.

But, the federal government alone cannot effectively remedy discrimination without the assistance of state and local governments. By allowing other government units to enact set-aside programs for minority and female entrepreneurs, we further the nation's interest in eliminating discrimination where it exists, and the nation's goal of achieving equality.

Mr. Chairman, the Croson decision sends the wrong message to those who have suffered from discrimination in this country. Our nation has long been committed on moral, social and economic grounds to fighting discrimination and its negative effects in education, voting rights, and housing. This commitment has only recently extended to the economic and business arena. Minorities and women still suffer from the effects of racial and gender discrimination. Without set-aside programs, minorities and women will continue to face the consequences of discrimination, both past and present, in all areas of business contracting.

As we approach a new century, minorities, immigrants and women will expand their role in the workforce and the workplace. The nation's economic health will depend on our ability to tap the human potential and productive capacity of the thousands of minorities and women who are striving to become a part of the American business community.

The Croson decision places an unnecessary and unworkable burden on state and local governments that wish to adopt or continue minority business set-aside programs to integrate minorities and women into the economic fabric of their communities. Congress should lift that burden, not only because of simple racial and

gender fairness, but also because the growth and prosperity of the nation demands it.

Mr. Chairman, I commend you for holding this hearing on S. 1235, and on the impact of the Croson decision on minority and women-owned businesses across the country. I look forward to working with you to reverse the full-scale retreat from equal opportunity represented by this decision.

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