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July 10, 2013
FOR IMMEDIATE RELEASE

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The National Black Chamber of Commerce and its New York Affiliates Submit Amicus Brief Objecting to Racially Discriminatory Effects of Union-Only Project Labor Agreement

(Albany, N.Y.) – On July 5, 2013, the Appellate Division, Third Department, issued a Decision and Order permitting The National Black Chamber of Commerce, The Black Chamber of Commerce of Western New York, and The Black Chamber of Commerce of New York City (collectively, the "Black Chamber of Commerce") to file an amicus brief in support of a lawsuit that was commenced last year against the New York State Department of Transportation.

The lawsuit was commenced by Couch White, LLP, on behalf of highway contractor Lancaster Development, Inc.; construction trade association Empire State Chapter of Associated Builders and Contractors; and the owner of a certified women-owned business enterprise, Lori Florian. The lawsuit seeks to nullify a union-only project labor agreement that the New York State Department of Transportation imposed on a large highway reconstruction project in Orange County, New York. The case is currently on appeal.

An affidavit filed by Harry C. Alford, President of The National Black Chamber of Commerce, explains that project labor agreements generally block the use of non-union contractors and their employees. As approximately 98% of African-American and Hispanic construction companies are non-union, the use of a project labor agreement on public work projects greatly restricts the opportunities for African-American and Hispanic construction companies and construction workers on such projects.

The Black Chamber of Commerce's amicus brief further states that, on the prior procurement of the same construction project, non-union highway contractor Lancaster Development, Inc. exceeded the minority-owned and women-owned business utilization by the second-lowest bidder, a union contractor, by approximately 50%. The Department of Transportation's imposition of a project labor agreement on the present procurement has, according to the affidavit of Petitioner Lori Florian, prevented her women-owned business enterprise from working on the project.

Copies of the Decision and Order, Mr. Alford's affidavit, and the Black Chamber of Commerce's amicus brief are attached.

For more details contact: Joel M. Howard, III at Couch White, LLP, (518) 426-4600.

About Couch White, LLP: Couch White, LLP is a nationally-recognized, full-service business law firm based in Albany, NY with primary practice areas in energy, construction, commercial and business, environmental, and labor and employment law. With additional offices in New York City and Saratoga Springs, New York, Washington D.C., and Hartford, CT, Couch White provides high-quality, cost-effective legal representation that leads to creative, ethical and desirable solutions for its broad base of clients.

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 5, 2013 516540

In the Matter of LANCASTER DEVELOPMENT, INC., et al.,
Appellants,

v

JOAN McDONALD, as Commissioner of Transportation, et al.,
Respondents.

DECISION AND ORDER ON MOTION

Motion by the National Black Chamber of Commerce, Inc., the Black Chamber of Commerce of Western New York, Inc., and the Black Chamber of Commerce of New York City, Inc., for permission to file a brief amicus curiae upon the appeal.

Upon the papers filed in support of the motion, and no papers having been filed in opposition thereto, it is

ORDERED that the motion is granted, without costs, and the Clerk of the Court is directed to accept for filing the amicus curiae brief received on June 20, 2013.

PETERS, P.J., LAHTINEN, SPAIN and GARRY, JJ., concur.

ENTER:

Robert D. Mayberger
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – THIRD DEPARTMENT

LANCASTER DEVELOPMENT, INC.; EMPIRE STATE CHAPTER OF THE ASSOCIATED BUILDERS AND CONTRACTORS, INC. and LORI FLORIAN,

Appellants,

-against-

JOAN McDONALD, as Commissioner for the New York State Department of Transportation and NEW YORK STATE DEPARTMENT OF TRANSPORTATION,

Respondents.

NOTICE OF MOTION

Albany Co. Index #4745-12
Case # 516540

PLEASE TAKE NOTICE that upon the annexed Affirmation of Anthony J. Adams, Jr., Esq., sworn to the 18th day of June, 2013; the annexed Affidavit of Harry C. Alford, sworn to the 17th day of June, 2013; and upon all proceedings heretofore had herein, the undersigned will move this Court at a term thereof to be held at the Supreme Court of the State of New York, Appellate Division, Third Department, Empire State Plaza, Robert Abrams Building for Law and Justice, State Street, Room 511, Albany, New York 12223, on the 1st day of July, 2013, at the opening of this Court on that day, or as soon thereafter as counsel can be heard for an order granting The National Black Chamber of Commerce, Inc., The Black Chamber of Commerce of Western New York, Inc., and The Black Chamber of Commerce of New York City, Inc. leave to file a brief *amicus curiae* in the above-entitled appeal and for such other and further relief as the Court may deem just and proper in the circumstances. This motion will be on submission.

Dated: June 18, 2013

Respectfully submitted,

ADAMS BELL ADAMS, P.C.

Anthony J. Adams, Jr., Esq.
Attorneys for The National Black Chamber of Commerce, Inc., The Black Chamber of Commerce of Western New York, Inc., and The Black Chamber of Commerce of New York City, Inc.
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – THIRD DEPARTMENT

LANCASTER DEVELOPMENT, INC.; EMPIRE STATE CHAPTER OF THE ASSOCIATED BUILDERS AND CONTRACTORS, INC. and LORI FLORIAN,

Appellants,

-against-

JOAN McDONALD, as Commissioner for the New York State Department of Transportation and NEW YORK STATE DEPARTMENT OF TRANSPORTATION,

Respondents.

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Albany Co. Index #4745-12
Case # 516540

STATE OF NEW YORK)
) ss.:
COUNTY OF MONROE)

Anthony J. Adams, Jr., Esq., being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice law in the State of New York and a principal of the law firm Adams Bell Adams, P.C., counsel to The National Black Chamber of Commerce, Inc. (the "National Black Chamber of Commerce"), The Black Chamber of Commerce of Western New York, Inc. (the "Black Chamber of Commerce of Western New York"), and The Black Chamber of Commerce of New York City, Inc. (the "New York City Black Chamber of Commerce"). I am familiar with the facts and circumstances herein set forth, and I submit this affirmation in support of the instant application by the National Black Chamber of Commerce, the Black Chamber of Commerce of Western New York and the New York City Black Chamber of Commerce for leave to file the annexed brief as *amicus curiae* in the above-entitled matter.

2. For the reasons set forth in the accompanying Affidavit of Harry C. Alford, sworn to the ___ day of June, 2013, the National Black Chamber of Commerce, the Black Chamber of

Commerce of Western New York, and the New York City Black Chamber of Commerce seek leave to appear as *amicus curiae* in this appeal because the determination that this Court makes in this case is of critical importance to African-American-owned construction companies' and African-American construction workers' right to work in New York State.

3. As set forth in the accompanying Affidavit of Harry C. Alford, project labor agreements necessarily result in the exclusion of, and discrimination against, minority contractors. That discriminatory impact of project labor agreements is demonstrated in the case at bar. In the prior procurement of the same project, Appellant Lancaster Development, Inc. committed to spend 15.93% of the contract value with minority-owned and or women-owned businesses. (R. 670.) The second-lowest bidder – a union contractor and ultimately a signatory to the project labor agreement on the 2012 reprocurement of the project – failed in the prior procurement to submit a minority-owned and women-owned business utilization package that met the project's 9% goal within the allotted time, and further failed to submit a minority-owned and women-owned business utilization package that met the 9% goal within the 45-day standard award period. (*Id.*) Ultimately, the second-lowest bidder produced a minority-owned and women-owned business utilization package that reached only 10.14%. (*Id.*) Lancaster Development exceeded the second-lowest bidder's minority-owned and women-owned business utilization by approximately 50%. (R. 671.)

4. Public policy weighs heavily against the use of project labor agreements generally, and specifically the project labor agreement at issue in this case. The lower court's decision in this case, if not reversed, threatens to make executive agencies' decisions to impose project labor agreements immune from judicial review – a result that is both unlawful and unjust.

5. The lower court's decision in this case is an aberration that is contrary to over a half a century of case law which establishes that trade associations have standing to challenge

administrative agencies' actions. It is of critical importance that the lower court's decision be reversed, in order to preserve that standing and to continue to provide access to the judiciary so that associations such as Appellant Empire State Chapter of the Associated Builders and Contractors, Inc.; the National Black Chamber of Commerce; the Black Chamber of Commerce of Western New York; and the New York City Black Chamber of Commerce, may continue to seek redress for administrative agencies' unlawful actions.

6. The National Black Chamber of Commerce, the Black Chamber of Commerce of Western New York, and the New York City Black Chamber of Commerce believe that they are uniquely qualified to discuss the implications that the position advocated by Respondents in this case would have on the interests of African-American-owned construction companies and African-American construction workers, and for that reason, they believe that the proposed amicus brief would be of assistance to the Court.

WHEREFORE, leave of the Court is respectfully requested to serve and file a brief as *amicus curiae* in support of the Appellants' appeal.

Dated: June 18, 2013

Respectfully submitted,

ADAMS BELL ADAMS, P.C.

Anthony J. Adams, Jr., Esq.
Attorneys for The National Black Chamber of Commerce, Inc., The Black Chamber of Commerce of Western New York, Inc., and The Black Chamber of Commerce of New York City, Inc.
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – THIRD DEPARTMENT

LANCASTER DEVELOPMENT, INC.; EMPIRE STATE CHAPTER OF THE ASSOCIATED BUILDERS AND CONTRACTORS, INC. and LORI FLORIAN,

Appellants,

-against-

JOAN McDONALD, as Commissioner for the New York State Department of Transportation and NEW YORK STATE DEPARTMENT OF TRANSPORTATION,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Albany Co. Index #4745-12
Case # 516540

DISTRICT OF COLUMBIA)
) ss.:
CITY OF WASHINGTON)

Harry C. Alford, being duly sworn, deposes and says:

1. I am the President and Chief Executive Officer of The National Black Chamber of Commerce, Inc. (the "National Black Chamber of Commerce"). I am familiar with the facts and circumstances herein set forth, and I submit this affirmation in support of the instant application by the National Black Chamber of Commerce, the The Black Chamber of Commerce of Western New York, Inc. (the "Black Chamber of Commerce of Western New York"), and The Black Chamber of Commerce of New York City, Inc. (the "New York City Black Chamber of Commerce") for leave to file the annexed brief as *amicus curiae* in the above-entitled matter.

2. The National Black Chamber of Commerce is a nonprofit, nonpartisan organization dedicated to the economic empowerment of African-American communities through entrepreneurship. Incorporated in 1993, it represents nearly 100,000 African-American-

owned businesses and advocates on behalf of the 2.1 million black-owned businesses in the United States. The National Black Chamber of Commerce has 190 affiliated chapters located throughout the nation, as well as international affiliates in, among others, the Bahamas, Brazil, Colombia, Ghana, and Jamaica.

3. The Black Chamber of Commerce of Western New York, Inc. is an affiliate of the National Black Chamber of Commerce, and is dedicated to advancing the interests of African-American-owned businesses in Western New York State.

4. The Black Chamber of Commerce of New York City, Inc. is an affiliate of the National Black Chamber of Commerce, and is dedicated to advancing the interests of Africa-American-owned businesses in New York City.

5. The National Black Chamber of Commerce has appeared as *amicus curiae* in an array of court proceedings involving legal issues affecting African-American-owned businesses.

6. The National Black Chamber of Commerce, the Black Chamber of Commerce of Western New York, and the New York City Black Chamber of Commerce join the Appellants in opposing the project labor agreement which Respondents have sought to impose in this action because such agreements have repeatedly been demonstrated to exclude and discriminate against African-American-owned construction companies.

7. I have testified before the United States Commission for Civil Rights and authored a number of articles regarding the discriminatory impact of project labor agreements on African-American-owned construction companies.

8. A Project Labor Agreement is between an owner of a specific construction project and applicable labor unions which generally blocks the use of non-union contractors and their employees.

9. Approximately ninety-eight percent (98%) of Black and Hispanic construction companies are non-union shops. Thus, project labor agreements greatly limit the opportunities for Black and Hispanic firms and for Black and Hispanic construction workers.

10. For these reasons, it is the policy of the National Black Chamber of Commerce to oppose Project Labor Agreements. This opposition is based on the fact that African American workers are significantly underrepresented in all construction trade unions and consequently in all crafts of construction union shops. This problem has been persistent for decades and shows no sign of improving in the immediate future. The higher use of union shops brings a correlated decrease in the amount of Black owned businesses being involved on a worksite subject to a project labor agreement.

11. On or about September 22, 2010, Anthony W. Robinson, President of the Minority Business Enterprise Legal Defense and Education Fund testified before the United States House of Representatives Subcommittee on Management, Organization, and Procurement and the Committee on Oversight and Government Reform. A copy of Mr. Robinson's testimony is attached hereto as Exhibit "A." Mr. Robinson concluded that: "It is clear that the construction trade labor unions have been, and remain, a serious obstacle to the participation of minority contractors and workers in the construction industry . . . . The execution of project labor agreements was also cited as disadvantageous to minority owned construction companies and their desire to employ minority workers."

12. In addition to the case at bar, examples abound in which project labor agreements caused or contributed to the unlawful exclusion of, or discrimination against, minority contractors. For example:

- There was a substantial concern over the use of Project Labor Agreements when the Woodrow Wilson Bridge was about to be rebuilt. Maryland's Governor Glendenning

demanded the use of a PLA while Virginia Governor Gilmore insisted on no usage. Through research, the National Black Chamber of Commerce compared the utilization of Black firms and employment on highway construction work for the states of Virginia and Maryland. Maryland had a statewide PLA on its highway program while Virginia was a Right to Work program. Virginia's utilization of Black firms and employees was greater than Maryland by a 3:1 ratio.

- In 2004, the mayor of Buffalo, N.Y., announced that construction trade unions were failing to meet diversity goals established in the PLA covering $1 billion in school renovation work. The PLA called for at least 35 percent minority participation and 10 percent women participation. *Buffalo Mayor Says Trades Not Attaining Diversity Goals as Specified in School PLA*, Construction Labor Report (BNA) Sept. 22, 2004.

- In 2008, the *New York Daily News* reported that the PLA containing a similar "community benefits" agreement on construction of the new Yankee Stadium was a "joke." "The team acknowledges that more than 3,900 people have applied for construction work at the stadium. More than 80 percent didn't belong to any union. Since you must be a union member to work on the site, the Bronx residents most in need of a job have been shut out of the daily workforce of 1,200." *Bronx officials deal with Yankees on stadium*, New York Daily News, June 19, 2008.

- Finally, the 2010 study of PLA school construction projects by the New Jersey Department of Labor concluded that – as in the case at bar – PLA projects fell short of the goals for minority participation by a wider margin than non-PLA construction projects. The study also found that statewide apprenticeship rates were higher on non-PLA projects than on PLA projects. Annual Report to the Governor and Legislature, use of Project Labor Agreements in Public Works Building Projects in Fiscal Year 2008 (NJDOL Oct. 2010).

13. The National Black Chamber of Commerce, the Black Chamber of Commerce of Western New York, and the New York City Black Chamber of Commerce seek leave to appear as *amicus curiae* in this appeal because the outcome of this case is of vital importance to African-American-owned construction companies' and African-American construction workers' right to work in New York State.

WHEREFORE, leave of the Court is respectfully requested to serve and file a brief as *amicus curiae* in support of the Appellants' appeal.

Harry C. Alford

Sworn to before me this 17th day of June, 2013.

Notary Public

6/17/13

VINCENT N EZULIKE
Notary Public
Montgomery County
Maryland
My Commission Expires May 20, 2015

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

Albany County Index #4745-12
Case # 516540

LANCASTER DEVELOPMENT, INC.; STATE CHAPTER OF THE ASSOCIATED BUILDERS AND CONTRACTORS, INC. and LORI FLORIAN,

Appellants,

-against-

JOAN McDONALD, as Commissioner for the New York State Department of Transportation and NEW YORK STATE DEPARTMENT OF TRANSPORTATION,

Respondents.

BRIEF FOR AMICUS CURIAE

ADAMS BELL ADAMS, P.C.
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OF COUNSEL:
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PRELIMINARY STATEMENT

The National Black Chamber of Commerce, Inc. (the "National Black Chamber of Commerce"), The Black Chamber of Commerce of Western New York, Inc. (the "Black Chamber of Commerce of Western New York"), and The Black Chamber of Commerce of New York City, Inc. (the "New York City Black Chamber of Commerce") submit this *amicus* brief in support of Appellant's appeal seeking to reverse the Decision and Order of the Supreme Court, dated January 14, 2013, that erroneously concluded that the Petitioners lacked standing to petition for judicial review of Respondent Department of Transportation's imposition of a project labor agreement on the subject construction project.

The National Black Chamber of Commerce is a nonprofit, nonpartisan organization dedicated to the economic empowerment of African-American communities through entrepreneurship. Incorporated in 1993, it represents nearly 100,000 African-American-owned businesses and advocates on behalf of the 2.1 million black-owned businesses in the United States. The National Black Chamber of Commerce has 190 affiliated chapters located throughout the nation, as well as international affiliates in, among others, the Bahamas, Brazil, Colombia, Ghana, and Jamaica. The Black Chamber of Commerce of Western New York, Inc. is an affiliate of the National Black Chamber of Commerce, and is dedicated to advancing the interests of African-American-owned businesses in Western New York State. The Black Chamber of Commerce of New York City, Inc. is an affiliate of the National Black Chamber of Commerce, and is dedicated to advancing the interests of African-American-owned businesses in New York City. Accordingly, the National Black Chamber of Commerce, The Black Chamber of Commerce of Western New York, and The New York City Black Chamber of Commerce are uniquely qualified to discuss the implications that the lower court's decision, if not reversed,

would have on African-American-owned construction companies and African-American construction workers.

The event that gave rise to this case was the New York State Department of Transportation's inclusion of a project labor agreement in the bid specifications for the subject construction project. Project labor agreements have been repeatedly demonstrated to preclude African-American-owned construction companies, and African-American construction workers, from bidding and working on construction projects. As the record demonstrates, these exclusionary and discriminatory effects are present in the construction project that is the subject of the case at bar.

For over half a century, New York State courts have recognized the standing of trade associations to seek judicial review of administrative agencies' actions. The lower court's decision, which was based on a misreading of that precedent, represents a departure from established law, to the detriment of trade associations such as the National Black Chamber of Commerce, The Black Chamber of Commerce of Western New York, and The New York City Black Chamber of Commerce.

For those critical policy reasons, the Court should reverse Supreme Court's grant of Respondents' motion to dismiss and order Respondents to file an answer so that this case may be decided on the merits.

STATEMENT OF FACTS

The National Black Chamber of Commerce, The Black Chamber of Commerce of Western New York, and The New York City Black Chamber of Commerce adopt Appellants' summary of facts and prior proceedings in this case.

ARGUMENT

POINT I

PROJECT LABOR AGREEMENTS EXCLUDE MINORITY CONTRACTORS

A project labor agreement ("PLA") is a patently restrictive bid specification having anti-competitive consequences. *Matter of New York State Ch. Inc. Associated General Contractors of Am. v. New York State Thruway Authority*, 88 N.Y.2d 56, 69 (1996). The imposition of a PLA imposes "significant restrictions" upon competitive bidding. *Id.* at 74-75.

One such anti-competitive consequence is that PLAs effectively preclude open-shop contractors from bidding on a construction project or from working as subcontractors on the project. Because approximately ninety-eight percent (98%) of Black and Hispanic construction companies are open-shop (Affidavit of Harry C. Alford, sworn to the ___ day of June, 2013 (the "Alford Affidavit") ¶ 8), a PLA excludes the vast majority of Black and Hispanic construction firms, and their workers, from working on a construction project for which a PLA is imposed.

In testimony before the United States House of Representatives Subcommittee on Management, Organization, and Procurement and the Committee on Oversight and Government Reform on September 22, 2010, Anthony W. Robinson, President of the Minority Business Enterprise Legal Defense and Education Fund, cited PLAs as "disadvantageous to minority owned construction companies and their desire to employ minority workers." (Appendix at A-5.)

The historical exclusion of African-Americans from construction trade unions and from union-only construction projects has been well-documented. "Nationwide, almost every major construction union excluded African-Americans, while the rest relegated them to second-class

segregated locals." David Bernstein, *The Shameful, Wasteful History of New York's Prevailing Wage Law*, 7 Geo. Mason U. Civ. Rts. L. J. 1 (1997), at 5. "New York's building trades unions were virtually impenetrable to African-Americans. Powerful Local 3 of the electrical workers' union, like other electrical union locals nationwide, simply refused to admit African-Americans." *Id.* "As of the early 1960s, African-Americans still were barred from the unions of the electrical workers, operating engineers, plumbers, plasterers, and sheet-metal workers, among others." *Id.* at 11. "African-American representation in the New York construction industry actually fell in the 1970s." *Id.* at 12. In March of 1971, several New York construction trade unions refused to accept minority trainees under a plan supported by New York's governor, New York City's major, and the United States Department of Labor. *Id.* at 9. A 1983 New York State Human Rights Appeal Board investigation uncovered "substantial evidence of a pattern of discrimination" by one New York construction trade union. These patterns continued into the 1990s, and in 1993, a United States District Court "found that the union's requirements for entry into its apprenticeship program discriminated against women and minorities." *Id.* "It is clear that the construction trade labor unions have been, and remain, a serious obstacle to the participation of minority contractors and workers in the construction industry." (Appendix at A-5.)

These exclusionary and discriminatory effects are evident in the case at bar. In the prior procurement of the same project, Appellant Lancaster Development, Inc. committed to spend 15.93% of the contract value with minority-owned and or women-owned businesses. (R. 670.) The second-lowest bidder – a union contractor and ultimately a signatory to the project labor agreement on the 2012 reprocurement of the project – failed in the prior procurement to submit a minority-owned and women-owned business utilization package that met the project's 9% goal

within the allotted time, and further failed to submit a minority-owned and women-owned business utilization package that met the 9% goal within the 45-day standard award period. (*Id.*) Ultimately, the second-lowest bidder produced a minority-owned and women-owned business utilization package that reached only 10.14%. (*Id.*) Lancaster Development exceeded the second-lowest bidder's minority-owned and women-owned business utilization by approximately 50%. (R. 671.)

Appellant Lori Florian, the owner of a certified women-owned business enterprise ("WBE") was precluded from working on the subject construction project by reason of the PLA's exclusion of open-shop contractors. (R. 958-962.)

The record also contains examples of union intimidation, vulgarities, and threats against open-shop contractors and their employees on a nearby highway construction project built by Appellant Lancaster Development in 2006. (R. 950-952.)

The project labor agreement study commissioned by Respondents, and upon which Respondents claims to have based their decision to impose a PLA on the subject construction project, specifically declines to comment on the impact that the PLA would have on the utilization of minority- and women-owned contractors on the project. (R. 115.)

Executive Order 13502, by which President Barack Obama authorized the use of PLAs on federally-funded projects, provided that "this order does not require an executive agency to use a project labor agreement on any construction project . . . . (Executive Order 13502 § 5) (emphasis added.) The Order further limited the use of PLAs to situations in which they are "consistent with law." (*Id.* §§ 3(a)(ii) and 10(b). One such law with which all federally-funded construction projects (like the one at bar) must comply is Executive Order 11246, which prohibits federally-funded contractors from discriminating in employment decisions on the basis

of race, color, religion, sex, or national origin. The exclusionary and discriminatory effects of PLAs are well-documented, and the case at bar is a case in point.

The Court should reverse Supreme Court's decision and order Respondents to serve an answer so that the lawfulness, or unlawfulness, of the PLA at issue in this case may be decided on the merits.

POINT II

THE COURT SHOULD CONTINUE TO RECOGNIZE THE STANDING OF ASSOCIATIONS TO SEEK JUDICIAL REVIEW OF ADMINISTRATIVE AGENCIES' ACTIONS

It is of vital importance to associations such as the National Black Chamber of Commerce, The Black Chamber of Commerce of Western New York, and The New York City Black Chamber of Commerce that they continue to be recognized as having standing to seek judicial review of administrative agencies' actions. The judicial review of executive actions (and, by extension, of executive-branch administrative agencies' actions), which is provided for in State and Federal Constitutions, is meaningless unless there is some person or association who has standing to seek that review. In the case at bar, rather than address the merits of the PLA's compliance with applicable law, Respondents claimed, and the lower court concluded, that none of the petitioners had standing to seek judicial relief for Respondents' imposition of the PLA.

The lower court's decision is at variance with over a half a century of case law which establishes that trade associations have standing to challenge administrative agencies' actions. *See, e.g., Empire State Ch.*, 161 Misc.2d 537, *cited with approval in New York State Chapter v. Thruway Authority*, 167 Misc.2d 572, 575 (Sup. Ct., Albany Co. 1994), *modified*, 88 N.Y. 2d 56 (1996); *Society of the Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761 (1991);

Nelcorp Elec. Contr. Corp. v. County of Broome, 18 Misc. 3d 1144(A) (Sup. Ct. Broome Co. 2008); *General Building Contractors of New York State, Inc. v. City of Syracuse*, 40 A.D.2d 584 (4th Dep't 1972); *Empire State Ch. of Associated Builders and Contractors, Inc. v. Rome Housing Auth.*, 72 Misc.2d 910 (Sup. Ct., Oneida Co. 1972); *General Building Contractors of New York State, Inc. v. County of Oneida*, 54 Misc.2d 260 (Sup. Ct., Oneida Co. 1967).

The case at bar illustrates the important public policy objectives inherent in preserving this associational standing. The lower court's decision in this case, if not reversed, threatens to administrative agencies' decisions to impose project labor agreements immune from judicial review – a result that is both unlawful and unjust. The lower court's decision should be reversed, in order to continue to provide access to the judiciary so that associations such as Appellant Empire State Chapter of the Associated Builders and Contractors, Inc., and *amicus* the National Black Chamber of Commerce, the Black Chamber of Commerce of Western New York, and The New York City Black Chamber of Commerce may continue to seek redress when administrative agencies exceed their lawful power.

CONCLUSION

The increased employment of African-American construction companies and construction workers on public construction projects is an important public policy. Project labor agreements have been demonstrated to have a discriminatory and exclusionary impact on African-American contractors and construction workers, and the project labor agreement in this case is no exception. The court should recognize the standing of Appellant Empire State Chapter of the Associated Builders and Contractors, Inc. to petition for judicial review of administrative agencies' actions, specifically, the Respondent Department of Transportation's imposition of the project labor agreement at issue in this case. The Court should reverse Supreme Court's opinion

and order Respondents to serve an answer, so that the lawfulness or unlawfulness of the project labor agreement can be determined on the merits.

Dated: June 18, 2013

Respectfully submitted,

ADAMS BELL ADAMS, P.C.

Anthony J. Adams, Jr., Esq.
Attorneys for The National Black Chamber of Commerce, Inc., The Black Chamber of Commerce of Western New York, Inc., and The Black Chamber of Commerce of New York City, Inc.
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MBELDEF
Minority Business Enterprise Legal Defense
and Education Fund, Inc.
www.mbeldef.org

Parren J. Mitchell
Founder and Chairman
Emeritus

Anthony W. Robinson
President
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Testimony of Anthony W. Robinson, President
Minority Business Enterprise Legal Defense and Education Fund

Before the United States House of Representatives
Subcommittee on Management, Organization, and Procurement
Committee on Oversight and Government Reform

Washington, DC
September 22, 2010

Testimony of Anthony W. Robinson, President
Minority Business Enterprise Legal Defense and Education Fund

Before the United States House of Representatives
Subcommittee on Management, Organization, and Procurement
Committee on Oversight and Government Reform

Washington, DC
September 22, 2010

Good morning Madam Chairwoman and members of this subcommittee. My name is Anthony W. Robinson, and I am President of the Minority Business Enterprise Legal Defense and Education Fund (MBELDEF). Our organization was founded by the late Congressman Parren J. Mitchell, to act as a national advocate and legal representative of the minority enterprise community. We promote policies affecting the equitable and full participation of minority businesses in the national and international marketplace. We attempt to provide non-partisan opinions on matters affecting these enterprises.

We appreciate the subcommittee providing us this opportunity to represent the class interest of minority entrepreneurs who continue to rely on the federal marketplace as a primary source of opportunity.

BACKGROUND

According to the most recent data published by the U.S. Census Bureau, minority-owned businesses now comprise approximately 21% of the 27 million U.S. businesses and they are growing very rapidly. Between 2002 and 2007, the percentage increase in the number of firms owned by Hispanic Americans was over three times that of whites; the percentage increase in firms owned by Black Americans was over four times that of whites; and the percentage increase among Asians owned firms was just under three times that of whites.[1]

As we project forward, this represents a rapidly changing business demographic profile. The advent of public policies encouraging minority participation and population changes are producing a growing parity in the number of businesses that are owned by minority and other historically underrepresented groups. However, because of pervasive discrimination there remains a tremendous disparity in the relative capacity and scale of minority-owned businesses in comparison to businesses owned by whites.

The global nature of the economy is forcing upon small and minority-owned businesses the need to increase scale and capacity to compete successfully or

[1] www.census.gov/econ/sbo.

merely survive. Globalization has moved major corporations to reduce the number of firms they use in their supply chain. In addition, there continues to be growing phenomena of government organizations bundling contracts.

Minority contractors who manage to overcome these obstacles are frequently confronted with racial discrimination in attempting to bid for, obtain, and perform construction contracts. In a recent survey by the economic research firm Euquant, they surveyed 350 of the fastest growing minority-owned firms relative to the significance of discrimination in their industry. The survey results found eighty percent (80%) of the firms in communication and utilities, forty-six percent (46%) in transportation; fifty-seven percent (57%) in heavy construction; and fifty-three percent (53%) among general and specialty contractors considered discrimination a very significant factor within their industry.[2]

The evidence of discrimination against minority contractors is stark and affects all aspects of market access, utilization and performance. Quantitative studies, as well as anecdotal reports, detail the considerable discrimination based on race and national origin that confronts minority contractors in all parts of the country and in virtually every industry. These discriminatory practices have been documented extensively in case law, regional disparity studies, and congressional hearings.

The discrimination is not limited to one particular minority group; instead disparity studies show conclusively that businesses owned by African-Americans, Hispanics/Latinos, Asians, Pacific Islanders, and Native Americans all confront discrimination in their efforts to form, grow and maintain businesses.

SUMMARY OF FINDINGS

In a collaborative effort between the Minority Business Enterprise Legal Defense and Education Fund (MBELDEF), the National Black Chamber of Commerce (NBCC) and the Philadelphia Chapter of the National Association of Minority Contractors (NAMC), we conducted field hearings in eight U.S. cities. The cities included Philadelphia, Chicago, St. Louis, New Orleans, Houston, Washington, DC, Portland and Richmond. Testimony provided by nearly sixty witnesses, including construction contractors and others directly involved in the implementation of minority inclusion programs, provides us with a clear and unimpeachable perspective on the nature of the discrimination they face. What the testimonies document are the operation of discriminatory systems that, independently are troubling enough, but in combination yield devastating outcomes

[2] T. Boston and Linje Boston (October 2007) "Increasing the Capacity of the Nation's Small Disadvantaged Businesses" Research Report prepared for the Congressional Black Caucus Foundation and entered into the Congressional Record as part of testimony before U.S. Senate Committee on Small Business and Entrepreneurship, September 11, 2008, 63 pp.

for the survivability of minority construction contractors and the creation of job opportunities for minorities in the construction industry.

Finance

Minority-owned construction firms face significant discrimination in the financial arena. They are less likely to receive loans than non-minority firms. Banks apply tighter lending standards for minority-owned construction firms than to their non-minority competitors. Creditworthy minority-owned construction firms are denied loans because they are minority-owned and, in some cases, have been forced to accept non-minority equity partners in order to qualify for loans. SBA and DOT loan programs and Federal Reserve Community Reinvestment Act are ineffective in increasing lending to minority-owned construction firms, fundamentally because they do not have a significant effect on bank lending procedures.

The testimonies of our witnesses have been buttressed by numerous studies that continue to document the racially discriminatory barriers minority firms encounter when pursuing debt and equity funding. A study by Ken Cavaluzzo analyzed credit applications, loan denials and interest rates paid across gender, race and ethnic characteristics of the small business owners. He gathered data on businesses that applied for credit and those that did not apply because they felt their application would have been turned down. He found large unexplained differences in denial rates between African American and white male owned companies that could only be attributed to discrimination. [3]

In a 2004 study conducted by Susan Coleman examined access to the capital for women and minority owned small firms and found that after controlling for differences in human capital characteristics of owners, minorities were significantly less likely to be approved for loan requests and they were also significantly less likely to apply for loans because they assumed they would be denied. [4] Karlyn Mitchell and Douglas Pearce (2004) found that African American and Hispanic firms are significantly less likely to receive bank loans than are white business owners. (cite?)

The inability of minority-owned construction firms to meet bonding requirements seriously constrains their participation. Approaches to risk management that have proven to be effective in dealing with this problem are not fully utilized. Insurance brokers lack incentives to serve the minority-owned construction firms, whose contracting opportunities are generally smaller in size.

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[3] Ken Cavalluzzo & Linda Cavalluzzo & John Wolken, 1999. "Competition, small business financing, and discrimination: evidence from a new survey," Proceedings, Federal Reserve Bank of Chicago, issue Mar, pages 180-266.

[4] Availability of Financing to Small Firms Using the Survey of Small Business Finances, by Karlyn Mitchell and Douglas K. Pearce SBA Office of Advocacy, May 2005, Under contract number SBAHQ-03-Q-0016.

Enforcement of MBE Regulations

The certification of minority contractors is fraught with problems. Minority certification places minority-owned construction firms at a competitive disadvantage when competing for work as prime contractors, relegating them to subcontracting. Lack of enforcement discourages minority participation. Prime contractors use a variety of tactics to discourage minority participation, such as slow payment, unjust termination, forced reduction in bid price, forcing subcontractors to pay liquidated damages, requesting bids without intending to use the contractor, and refusing to assist minority-owned construction firms to obtain equipment, supplies and financing. When project owners fail to challenge these tactics and regulators fail to enforce the law, minority contractor discouragement is exacerbated.

Private Sector Participation

One of the reasons that government minority business programs are important is that the discrimination and disparities in the private sector are so pervasive. There has been an enormous amount of research documenting the fact that private sector discrimination, where minority business programs are not in place, is far greater than in the public sector where such programs do exist. I would direct the committee's attention to many of the disparity studies that my colleague, Mr. O'Bannon is putting in the record today for ample evidence of private sector discrimination. Another problem is that, unfortunately, existing public sector minority business programs are insufficiently effective in preparing minority construction firms to compete for work in the private sector. We must improve and strengthen these programs so that they do more to allow minority businesses to transfer their skills and experience from the public sector to the private sector. We may also need to consider new legislation to more effectively prohibit discrimination in the private sector. Without these improvements, minority-owned construction firms will continue to work almost exclusively in the public sector. .

Impact of Unions, PLAs and Exclusionary Agreements

It is clear that the construction trade labor unions have been, and remain, a serious obstacle to the participation of minority contractors and workers in the construction industry. They intimidate minority-owned construction firms to discourage utilization of minority construction workers, discourage workforce development in higher-paying skilled trades, send less qualified workers to minority-owned construction firms, and discriminate against minority-group workers in apprenticeship programs. The execution of project labor agreement was also cited as disadvantageous to minority owned construction companies and their desire to employ minority workers.

I would like to give you some specific examples of real business owners who have confronted discrimination. This represents a sampling of the testimonies we have collected. With the Chair's permission, we may supplement our testimony with additional examples at a later date. It is critical that the Committee understand how very difficult it is for these businesspersons to come forward and share their experiences. By coming forward, they are putting their businesses in jeopardy of being blackballed and frozen out of future business opportunities with larger companies that dominate their market or industry. I hope that you will all carefully consider the sort of courage and commitment to justice required to those kinds of risks. I will submit letters and emails providing details of these entrepreneurs' stories for the record. However in the interest of time, I will provide only a short synopsis anonymously of the difficulties they have experienced

INDIVIDUAL TESTIMONIES

- A Louisiana concrete contractor was rejected by six banks despite the fact that he worked for some of the largest real estate development companies in the country, and had been an officer of the city government with responsibility for putting finance deals together. He therefore knew what the banks were looking for and knew the bankers personally. He had contract commitments from customers who were willing to go with him to the bank to verify their commitments. Nevertheless, he was forced to diversify his ownership to include a white minority partner before any of the banks would approve a loan. The only difference in his presentation to the banks before and after loan approval was the presence of a white equity partner. The critical variable was not the financial strength of his presentation because he had a wealthy black football player that was willing to act as credit backer, but the banks still rejected the loan application. Only when the white credit backer was presented did the banks approve, so the issue had to be the credit backer's race.

  His is an 8-year-old business with 45 employees. He has generated 25% annual growth even during the recession with $10-15 million annual sales and $800,000 to $1 million in annual profits, which he used to retire his debt by 50% in the last two years. He has three times the cash flow needed to cover debt service on three new plants, but still can not get a loan for a single new plant unless he has a backer. In spite of his obvious creditworthiness, he is facing the same discrimination today that he faced as a start-up business. No matter how strong his business is, he must have a "secondary source" of repayment before the banks will lend to him, and he has documentation from the banks to prove it.

- An African-American contractor in Richmond, Virginia faced disparate treatment in his competition for construction, demolition, and disposal contracts. After his bid for a city demolition contract was determined to be the lowest, the contract was split in half – resulting in a majority contractor receiving a portion of the contract as well. In other cases where he was the lowest bidder and the contract award was split, majority contractors would receive larger shares of the work despite their higher bids. In another case where he had the lowest of four bids and another African-American contractor submitted the second lowest bid, the contract was subsequently awarded in part to all four.

- An African-American electrical contractor in Philadelphia, Pennsylvania was forced to join the International Brotherhood of Electrical Workers in order to continue to provide services to the Philadelphia School District under the terms of a union-only project labor agreement (PLA). The PLA provided that minority contractors who joined the union because of the PLA but were never unionized prior to the PLA, would be permitted to utilize their own work force of skilled and semi-skilled workers rather than workers provided by the union hiring hall. Six of the contractor's nine employees were signed as apprentices. The apprentices were told that apprenticeship classes would begin three or four months later. When the classes began, they learned that all the other participants in the apprenticeship program had been given the benefit of up to ten weeks pre-apprenticeship training, including mathematics courses. The minority apprentices had difficulty with the geometry, trigonometry and other subjects, having been out of school six to seven years. The union terminated all six apprentices, banning them from continuing to perform work that they had been successfully performing for years and denying the minority contractor the benefit of utilizing the workforce he had personally trained and should have been allowed to employ under the terms of the PLA. The contractor is now litigating this and other related issues with the IBEW in federal court.

- A leading second-generation New Orleans African-American general contractor has been in business for eighteen years, and has done business throughout the Gulf region and in more than a dozen countries. He is an 8A and HUB Zone program participant. Recently he paid cash for a 50,000 square foot strip mall and a 26-unit condominium complex worth $8 million. He has perfect credit and substantial deposits on account with Omni Bank, Chase and Capital One. He has done business with Chase and Capital One for years and they know him well. Yet even though he has perfect credit and has $8 million in real estate as collateral, when he sought a loan of $1.5 to $2 million and was not able to get a response for three months from these banks to complete the project renovations. He has over $20 million in bonding capacity and an 18-year track record, but still cannot

get a modest working capital loan, even from banks that have known him, and profited from his business, for years.

- Another African-American contractor encountered difficulties while working on a bridge project in Maryland. The Ironworkers Local said that they were informed by the business manager of the ironworkers in another jurisdiction that the contractor only hired minorities and told him that was not going to happen in Baltimore. The contractor explained that, while he planned to hire minorities on the project, he did not have a problem hiring non-minorities, some of whom he had already identified. He agreed to release the non-union minorities he had hired and hire his workers through the union hall. The union initially sent him a crew of four, two of which were minorities that were so obviously unqualified that they themselves wondered why the union had sent them. They were on probation (complete with ankle bracelets) and had to receive visits from their probation officer twice a day. Though they both carried union cards identifying them as journeymen, they did not know how to read blueprints and did not know how to tie steel. When the contractor complained to the union for sending unqualified workers he was told, "you asked for blacks and we sent you blacks." The contractor explained his dilemma to one of his non-minority workers, who told him that he knew of many minority ironworkers who could tie steel. When he contacted them he was asked why he had not contacted the black ironworkers, and was told that there are hundreds of black ironworkers were "sitting on the bench" waiting for a call to work. When they learned that an African-American had been awarded the contract, they felt that they would get an equitable opportunity to work but had never been called. The union refused to call minority ironworkers who were qualified.

- An African-American general contractor in Richmond, Virginia formed a joint venture with other African Americans in an effort to pool their resources, knowledge and experience. The group faced disparate treatment in the bidding process for the construction of 106 manufactured homes through HUD. They were selected as finalists and invited to compete in a defined, multi-step process. However, the local agency failed to follow its own steps in the process that had been outlined before awarding the contract to a majority firm with less experience. Through its bid protest, the group discovered that they had been assigned a "zero" on the financial component of their evaluation by the white committee members even though they "had four banks backing them" and "more money than everyone else [bidding] combined."

  In another example of disparate treatment, the group bid on, and won, a contract in Petersburg, Virginia for mixed use and income apartments. Subsequently, certain issues regarding parking and historical preservation were identified. Although the group identified efficient solutions, the city manager said he doubted their figures and that the contract would be

resubmitted for bidding. A majority contractor with strong political ties was ultimately awarded the project.

- Another African-American contractor in Richmond, Virginia successfully bid on the first large contract awarded to a minority firm by a local university. The university had a "dog and pony show" congratulating him. Once the project commenced, it became clear that drawings were incomplete. The contractor proposed the necessary solutions and price, but did not receive approval. An African-American from the university working supportively with the contractor was terminated. Ultimately the in-house renovations department took over the project. The contractor was advised by the campus diversity purchasing director to "just let it go." The contractor was not compensated for a large amount of the work performed before his removal.

Clearly racial discrimination remains a very serious problem in government contracting. We strongly urge this subcommittee to continue to investigate and document this discrimination so that we can ensure that the government is adequately addressing this very serious problem. Thank you for your attention.