In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1007

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DEVITTA as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHERRY AIR-CONDITIONING CO., INC.,

Petitioners,

vs.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS H. EARL FULLILOVE, ET AL.

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS H. EARL FULLILOVE, ET AL.

INTEREST OF AMICUS

This brief amicus curiae is respectfully submitted on behalf of amicus curiae Pacific Legal Foundation (hereinafter PLF) pursuant to Supreme Court Rule 42. Consent

to the filing of this brief has been granted by counsel for all parties and has been filed with the Clerk.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for the Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

At the present time, PLF counsel are representing plaintiffs and appellees Associated General Contractors of California, *et al.*, in several actions before this Court, Nos. 78-1108, 78-1114, 78-1382, 78-1107, 78-1442, which, like the present case, challenge the validity of the minority business enterprise quota of the Public Works Employment Act of 1977. This Court has, as of now, taken no action in the above designated cases. PLF, therefore, wishes to take this opportunity to present its views in regard to the quota provisions and to argue that, as applied to this case, the guarantees of the United States Constitution prohibit such preferences.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York is reported at 443 F. Supp. 253 (S.D.N.Y. 1977), and the opinion of the United States Court of Appeals, Second Circuit, is reported at 584 F.2d 600 (2d Cir. 1978).

STATEMENT OF THE CASE

On May 13, 1977, Congress enacted the Public Works Employment Act of 1977 (hereinafter Act or PWEA), Pub. L. No. 95-28, amending the Local Public Works Capital Development and Investment Act of 1976, 42 U.S.C. §§ 6701, *et seq.* The amendments, among other things, included a provision which required that at least 10% of the dollar value of each project grant be expended with certain minority business enterprises. On May 27, 1977, the Secretary of Commerce issued regulations implementing minority business enterprise (hereinafter MBE) preference. These regulations restated the statutory requirement that no grant would be made under the Act unless at least 10% of the grant amount is expended with minority business enterprises. 42 Fed. Reg. 27,434-35 (May 27, 1977).

Numerous challenges were made in United States district courts to the constitutional and statutory permissibility of the MBE provision of PWEA. Three district courts found the MBE to be unconstitutional, either on its face or as applied. *Associated General Contractors of California v. Secretary of Commerce*, 441 F. Supp. 955 (C.D. Cal. 1977); *Wright Farms Construction, Inc. v. Kreps*, 444 F. Supp. 1023 (D. Vt. 1977); *Montana Contractors' Association v. Secretary of Commerce*, 460 F. Supp. 1174 (D. Mont. 1978). In the present case, both the United States District Court for the Southern District of New York and the United States Court of Appeals, Second Circuit, found the provision to be valid. *Fullilove v. Kreps*, 443 F. Supp. 253 (S.D.N.Y. 1977); *Fullilove v. Kreps*, 584 F.2d 600 (2d Cir. 1978). This Court must now determine whether these rulings were proper. It is the position of amicus curiae Pacific

Legal Foundation that, in upholding the MBE preference, the courts below failed to apply properly the standards required by this Court for cases in which governmental activity is challenged for failure to comply with the equal protection and due process guarantees of the United States Constitution. It is further the position of amicus curiae that the courts below erred in not finding the MBE preference in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000, *et seq.*

ARGUMENT

I

THE MBE PREFERENCE IN THE PUBLIC WORKS EMPLOYMENT ACT OF 1977 VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION

Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2), requires that:

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

The primary issue in this case is whether this Act violates the equal protection, due process, and other guarantees of the United States Constitution. The issue of the constitutionality of a federal statute which grants a preference to selected minority groups is clearly one that this Court has never before reached. However, as with many questions of first impression, the Court is not, in this case, without an excellent map established by the principles of prior decisions, which plainly set forth the route to the final decision.

It is established that the Fourteenth Amendment guarantees of equal protection apply, by way of the Fifth Amendment's Due Process Clause, in cases of federal action. *Washington v. Davis*, 426 U.S. 229, 239 (1976). It is also clear that classifications, such as the one at issue in the present case, which are based on race or national origin, are inherently suspect and subject to the most strict scrutiny under an equal protection analysis. *Loving v. Virginia*, 388 U.S. 1, 9, 11 (1967). The fact that a state action discriminates against persons not traditionally termed "minorities" does not alter the scrutiny required when a court examines classifications based on race or national origin. *Civil Rights Cases*, 109 U.S. 3, 24 (1883); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *Regents of the University of California v. Bakke*, 46 U.S.L.W. 4896, 4904 (1978) (opinion of Powell, J.).

Further, it is settled that when a law establishes a classification which is subject to strict scrutiny, the government imposing the classification must show the law is "'necessary to promote a compelling governmental inter-

est.'" *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972). As this Court made explicit in *Dunn v. Blumstein*, 405 U.S. at 343:

> "It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' [citations omitted], and must be 'tailored' to serve their legitimate objectives. Shapiro v. Thompson, supra, at 631, 22 L Ed 2d at 613. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'"

These established principles, when applied to the facts of this case, demonstrate that MBE quotas in PWEA unconstitutionally abridge the rights guaranteed to the petitioners by the United States Constitution.

A. The MBE Preference Has Not Been Shown to Serve a Compelling State Interest

At the heart of the decision upholding the Act's MBE quota is the finding that "under the most exacting standard of [equal protection] review the MBE provision passes constitutional muster." *Fullilove*, 584 F.2d at 603. In making this determination, the court correctly recognized that it must inquire into whether the MBE provision served a compelling state interest and noted that the provision "is permissible only if it is a remedy for past discrimination." *Id.*

In holding that a remedial preference can fulfill a compelling state need, the Court of Appeals specifically endorsed and relied upon the reasoning of Justice Powell in *Bakke*. The issue in *Bakke*, concerning the permissibility of a 16% set-aside for minority medical school applicants, is strikingly similar to the issue presented in this case. In *Bakke*, Justice Powell's opinion constituted the determinative factor in holding the set-aside invalid. While Justice Powell did consider that the remedying of past discrimination might serve as a compelling justification for a minority preference, he elaborated:

> "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. [Citations omitted.] After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations [footnote omitted], it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm. [Footnote omitted.]" *Bakke*, 46 U.S.L.W. at 4906-07.

Thus, in order for the MBE quota in PWEA to be justified as meeting a compelling state need, the quota must be shown to be based on specific findings of past discrimination against MBE's preferred by the Act. While the Court of Appeals appears to recognize this requirement, its analysis of the congressional action preceding the adoption of the quota and its determination that "Congress acted upon sufficient evidence of past discrimination," *Fullilove*, 584 F.2d at 606, reveals a misunderstanding of the issues involved.

Briefly, the Court of Appeals found that in adopting the MBE provision of PWEA, Congress, because of its special competence, must be presumed to have intended to remedy past discrimination and that the quota would "[make] no sense unless it is construed as a set-aside to benefit minority contractors." *Id.* at 604 (footnote omitted). It also held that although there were no explicit congressional findings of past discrimination, this could be overlooked because knowledge of the history of discrimination in the construction industry was well established in the minds of the members of Congress. In addition, the court construed as findings a one sentence comment referring to economic and social discrimination in the national business system contained in a report prepared by a subcommittee on a matter unrelated to the MBE provision. *Id.* at 605-06, n.10.

The errors of the Court of Appeals' determinations become clear when the evidence of congressional activity surrounding the passage of the MBE preference is carefully examined and when the pertinent law is applied to this evidence. To begin, the issue here is not really the authority of Congress to provide a remedy for past dis-

crimination under the provisions of the Thirteenth and Fourteenth Amendments. Quite clearly, there is congressional authority for that purpose. *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Jones v. Alfred H. Mayer Company*, 392 U.S. 409 (1968). However, this authority is limited by the fact that Congress, like all other governmental agencies, is prohibited from denying persons the constitutional guarantees of due process and equal protection. *Katzenbach v. Morgan*, 384 U.S. at 650. In cases involving minority preferences, these guarantees are protected by requiring legislative findings of discrimination against minorities before a preference is allowed. *Bakke*, 46 U.S.L.W. at 4906-07; *Wright Farms Construction, Inc. v. Kreps*, 444 F. Supp. at 1038-39.

To recognize, as Justice Powell has done in *Bakke*, 46 U.S.L.W. at 4905 n.41, that Congress has special competence "to make findings with respect to identified past discrimination and its discretionary authority to take appropriate remedial measures" is indeed appropriate. However, it is a quantum leap from here to assuming, as the Court of Appeals did in this case, that Congress must be presumed to have made findings. There is a total absence of any congressional findings of identified past discrimination or constitutional or statutory violations against MBE's assisted by the preference in PWEA. The legislative history of the preference, which is confined to several pages in the congressional record, is devoid of any references to past discrimination. The most that can be said here is that proponents of the measure felt that minority businesses were underrepresented among those companies receiving federal contracts. 123 Cong. Rec. H1436-37 (1977)

(Remarks of Rep. Mitchell[1]). This notation of underrepresentation quite clearly cannot support a finding of discrimination. *Washington v. Davis*, 426 U.S. 229 (1976).

Similarly, there is nothing in the congressional history of the preference in general, nor specifically in the statements of its proponents, which would indicate an intent to remedy generalized past discrimination, even though specific findings had not been made. The goal to which the proponents refer is only that minorities be given some hypothetical "fair share" of government contracts. 123 Cong. Rec. H1440 (1977) (Remarks of Rep. Biaggi). Proportional parity is not required by the Constitution. Indeed, without more it is prohibited. *Washington v. Davis*, *supra*.

Also, it is apparent that the section of the report of the House Subcommittee on Small Business Administration Oversight and Minority Business Enterprise (hereinafter Subcommittee Report) relied upon by the Court of Appeals cannot be considered to be the type of findings required by Justice Powell in *Bakke* to support a minority preference. The quoted section contains no reference to the "identified past discrimination" mentioned by Justice Powell. The section merely notes past social and economic discrimination in the "business system" and observes that, "minorities, until recently, have not participated to any measurable extent, in our total business system generally,

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[1]In *Associated General Contractors of California v. Secretary of Commerce*, 441 F. Supp. 955, 969 (C.D. Cal. 1977), the court questioned whether these statements could be considered legislative history. Rather, the court characterized the statements as merely "debate rhetoric of a partisan." *See also, Montana Contractors' Association v. Secretary of Commerce*, 460 F. Supp. 1174, 1178-79 n.6.

or in the construction industry, in particular." *Fullilove*, 584 F.2d at 606 (emphasis omitted). There is absolutely no evidence that the report was considered by Congress during passage of PWEA's MBE provision or that the 10% quota was in any manner intended to remedy this past discrimination. *Montana Contractors' Association v. Secretary of Commerce*, 460 F. Supp. 1174, 1178-79 n.6 (D. Mont. 1978). Therefore, the "record" of MBE preference in PWEA is totally devoid of findings of statutory or constitutional violations against minority controlled construction businesses.

This absence is crucial inasmuch as Justice Powell has stressed,

> "Before relying upon these sort of findings [of discrimination] in establishing a racial classification, a governmental body must have the authority and capability to establish, *in the record*, that the classification is responsive to identified discrimination." *Bakke*, 46 U.S.L.W. at 4907 (emphasis added).

In the present case, the lack of specific findings of prior discrimination destroys any "capability to establish, in the record," that the MBE program was responsive to this problem.

It is also emphasized in Justice Powell's opinion in *Bakke* that in order to validate a minority preference, findings of statutory and constitutional violations constituting discrimination must be made *prior* to the preference's formulation and implementation. It is also clear that *post hoc* justifications, precipitated by a legal challenge, will not uphold a preference. *Bakke*, 46 U.S.L.W. at 4908 n.44; *Department of General Services v. Superior Court*, 85 Cal.

App. 3d 273, 284 (1978). In the instant case, all that exists are attempts at *post hoc* justifications of MBE preference.[8]

Furthermore, it is clear from the evidence to which the trial court refers that even the *post hoc* justifications of MBE preference presented there cannot support its validity. First, the Subcommittee Report speaks only in terms of generalizations. *Fullilove v. Kreps*, 443 F. Supp. at 295. More importantly, however, the only witness for the government at trial did not indicate any prior discrimination, but rather lack of it. Specifically, this witness "conceded on cross examination that he knew of no concerted effort by construction contractors to discriminate against minority business enterprises in the City of New York." *Fullilove v. Kreps*, 443 F. Supp. at 260 n.16. Thus, lacking a basis in specific findings of past discrimination, the MBE preference in PWEA cannot pass constitutional muster as fulfilling a compelling state interest.

B. The MBE Quota Has Not Been Shown to Be Necessary Nor Has It Been Shown to Be the Least Intrusive Method of Serving This Interest

Amicus has argued that a compelling state interest cannot be served by the MBE quota at issue here because it

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[8]As related in the text, the legislative history of the MBE preference indicates only a statement, on the part of the preference proponents, of minority underrepresentation in business and a desire to give minorities a hypothetical "fair share" of federal contracts. 123 Cong. Rec. H1440 (1977) (Remarks of Rep. Biaggi). There is no evidence of findings of discrimination made by Congress prior to enacting the preference. The only "specific" reference on which the Court of Appeals relies is the Subcommittee Report on small and minority businesses (*Fullilove v. Kreps*, 584 F.2d 600, 606 (2d Cir. 1978)). Since there is no record of this being before Congress at the time of consideration of the MBE preference, it was apparently not unearthed until respondents attempted to justify the quota at trial.

is not a remedy for past discrimination based upon specific findings of constitutional or statutory violations consisting of discrimination against minority businesses. Even assuming *arguendo* that there had been some generalized discrimination and knowledge of this on the part of Congress, these factors could not, in this case, be applied to support the validity of the MBE quota. Governmental action subject to strict scrutiny cannot be upheld solely on the basis that it meets a compelling state need; it must also be shown to be strictly "tailored" to serve legitimate objectives. Further, the government in serving the compelling state interest must choose means which are the least restrictive of constitutional rights. *Dunn v. Blumstein*, 405 U.S. at 343. In the context of the present case:

> "[i]f previous discrimination is one of the factors justifying a selection, [of a group for minority preference] then, generally speaking, the inclusion of members in the group who have not been victims of discrimination would not serve the public interest. By the same token, if to remedy the damage done or to promote racial equality a law is enacted which includes individuals upon whom those factors have not operated, then the remedy has not been precisely tailored." *Montana Contractors' Association v. Secretary of Commerce*, 460 F. Supp. at 1177.

The MBE quota here at issue makes no provision for aiding only minority group members who were victims of prior discrimination. Further, it even fails to make provision for implementation in areas where alleged discrimination has taken place or to make provision for utilization with respect to contractors who have practiced discrimina-

tion.[8] It therefore cannot be viewed in any way to be strictly tailored to meet the legitimate remedial objective. *Associated General Contractors of California v. Secretary of Commerce*, 441 F. Supp. at 965.

In actuality, it might even be doubted whether the MBE preference in PWEA could be said to be tailored in any way so that a remedial objective could be carried out. Since the preference contained no criteria of previous discrimination, there was no requirement that minority firms approved to fulfill the quota be victims of discrimination. As practice has shown, the lack of this requirement has indeed served to benefit many who could not be considered discriminatees under any definition of the term. General Accounting Office, *Report to the Congress of the United States: Minority Firms On Local Public Works Projects—Mixed Results*, January 16, 1979, at 25-30 (hereinafter GAO Report).

Just as respondents could not show that the MBE quota in PWEA is strictly tailored to meet a remedial objective, neither could they show that there are no other reasonable ways to achieve remedial goals which might be less restrictive of petitioners' constitutional rights.

Imposing a racial preference in the form of a quota is a most drastic measure. *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420, 427 (2d Cir. 1975). Thus it would have to be very clear that there were

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[8] If Congress had been attuned to aiding specific victims of actual discrimination in passing the MBE preference in PWEA it is quite unlikely that the preference would have operated to affect current petitioners. This is the case because, even when given the opportunity to justify the MBE preference after the fact, respondents could produce no evidence of discriminatory activity by petitioners. *Fullilove v. Kreps*, 443 F. Supp. 253, 260 n.16 (S.D.N.Y. 1977).

no reasonable alternatives available in the present case in order to justify the quota's use. This clarity simply does not exist. On the contrary, it is apparent that alternative means for aiding minority businesses, even assuming past discrimination, were readily available to the government. The means which most readily come to mind are, of course, utilization and improvement of the Small Business Administration program authorized under 15 U.S.C. §§ 631, *et seq.* The GAO Report makes clear that these means could have indeed been utilized more effectively, even in conjunction with the MBE program. GAO Report at 30-32. *See also, Associated General Contractors of California v. Secretary of Commerce,* 441 F. Supp. at 965-66.

It is also apparent that Congress itself was aware of means less intrusive than the strict 10% quota upheld by the Court of Appeals. During the second session of the 95th Congress, detailed consideration was given to institution of an MBE preference which, although stated in terms of a quota, would not be absolute in regard to percentage and would be geared to MBE availability. *Associated Contractors of California v. Secretary of Commerce,* 459 F. Supp. 766, 775 (C.D. Cal. 1978). Although such a sliding quota, without more, might be subject to attack on equal protection grounds were it not remedial and based on findings of discrimination, the fact that it is available indicates that a nationwide 10% preference is unreasonably burdensome.

In upholding the constitutionality of PWEA's MBE quota the Court of Appeals appears to give consideration to the requirement that governmental action subject to strict scrutiny must not only fulfill a compelling state interest, but must also meet additional tests. However, in

place of the requirements that such action must be strictly tailored to fulfill legitimate objectives and minimally intrude into the constitutional rights of affected parties, the Court of Appeals determined only that the action must "not exceed the bounds of fundamental fairness." *Fullilove*, 584 F.2d at 607. This determination is completely at odds with the equal protection standards set forth by this Court in *Dunn v. Blumstein, supra.*

Further, it is difficult to transfer and utilize the fundamental fairness concept to which Justice Powell referred in *Franks v. Bowman Transportation Company*, 424 U.S. 747 (1976), to the quota at issue in the present case in that *Franks*, as a Title VII case, did not even consider equal protection standards as applied to state action.

Therefore, if the well established equal protection standards elucidated in *Dunn v. Blumstein, supra*, are to be altered, this alteration cannot be made based upon reasoning in a case which does not even consider such standards. Thus, the Court of Appeals erred when it engrafted fundamental fairness concepts onto a strict equal protection analysis.

The Court of Appeals commits further error when it attempts to minimize the effects of the MBE quota upon nonminority businesses. The court reasons:

> "Considering that nonminority businesses have benefitted in the past by not having to compete against minority businesses, it is not inequitable to exclude them from competition for this relatively small amount of business for the short time that the program has to run." *Fullilove*, 584 F.2d at 608.[4]

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[4]Under the MBE preference in PWEA, nonminority businesses have been excluded from $400 million worth of contracts.

This reasoning primarily ignores the fact that the equal protection guarantees of the Constitution apply to individuals not groups, *Shelley v. Kraemer*, 334 U.S. 1, 22 (1947). Thus, even were generalized discrimination to be assumed here, this cannot justify the adverse effects of preferential relief upon those who have not discriminated. This is in itself inequitable and indeed impermissible when the preferential relief is not, as it is not in the present case, directed toward aiding specific victims of discrimination. *Bakke*, 46 U.S.L.W. at 4904, 4906. Further, the assumption that petitioners, or any specific nonminority business, have benefited from, or achieved their current positions, as a result of minority discrimination, thus reducing the inequity of the MBE quota, is an unwarranted assumption which simply cannot be made. *Id.* at 4903 n.36.

II

THE MBE QUOTA IS AN UNCONSTITUTIONAL BILL OF ATTAINDER

The MBE quota raises serious questions under article I, section 9 of the United States Constitution which prohibits the enactment of bills of attainder.[8] The constitutional prohibition against bills of attainder has been examined by this Court infrequently. However, in 1866 the Court examined a portion of the Missouri Constitution which required persons to take an oath of loyalty as a prerequisite to practicing a profession or holding a position of "honor, trust or profit" in the state. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 317 (1867). In finding that

[8]Article I, Section 9, Clause 3 of the U.S. Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed".

the oath requirements constituted a prohibited bill of attainder, this Court in *Cummings* reviewed the historical and philosophical derivations of bills of attainder. In so doing, the Court set forth standards, defining a bill of attainder as "a legislative act, which inflicts punishment without a judicial trial." *Id.* at 323. Punishment was broadly defined by the Court in the following manner:

> "The deprivation of any rights, civil or political, previously enjoyed, may be punishment; the circumstances attending and the causes of the deprivation determine this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as executor, administrator or guardian, may also, and often has been, imposed as punishment." *Id.* at 320-21.

The evil of this type of deprivation through legislative action was clear. As the Court indicated:

> "there would be legislative enactment creating the deprivation, without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals." *Id.* at 324.

In addition to the element of punishment, the Court in *Cummings* established that to be prohibited as a bill of attainder, a legislative enactment must also be specific. In other words, it must single out or designate named individuals or ascertainable groups to bear the penalty of the law.

The MBE provisions of PWEA contain both the elements, punishment and specificity, of bills of attainder.

It is a legislative enactment which applies to members of an ascertainable group, nonminority contractors who wish to work on specific federally funded projects. Under the MBE provisions, general contractors are, without more, prevented from successfully bidding for government work unless they work with certain designated groups. Nonminority subcontractors are totally excluded from at least 10% of all the federal contracts awarded under the Act. This type of requirement is akin to that held invalid in *Cummings* wherein the provision challenged deprived certain persons of their chosen livelihoods.

It is also similar and perhaps more closely related to the federal statute which this Court examined in *United States v. Lovett*, 328 U.S. 303 (1946). That statute specifically prevented certain individuals from holding government employment by prohibiting appropriations for their salaries. This Court had little difficulty in finding the legislation prohibited by the bill of attainder clause and stressed its severity in excluding individuals from their chosen employment. *Id.* at 316. While the exclusionary features of the PWEA minority quota are not as severe as those in either *Cummings* or *Lovett*, the amount of exclusion or punishment is immaterial in determining whether legislation is proscribed as a bill of attainder. *United States v. Lovett*, 328 U.S. at 324 (Frankfurter, J., concurring).

In meeting the definitional elements required for bills of attainder, the MBE quota forcefully illustrates the evils toward which the bill of attainder clause was directed. This Court in *Cummings* indicated the dangers of deprivation of rights without the safeguards traditionally associated with

the judicial process. The Court in *Lovett* elaborated upon this in holding that the framers of the Constitution:

> "intended to safeguard the people of this country from punishment without trial by duly constituted courts. [Citations omitted.] And even the courts to which this important function was entrusted, were commanded to stay their hands until and unless certain tested safeguards were observed. . . . When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder." *Id.* at 317-18.

In the instant case, the nonminority individuals subject to the MBE quota have had not even the benefit of a legislative trial. Since there have been no findings of specific past misconduct in the form of discrimination against minorities and no attempt even made to make such findings, the excluded contractors have had no opportunity to show either that there has been no misconduct at all or that they themselves have not participated in it. They are simply being asked to submit to the penalty of exclusion. It is this mute submission that the bill of attainder clause was created to prohibit.

In *United States v. Brown*, 381 U.S. 437 (1965), this Court again dealt with a challenge that a certain federal enactment violated the constitutional prohibition against bills of attainder. In ruling that the statute was invalid, the Court, as it had done in the past, examined the philosophies of the men who created the United States Constitution. In quoting from the writings of Alexander Hamilton, the Court illuminated yet another danger of allowing the

Legislature to penalize certain individuals without providing adequate safeguards:

> "'Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense.'" *Id.* at 444 (footnote omitted).

A minority quota such as that included in PWEA aptly illustrates the exclusionary dangers which Alexander Hamilton feared. In fact, writing almost 200 years after Hamilton, Justice Douglas, dissenting in *De Funis v. Odegaard*, 416 U.S. 312, 341-43 (1974), alluded to many of the same reservations when discussing a minority quota for law school admissions. Justice Douglas noted that quotas for one group can evolve into quotas for all and that preferential policies may well carry stigmatization as severe as active discrimination. These dangers cogently illustrate that while quotas may indeed "gratify momentary passions" of political expediency, they may well establish "principles and precedents which afterwards prove fatal to themselves."

III

THE MBE PROGRAM IN THE PUBLIC WORKS EMPLOYMENT ACT OF 1977 IS IN VIOLATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

The appellate decision in *Fullilove* dealt almost exclusively with the court's views regarding the constitutional permissibility of PWEA's MBE provisions. However, it is also apparent that the court considered the preference to be consistent with Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(d), *et seq.*[6] *Fullilove*, 584 F.2d at 608 n.15. In *Bakke*, Justices Stevens, Stewart, Rehnquist, and the Chief Justice would have decided the case solely on the basis of Title VI, stating that the statute must have a "colorblind" application which prevents the exclusion of any person from a federally funded program on the ground of race.

In concluding that Title VI would have invalidated the University of California at Davis' medical school admissions policy, the justices reiterated:

> "[T]he meaning of the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program." *Bakke*, 46 U.S.L.W. at 4935.

In the present case, as in *Bakke*, it is apparent that an alloted percentage of governmentally created benefits was denied to nonminorities simply because of their race. This

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[6] Title VI of the Civil Rights Act of 1964 provides:

"No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000(d).

similarity clearly indicates that the reasoning of Justices Stewart, Rehnquist, Stevens, and the Chief Justice that Title VI mandates a color-blind approach would find the MBE quota in PWEA to be in violation of Title VI. When the opinion of Justice Powell in regard to Title VI is considered, the decision of a majority of the Court's members necessitates a finding that the MBE preference violated Title VI. Justice Powell observed:

> "[e]xamination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution." *Id.* at 4900.

Therefore, in Justice Powell's opinion, if a federally funded activity violates the Constitution's guarantees in regard to racial treatment, it also violates Title VI. As has been discussed in detail above, the MBE preference of PWEA clearly violates the guarantees of equal protection.

It is, therefore, apparent that the program challenged herein cannot survive a Title VI challenge when Title VI is read in the manner in which a majority of the *Bakke* court indicates it must be. And, as noted in *Associated General Contractors of California v. Secretary of Commerce*, 441 F. Supp. at 966-69, the circumstances surrounding the adoption of the MBE quota in PWEA subordinate that statute to the national policy expressed in Title VI.

CONCLUSION

Using the Thirteenth and Fourteenth Amendments as bases, the representatives of the American people have gradually passed legislation designed to eradicate racial distinctions. *See, e.g.*, Civil Rights Acts, 42 U.S.C. §§ 1981, *et seq.*; Civil Rights Acts of 1964, 42 U.S.C. §§ 2000(a) *et seq.* The 10% MBE quota contained in PWEA represents a radical departure from this tradition. Instead of eliminating racial considerations from governmental determinations, the quota stresses these considerations. It is the position of amicus that such a departure cannot be made consistent with the guidelines of equal protection which have evolved from the Fifth and Fourteenth Amendments. Congress has failed to resort to studied action, supported by detailed reasoning, and rather has summarily approved an arbitrary quota based solely upon assertions of several members that certain groups have been underrepresented in certain areas of the national scene. Inasmuch as the decision of the Court of Appeals in the present case approved just such an arbitrary quota, it is respectfully submitted that this Court reverse the decision below and find the MBE quota here at issue statutorily and constitutionally impermissible.

Respectfully submitted,

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