IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, et al., *Petitioners,*

v.

JUANITA KREPS, Secretary of Commerce of the United States of America, et al., *Respondents.*

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

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BRIEF AMICUS CURIAE OF THE MINORITY CONTRACTORS ASSOCIATION, INC.

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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INTEREST OF AMICUS

This brief *amicus curiae* is submitted with the consent of counsel[1] on behalf of the Minority Contractors Association, Inc. The Minority Contractors Associa-

[1] This brief is filed with the consent of the parties. The letters of consent that are not presently on file with the Clerk will be filed with the Clerk of Court immediately following receipt.

tion, Inc., is an association of predominately Native American Construction contractors and subcontractors located in the State of Montana. The Indian membership of the Association reflects the demographic fact that Indians comprise the only significantly numbered minority group in the State of Montana. The Association, concerned with the economic well-being of its members, has a special interest in the implementation of federal statutes which may yield economic benefits to minority contractors in general and Indian contractors in particular. Federal statutes providing for Indian preference in employment are of special concern to the Association as these statutes directly affect the livelihood of Association members. *See, e.g.*, § 7(b) of the Indian Self-Determination Act, 25 U.S.C. § 450e(b); and the Buy-Indian Act, 25 U.S.C. § 47. Since the Minority Business Enterprise (MBE) provision of § 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), 42 U.S.C. § 6705(f)(2), expressly provides a limited employment preference for American Indians and other minorities, a decision concerning the provision's constitutionality could obviously have substantial impact upon the economic vitality of Indian owned economic enterprises as well as the validity of other Indian preference legislation. Indeed, the federal district court in Montana, applying the strict scrutiny test, held that the MBE provision is unconstitutional as applied to Indians. *Montana Contractors Association, et al.* v. *Secretary of Commerce, et al.*, 460 F.Supp. 1174 (D.Mont. 1978). The rationale of that decision threatens all Indian preference legislation and the decision itself directly affects the members of the Association. The interest of the Association as *amicus curiae* is therefore apparent.

ARGUMENT

I. With Respect To American Indians The Rational Basis Test Is The Proper Standard Of Judicial Review.

Amicus does not intend to offer additional arguments as to the constitutionality of the MBE provision of PWEA under the strict scrutiny standard of review. The Solicitor General and the other *amici* have adequately demonstrated the constitutionality of the MBE provision under the strict scrutiny test, and *amicus* joins in these arguments. *See Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978).

Amicus does point out, however, that the rational basis test has continuously been applied by this Court to test the constitutionality of federal legislation affecting Indians. The leading modern case is *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974). *See also Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, —— U.S. ——, 58 L.Ed.2d 740, 767-768, 99 S.Ct. 740 (1979); *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 85 (1977); and *United States* v. *Antelope*, 430 U.S. 641, 645 (1977). *Cf., Fisher* v. *District Court*, 424 U.S. 382, 390-391 (1976); and *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480 (1976). *See also* Johnson and Crystal, *Indians and Equal Protection*, 54 Wash.L.R. 587 (1979). The oft-repeated test is stated as follows:

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.

E.g., Morton v. *Mancari, supra* at 555.

This Court has recognized that the strict scrutiny test is not applicable to federal legislation concerning

Indians because of the unique legal status of Indians under federal law. In *United States* v. *Antelope, supra* at 645 and 646, this Court stated:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications.
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> * * * *
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> . . . [F]ederal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a " 'racial' group consisting of 'Indians' . . . . [citing *Morton* v. *Mancari*, 417 U.S. 553 n.24].

Since the MBE provision of PWEA expressly applies to citizens of the United States who are "Indians, Eskimos and Aleuts," 42 U.S.C. § 6705(f)(2), it is clear from the decisions of this Court that the rational basis test is the applicable standard to judge the constitutionality of the MBE provision as applied to Indians. Furthermore, given the applicability of the rational basis test, the Court need not consider "the wisdom, need or appropriateness of the legislation" with respect to Indians as these are considerations which are properly left to Congress. *Olsen* v. *Nebraska ex rel. Western Ref. and Bond Association*, 313 U.S. 236, 246 (1941). Accordingly, judicial, administrative, or legislative "findings" such as findings of past discrimination are not necessary with respect to Indians where the rational basis test is employed.

II. The MBE Provision Is Rationally Related To Congress' Unique Obligation Toward The Indians .

The three primary sources of Congress' unique obligation to the Indians can be traced to the explicit reference in Article I, Section 8 of the United States Constitution granting Congress exclusive authority to regulate commerce with Indian tribes, to the treaty power of Article II, Section 2, Clause 2 of the Constitution, and to congressional authority to legislate with respect to the guardian-ward relationship between the federal government and the Indians. *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164, 171 n.7 (1973); *United States* v. *Kagama*, 118 U.S. 375 (1886); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832). Pursuant to this authority, the federal government has promoted Indian self-government and encouraged the employment and economic development of Indian individuals and enterprises. *See, e.g., Bryan* v. *Itasca County*, 426 U.S. 373, 426 U.S. 873, 388 n.14 (1976); *Fisher* v. *District Court*, 424 U.S. 382 (1976); *Arizona* v. *California*, 373 U.S. 546, 599-601 (1963); *Squire* v. *Capoeman*, 351 U.S. 1, 9-10 (1956); Indian Financing Act, P.L. 93-262, 88 Stat. 77, 25 U.S.C. § 1451, *et seq.*; §§ 701(b) and 703(i) of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. §§ 2000e(b) and 2000e-2(i); the Indian Self-Determination Act, P.L. 93-638, 88 Stat. 2203, 25 U.S.C. § 450, *et seq.*; President's 1970 Message to Congress on Indians, 116 Cong. Rec. 23132-33 (1970).

Furthermore, this Court has recognized that employment preferences for Indians are directly related to the articulated federal goal of promoting tribal self-government. In *Morton* v. *Mancari*, *supra*, a case up-

holding an employment preference for Indians within the Bureau of Indian Affairs, this Court noted:

> [T]his preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. Rather, it is an *employment criterion* reasonably designed to further the cause of Indian self-government . . . . [citations omitted] [emphasis added].

417 U.S. 553-554.[2]

Moreover, the federal obligation to Indians extends beyond the promotion of Indian self-government—it extends "more broadly" to justify special treatment for Indians in other areas as well. *United States* v. *Antelope, supra,* 430 U.S. at 646. *See also State of Washington* v. *Washington State Commercial Passenger Fishing Vessel Association,* —— U.S. ——, 61 L. Ed.2d 823, 837 n.20, 99 S.Ct. —— (1979); *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918); and *Winters* v. *United States,* 207 U.S. 564 (1908).

This Court has recognized the validity of Indian employment preferences in other areas. In *Morton* v. *Mancari,* this Court noted the comments of Senator Humphrey, the Senate sponsor of the Civil Rights Act of 1964, in explaining §§ 701(b) and 703(i) of Title VII of the Civil Rights Act which provided for prefer-

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[2] A lower federal court has also noted the relationship between Indian self-determination and Indian economic opportunities. In Livingston v. Ewing, 455 F.Supp. 825, 832 (D.N.M. 1978), *affirmed* 601 F.2d 1110 (10th Cir. 1979), the district court stated:

> Indian self-determination is meaningless if opportunities for self-support are destroyed. Therefore, it is clear that the policy is intimately and directly related to this one very legitimate, racially neutral state interest.

ential employment of Indians by Indian tribes or industries located on or near Indian reservations:

> This exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians. 110 Cong. Rec. 12723 (1964).

417 U.S. at 546.

The application of these principles clearly establishes that the MBE provision is reasonably and rationally related to the federal government's obligation to the Indians. Indians are expressly included as beneficiaries under the MBE provision. Further, § 105(a)(1) of PWEA sets aside 2½% of PWEA funds to be expended *exclusively* for "public works projects under this chapter to Indian tribes and Alaska Native villages." 91 Stat. at 117, 42 U.S.C. § 6707(a)(1). Also the legislative history of PWEA notes "the extremely high unemployment rate on Western Indian reservations." H.R.Rep. No. 95-20, 95th Cong., 1st Sess. 3, reprinted in 1977 U.S. Code Cong. & Admin. News 152. Furthermore, the 1976 Act (Local Public Works Capital Development and Investment Act of 1976, P.L. 94-369, 90 Stat. 999-1012, 42 U.S.C. §§ 6701-6735), which is extended and amended by PWEA, expressly includes Indian tribes as eligible public works grants recipients. 42 U.S.C. § 6701(3), and § 107(h)(2)(B) provides that the Secretary may receive applications for grants and projects "from Indian tribes and Alaska Native villages." 91 Stat. at 119, 42 U.S.C. § 6707(h)(2)(B). In light of the general congressional purpose behind PWEA to "help revitalize the Nation's financially-pressed communities," H.R.Rep. 95-20, 95th Cong., 1st Sess. 1, reprinted in 1977 U.S. Code Cong.

& Admin. News 150, and the specific references to Indians, it is clear that Congress, in enacting PWEA, was in part attempting to promote tribal government and Indian economic sufficiency. There is little doubt that these purposes are rationally related to Congress' unique obligation to the Indians. The MBE provision, therefore, is constitutional as applied to Indians.

CONCLUSION

Amicus agrees with the Solicitor General and the other *amici* that the MBE provision is constitutional as applied to all minorities, including Indians, under the strict scrutiny standard of review. If the Court does uphold the constitutionality of the MBE provision under this test, the decision should specifically note that the Act is also constitutional as applied to Indians.[1] However *amicus* asserts that the "rational relationship test" is the proper test of the constitutionality of the MBE provision as applied to Indians. *Amicus* further asserts that the MBE provision is consistent with and advances the trust relationship

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[1] In Montana Contractors Association, et al. v. Secretary of Commerce, et al., 460 F.Supp. 1174 (D.Mont. 1978), the Court held the MBE provision unconstitutional as applied to Indians under the strict strutiny standard of review as the Court concluded that the required "findings" as to Indians were not present.

that Indians enjoy with the federal government. Accordingly, if the MBE provision is struck down by the Court under the strict scrutiny standard of review, the Court should either uphold the constitutionality of the MBE provision as applied to Indians, *see United States* v. *Jackson*, 390 U.S. 570, 585 (1968,) or specifically note that its decision does not address the constitutionality of the MBE provision as applied to Indians.

Respectfully submitted,

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October 1979