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SOUTH DAKOTA

COMMITTEES
FOREIGN RELATIONS
COMMERCE SCIENCE AND TRANSPORTATION
SELECT COMMITTEE ON AGING
SMALL BUSINESS
JUDICIARY

United States Senate
WASHINGTON, DC 20510-4101

July 23, 1993

The Honorable Ruth Bader Ginsburg
U.S. Supreme Court Nominee
c/o Senate Judiciary Committee
Dirksen Senate Office Building, Room 246
Washington, D.C. 20510

Dear Judge Ginsburg:

As I mentioned in my questioning last Wednesday, I would appreciate your answering for the record the enclosed questions regarding issues of interest to the small business community.

Thank you for your attention to this matter.

Sincerely,

Larry Pressler
United States Senator

LP/gwg
Enclosures

SMALL BUSINESS

I would like to ask a couple of questions relating to business issues. While Ranking Member on the Small Business Committee, I intend to devote considerable attention during this Congress to improving the business climate for the small businesses of my state and throughout the nation.

MINORITY SET-ASIDE PROGRAMS

In City of Richmond v. Croson, 488 U.S. 469 (1989), the Supreme Court overturned a minority set-aside program that had been implemented by the City of Richmond, Virginia. In doing so, the Court outlined a two-part test that must be met if state and local governments are to implement constitutional set-aside programs for minority contractors.

As I understand the test, it requires that local public sector entities must base remedial minority set-aside programs on their own past discriminatory practices -- not on more general societal wrongs that precipitated past discrimination against minority groups, even if ample historical evidence supports such a finding. Once a strong factual predicate is established, state and local governments must develop a set-aside program narrowly tailored to a specific goal.

You had occasion to apply the Croson standard in O'Donnell Construction Company v. District of Columbia, 963 F.2d 420 (1992). In that case, you wrote a concurrence in which you held with the majority that the District of Columbia Minority Contracting Act violated a local non-minority contractor's Fifth Amendment right to equal protection. You agreed that under the Croson test, where "race classification is resorted to for remedial purposes, measures must be narrowly focused and supported by a strong factual predicate". You also agreed that the District's Minority Contracting Act "falls short on both counts."

However, you go on to state that you concur "with the understanding, made clear by Croson, that minority preference programs are not per se offensive to equal protection principles, nor need they be confined solely to the redress of state-sponsored discrimination."

1) First, do you believe I have stated the holding in Croson correctly -- that (1) a state or locality must demonstrate a compelling governmental interest by relying on prior discrimination by the state or local government itself; and (2) a resulting set-aside program must be narrowly tailored to accomplish a remedial purpose?

2) Could you elaborate on what you meant in your O'Donnell concurrence when you state that it is your "understanding" that minority preference programs need not "be confined solely to the redress of state-sponsored discrimination."

Over 75 percent of the states and more that 190 U.S. localities have implemented some form of set-aside programs for minority contractors. In many of these instances -- such as in Richmond and the District of Columbia -- these programs were developed using the guidance of Fullilove v. Klutznick, 448 U.S. 448 (1980). However, cases such as Croson and Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) hold that Fullilove does not provide an appropriate standard for state and local governments since it applied to actions of the U.S. Congress taken under its specific constitutional mandate to enforce the dictates of the Fourteenth Amendment.

3) Do Croson, Wygant and their progeny provide state and local governments with a standard clear enough that they can revise their Fullilove based minority set-aside programs in such a manner as to make them constitutional? My basis for this question once again is your statement in O'Donnell that these programs need not "be confined solely to the redress of state-sponsored discrimination" and your additional statement that "remedy for past wrong is not the exclusive basis upon which racial classification may be justified."

4) Do the caveats you expounded in O'Donnell demonstrate your belief that communities and states can develop constitutional minority set-aside programs based on standards other than those established by Croson? If so, doesn't this leave the future of Croson somewhat unclear and the job of state and local officials trying to develop a constitutional program much more difficult?

EMPLOYER V. UNION RIGHTS

In Microimage Display Division of Xidex Corporation v. National Labor Relations Board, 924 F.2d 245 (1991), you voted in the majority in a case involving a series of actions taken by Xidex Corporation following its purchase of a new plant that had been a union shop. The union alleged many of these actions constituted unfair labor practices. An administrative law judge and the NLRB agreed with the union on several points and you enforced their orders against Xidex.

1) In Xidex, the Circuit Court relied on the holding in NLRB v. Brown, 380 U.S. 278, 287-88 ((1965) that "antiunion motivation will convert an otherwise ordinary business act into an unfair labor practice." Please elaborate on what you understand this standard to mean.

2) The Circuit Court in Xidex also makes the point that in conducting its review of NLRB actions, it would extend deference to the Board's findings of fact. Indeed, the court's opinion cites 29 U.S.C. 160(e) and explains its decision is governed by the statutory language that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

   a) Please explain your understanding of the phrase "substantial evidence on the record considered as a whole."

   b) Do you find the use of the word "substantial" particularly instructive in making a fact-based determination that the National Labor Relations Act has been violated?

3) At another point in the opinion, the Circuit Court notes that "although a showing of antiunion animus does not automatically establish a violation of [the Act], it places on the employer the burden to prove that it would have undertaken the action alleged to be an unfair labor practice even in the absence of the antiunion sentiment." The Court goes on to find that "[h]ere, the employer failed to carry its burden; the Board was therefore justified in finding a violation" of the Act.

a) What evidentiary standard must a union meet in order to demonstrate "antiunion animus" sufficient to shift the burden of proof to the company?

b) What evidentiary standard is applied to employers once the burden of proof has shifted to them in these cases?

INCOME TAX DEDUCTION FOR HOME OFFICE EXPENSES

Earlier this year, the Supreme Court, in Commissioner v. Soliman, 113 S. Ct. 701 (1993), limited the availability of the home office income tax deduction for many taxpayers. While I know you did not have occasion to write an income tax opinion during your years on the Circuit Court, as the ranking member of the Small Business Committee, I would like to explore this issue. I am troubled by the decision in Soliman and what it could mean for small business men and women and other self-employed individuals.

As you may know, the issues in Soliman, revolved around an anesthesiologist who practiced in three local hospitals--none of which provided him an office. He used a room in his home for administrative office functions such as records keeping and billing. While the District and Circuit courts allowed his deduction of expenses associated with his home office, the Supreme Court reversed and created new factors to be considered in the determination of whether home office expenses are deductible.

In essence, it seems to me the decision wrote two new conditions into law--conditions that appear nowhere in the tax statutes written by Congress. The Court held that in deciding whether to allow a deduction for home office expenses, the IRS and the courts should take into account: (1) the relative importance of the activities performed at each business location; and (2) the time spent in each place.

The reason I am troubled by the decision is that it creates new standards based upon what the justices think Congress meant to say. While such an exercise certainly is part of the statutory interpretation responsibilities of the Court, it seems to me that in this case, the Justices read the statute very expansively--and did so

in favor of the IRS position at the expense of individual taxpayers' interests.

1) What is your philosophy concerning the Court's role in statutory interpretation? In answering, I would like to hear your views with regard to tax cases, but anything you would wish to add in a general vein on the subject also would be appreciated.

2) If you are familiar with Soliman, I also would appreciate any comments you might have concerning the Court's reasoning and decision in that case.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, DC 20001

RUTH BADER GINSBURG
UNITED STATES CIRCUIT JUDGE

July 28, 1993

Senator Larry Pressler
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Pressler:

The questions attached to your July 23, 1993 letter were forwarded to me yesterday. I enclose responses which I hope you will find satisfactory. If you wish me to supply, in writing, the answers I gave to the questions you asked on the second day of the Hearings, please tell me, and I will be glad to do so.

With appreciation for your interest.

Sincerely,

Ruth Bader Ginsburg

Enclosures