IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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

BRIEF FOR PETITIONER, GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., THE NEW YORK STATE BUILDING CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 23a)[1] is reported at 584 F.2d 600 (2d Cir. 1978). The opinion of the United States District Court for the Southern District of New York (Werker, J.) (Pet. App. 1a) is reported at 443 F.Supp. 253 (S.D.N.Y. 1977).

[1] "Pet. App." refers to the appendix attached to Petitioners' Petition for Writ of Certiorari filed December 21, 1978.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgment on September 22, 1978. The petition for writ of certiorari was filed on December 21, 1978 and granted on May 21, 1979. The jurisdiction of this Court to review the judgment below rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether Sec. 103(f)(2) of the Public Works Employment Act of 1977, which provides for a 10 percent quota for minority business enterprises, violates the Due Process Clause of the Fifth Amendment.

Whether Sec. 103(f)(2) of the Public Works Employment Act of 1977, which provides for a 10 percent quota for minority business enterprises, violates Title VI of the Civil Rights Act of 1964.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V of the United States Constitution provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

STATUTES INVOLVED

Sec. 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116, 42 U.S.C. 6705(f)(2) provides:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act 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 busi-

> ness 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, or Aleuts.

Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d 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.

STATEMENT

On July 22, 1976, Congress enacted the Local Public Works Capital Development and Investment Act of 1976, Pub. L. 94-369, 90 Stat. 999, [hereinafter the LPWA)]. The LPWA provided $2,000,000,000 of federal funds to state and local entities for the purpose of alleviating national unemployment. On May 13, 1977, Congress enacted the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 [hereinafter PWEA], which amended the LPWA and appropriated an additional $4 billion for similar projects. The PWEA contained Sec. 103(f)(2), the minority business enterprise provision [hereinafter MBE provision], which required at least a 10 percent set aside [hereinafter quota] for minority business enterprises of the dollar value of each grant. 42 U.S.C. § 6705 (f)(2).

The Secretary of Commerce administers the PWEA through the Economic Development Administration [hereinafter EDA] which distributes program funds to state and local applicants for the construction of public works projects. Under Section 103(e)(1) of the PWEA, state and local grantees are required to contract with private contractors for the construction of these public works projects, 42 U.S.C. § 6705(e)(1). On May 27, 1977, the Secretary of Commerce issued regulations implementing the MBE provision of the PWEA, 42 Fed. Reg. 27,434 (1977).[2] There regulations require that at least 10 percent of each grant made under the PWEA must be expended for contracts with and/or supplies from minority business enterprises. 13 C.F.R. 317.19(b)(1).

In August of 1977, EDA issued *Guidelines for 10 Percent Minority Business Participation in LPW Grants.* Under these guidelines, the MBE requirement could be met in a number of ways, depending upon whether the particular project was administered through a single prime contract involving subcontracts and/or substantial supply contracts, more than one prime contract, simple contracts, or a combination of prime and simple contracts. *See* Respondent's Brief, Exhibit 22e-37e, *Fullilove* v. *Kreps,* 584 F.2d 600 (2d Cir. 1978), *cert. granted* May 21, 1979.

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[2] The regulations provide:

> (1) No grant shall be made under this part for any project unless at least ten percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.
>
> (2) The restriction contained in paragraph (1) of this subsection will not apply to any grant for which the Assistant Secretary makes a determination that the ten percent set-aside cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured.
>
> 13 C.F.R. 317.19(b) (1977).

The City of New York and the State of New York have received grants under the PWEA to fund various municipal projects. Contracts under these projects have been let in accordance with the MBE provision as implemented by EDA regulations and guidelines. Petitioner, General Building Contractors of New York State, Inc., The New York State Building Chapter, Associated General Contractors of America, Inc., is a contractor association whose members perform contracting work on construction projects, including projects let by the State of New York and the City of New York.* The other Petitioners are comprised of various individuals and contractor associations engaged in similar type of work as Petitioner.[3]

On November 30, 1977, Petitioners filed this action in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief. Petitioners contended that Sec. 103(f)(2), which provides for a 10 percent quota for minority business enterprises, violated the Fifth and Fourteenth Amendments, the Reconstruction Civil Rights Statutes (42 U.S.C. §§ 1981, 1983, and 1985) and Title VI and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000d, 2000e). Petitioners sought a declaratory judgment that the Sec. 103(f)(2) was contrary to statute and unconstitutional. Petitioners also sought to enjoin the Secretary of Commerce and the state and local entities that were grantees, having receiving funds under the Act, from enforcing Sec. 103(f)(2) of the MBE provision.

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* See Appendix A.

[3] These Petitioners are also jointly filing a brief in this case.

After denying Petitioners' motion for a temporary restraining order, the District Court consolidated Petitioners' application for preliminary injunction with a trial on the merits. Thereafter, the District Court issued an opinion which upheld the constitutionality and legality of Sec. 103(f)(2), denied all requests for relief and dismissed the complaint. *Fullilove* v. *Kreps,* 443 F.Supp. 253 (S.D.N.Y. 1977), (Pet. App. 1a-22a).

The United States Court of Appeals for the Second Circuit affirmed the decision of the District Court and held that Sec. 103(f)(2) did not violate the Fifth Amendment's Due Process Clause. *Fullilove* v. *Kreps,* 584 F.2d 600 (2d Cir. 1978) (Pet. App. 23a-41a). The Court of Appeals ruled that under the most exacting standard, the MBE provision passed constitutional muster. *Id.* at 603, (Pet. App. 28a). It found that "... the set-aside was intended to remedy past discrimination," and that "the [District Court] judge's finding that Congress acted upon sufficient evidence of past discrimination is more than amply supported by the record. . . ." *Id.* at 604, 606, (Pet. App. 32a, 36a). The Court of Appeals in a footnote states that a majority of this Court has held that Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment, citing *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978). *Id.* at 608, n.15, (Pet. App. 39a). Inasmuch as it finds the set aside provision constitutional, the Court of Appeals implies that the MBE provision does not violate Title VI.

SUMMARY OF ARGUMENT

The Fifth Amendment's Due Process Clause guarantees persons equal protection of federal laws. Traditional equal protection analysis is used in examining whether a statute violates the Due Process Clause. Where a statute contains a race-based classification, strict scrutiny analysis is required. Sec. 103(f)(2), the MBE provision of the PWEA, which establishes a 10 percent quota for each grant under the PWEA, is clearly a race-based classification and thus should be examined with strict scrutiny by this Court.

The MBE provision fails the strict scrutiny test for many reasons. First, Respondent [hereinafter the Government] has not shown a compelling governmental interest for the MBE provision. Specifically, the MBE provision is not a remedy for specific past discriminatory acts because none have been shown. Further, there have been no legislative findings by the Congress of discrimination by contractors or the construction industry generally. Also, the MBE provision is not precisely tailored to serve a compelling governmental interest. In addition, the MBE provision is not the less drastic means of achieving the Government's claimed objective. It has not been shown that the MBE provision is an effective means of arriving at its purported objective. Further, there exist or have been proposed other alternatives which are less drastic than the MBE provision which should have been considered by the Congress.

Moreover, Petitioner submits that under any test the MBE provision violates the Due Process Clause of the Fifth Amendment. Under the Due Process Clause, the MBE provision, a race-based classification, which

imposes disadvantages upon persons who bear no responsibility for whatever harm the beneficiaries of the MBE provision are thought to have suffered, cannot be justified. The MBE provision also violates Title VI of the Civil Rights Act, as amended.

ARGUMENT

I.

Sec. 103(f)(2) of the PWEA Violates the Due Process Clause of the Fifth Amendment of the Constitution

A. Sec. 103(f)(2) of the PWEA is subject to strict scrutiny [4]

This Court has held that the principles of the Fourteenth Amendment are embodied in the Due Process Clause of the Fifth Amendment. *Washington* v. *Davis,* 426 U.S. 229, 239 (1976); *Johnson* v. *Robison,* 415 U.S. 361, 364 n.4, (1974); *Frontiero* v. *Richardson,* 411 U.S. 677, 697 (1973). The type of analysis required is the same for both amendments. *See Buckley* v. *Valeo,* 424 U.S. 1, 93 (1976). Under modern equal protection standards, classifications based on "race" are suspect and therefore trigger the strict scrutiny standard. *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967); *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944); *Hirabayashi* v. *United States,* 320 U.S. 81, 100 (1943). In *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 291 (1978) [hereinafter *Bakke*], Justice Powell stated that "racial and ethnic distinctions of any sort are in-

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[4] The decision of this Court in *United Steelworkers* v. *Weber,* —— U.S. ——, Nos. 78-432, 78-435, and 78-436 (June 27, 1979) [hereinafter *Weber*], is inapposite to the instant case. The *Weber* case did not involve a constitutional challenge under the Fifth or the Fourteenth Amendment inasmuch as there was no governmental action.

herently suspect and thus call for the most exacting judicial examination."[5]

Sec. 103(f)(2) of the PWEA provides that at least 10 percent of each grant made under the Act must be to minority business enterprises. 42 U.S.C. § 6705(f)(2). Under this section, a "minority business enterprise" is a business at least 50 percent of which is owned by minority group members or 51 percent of the stock is owned by minority group members in the case of a publicly owned business.[6] Minority group members are defined in this section as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." The MBE provision is an explicitly race-based condition on the receipt of federal funds under the PWEA.[7] As a classification based on race, it is inherently suspect and subject to strict scrutiny by this Court.[8]

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[5] According to Justice Powell, racial and ethnic classifications are subject to stringent examination without regard to the additional characteristics of discreteness and insularity. *Bakke, supra* at 291.

[6] It is well established that corporations are persons within the meaning of the Equal Protection Clause of the Fourteenth Amendment and entitled to its protection. *First National Bank of Boston* v. *Bellotte*, 435 U.S. 765 (1978); *Safeguard Mutual Insurance Co.* v. *Miller*, 472 F.2d 732 (3d Cir. 1973); *Township of River Vale* v. *Town of Orangetown*, 403 F.2d 684 (2d Cir. 1968). Likewise, corporations are entitled to due process protections under the Fifth Amendment of the Constitution. *Wright Farms Construction, Inc.* v. *Kreps*, 444 F.Supp. 1023 (D. Vt. 1977); *Blawis* v. *Bolin*, 358 F.Supp. 349 (D. Ariz. 1973).

[7] The Secretary of Commerce has admitted that Congress, in enacting the MBE provision, created an explicitly race-based condition on the receipt of federal funds. *Fullilove* v. *Kreps*, 584 F.2d 600, 602 (2d Cir. 1978) (Pet. App. 28a).

[8] This Court also utilizes the strict scrutiny standard in ". . . reviewing legislative judgments that interfere with fundamental con-

The strict scrutiny standard involves a two-prong standard of review. First, the provision must serve a compelling governmental interest. Second, it can be justified only, if it is the less drastic means of achieving the objective.[9] *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 16-17 (1973); *Dunn* v. *Blumstein,* 405 U.S. 330, 337, 343 (1972); *Bakke, supra* at 299 (Powell, J.).

B. The 10 Percent MBE Provision does not serve a compelling governmental interest

This Court has recognized that there is a compelling governmental interest for racial classification preferences only where minorities were victims of discrimination by a particular employer.[10] Also, as recognized by Justice Powell in *Bakke, supra* at 301, such pref-

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stitutional rights. . . ." *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 16 (1973), and cases cited therein. In *Bakke, supra,* at 357, Justice Brennan in an opinion joined by Justices Marshall, White, and Blackmun [hereinafter Brennan, J.] stated: "a government practice or statute which restricts fundamental rights, . . . is to be subjected to strict scrutiny and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available." (footnote omitted). Justice Brennan did not employ the strict scrutiny analysis in reviewing the Davis two-track admissions system, finding neither a suspect class nor a fundamental right involved. *Id.* In contrast, the 10 percent MBE provision in the PWEA which absolutely deprives non-minority businesses from participating in at least 10 percent of each grant, infringes on their right to work, which is a fundamental right. *Slaughter House Cases,* 16 Wall 36 (1872). *See also Truax* v. *Raich,* 239 U.S. 33, 41 (1915). Thus, this is an additional reason for examining the 10 percent MBE provision under the strict scrutiny standard.

[9] The Court of Appeals erred in not finding that the 10 percent MBE provision, a clearly race-based classification, must be examined under the strict scrutiny standard.

[10] In *Franks* v. *Bowman Transp. Co.,* 424 U.S. 747 (1976), this Court approved a retroactive award of seniority to a class of

erences have been upheld where a legislative or administrative body made determinations of past discrimination by the industries affected.[11] In *Bakke, supra* at 307, Justice Powell stated:

> 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. See, *e.g., Teamsters* v. *United States,* 431 U.S. 324, 367-376 (1977); *United Jewish Organizations* v. *Carey,* 430 U.S. at 155-156; *South Carolina* v. *Katzenbach,* 383 U.S. 301, 308 (1966).

Justice Powell found that there was no compelling state interest for the race-based classification because "... there has been no determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts." *Id.* at 305. An analysis of the legislative history does not indicate Congress' purpose in passage of Sec. 103(f)(2) was to remedy past discrimination or that Congress made detailed findings of past discrimination that would justify the preferential treatment mandated in Sec. 103(f)(2).

The MBE provision was not considered in committee in either the Senate or the House.[12] The MBE provi-

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Black truck drivers who had been identifiable victims of discrimination, not just by society at large but by the employer in that case.

[11] *Contractors Ass'n of E. Pa.* v. *Secretary of Labor,* 442 F.2d 159 (3d Cir. 1971).

[12] See H.R. Rep. No. 20, 95th Cong. 1st Sess. (1977); S. Rep. No. 95-38, 95th Cong. 1st Sess; *Fullilove* v. *Kreps,* 584 F.2d at 605 (Pet. App. 34a).

sion originated as an amendment offered on the House floor by Representative Parren Mitchell during debate on the PWEA. 123 Cong. Rec. H. 1436 (daily ed. Feb. 24, 1977). The House passed H.R. 11 containing Representative Mitchell's amendment, after amending it to give the Secretary of Commerce discretion to grant waivers. 123 Cong. Rec. H. 1441, 1462 (daily ed. Feb. 24, 1977). Senator Edward Brooke moved to amend the Senate version of the PWEA to include a similar MBE provision.[13] 123 Cong. Rec. S. 3910 (daily ed. March 10, 1977). The Senate passed H.R. 11 on March 10, 1977, after amending it and inserting in lieu thereof S. 427, which contained Senator Brooke's amendment. 123 Cong. Rec. 3927-29. The Conference Committee on the PWEA agreed to the House version of the amendment. The Conference Committee's bill was agreed to by the Senate and the House.[14] 123 Cong. Rec. S. 6755-6757 (daily ed. April 29, 1977); 123 Cong. Rec. H. 3920-3935 (daily ed. May 3, 1977).

Thus, there is little legislative history relating to the MBE provision. The floor debates, in both the Senate (123 Cong. Rec. S. 3910) and the House (123 Cong. Rec. H. 1436-1441), do not mention present or past discrimination, nor the fact that the 10 percent MBE requirement was intended to remedy such discrimination. There was no "detailed legislative consideration of the various indicia of previous constitutional or statutory violations" by the Congress and

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[13] The Brooke amendment differed from the Mitchell amendment in that it would have prohibited defunding of a project for failure to comply with the 10 percent set aside in areas where the minority population was less than 5 percent. 123 Cong. Rec. S. 3910.

[14] The PWEA, P.L. 95-28, was signed into law on May 3, 1977.

further the Congress did not make "findings with respect . . . to identified past discrimination" in the construction industry. *Bakke, supra,* at 302, n.41, (Powell, J.). The legislative history indicates that the purpose of the bill was to simply give minority business enterprises, in the words of Rep. Mitchell, its sponsor, "a piece of the action." 123 Cong. Rec. H. 1436. The remarks made by other Representatives also do not indicate that there were findings of identified discrimination and a determination that the proper remedy was a 10 percent quota. 123 Cong. Rec. H. 1436-1441 (daily ed. February 24, 1977).[15]

The Court of Appeals found that the quota was intended to remedy past discrimination. ***Fullilove*** v. ***Kreps,*** 584 F.2d at 604 (Pet. App. 32a). It also ruled that the record support the District Court's finding that Congress acted upon sufficient evidence of past discrimination. *Id.* at 606 (Pet. App. 36a) The Court of Appeals does not address the specific issue of "who discriminated" against minority business enterprises. It is clear that the District Court could make no specific finding that "contractors" discriminated against minority business enterprises because the Congress did not consider this issue.

The District Court cited a Department of Commerce Minority Business Opportunity Handbook (Aug. 1976) and the Report of the United States Commission on Civil Rights, "Minorities and Women as Govern-

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[15] In this regard, it should be noted that this Court has held that such remarks made on the floor in the course of legislative debates are not to be treated as persuasive or expressions of legislative intention. *United States* v. *United Mine Workers,* 330 U.S. 258, 276-277 (1947); *United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110, 125 (1942); *McCaughan* v. *Hershey Chocolate Co.,* 283 U.S. 488, 493-494 (1930) and cases cited therein.

ment Contractors" May, 1975 [hereafter Civil Rights Report] as indicating that minority business enterprises receiving government contracts are few in number. *Fullilove* v. *Kreps,* 443 F.Supp. 253, 258-259 (S.D. N.Y. 1977), (Pet. App. 11a-12a). However, it does not find that these sources identify discrimination as a reason for the small number of minority business enterprises.[16] In fact, the Civil Rights Report, one of the sources cited by the District Court, does not list discrimination as an obstacle to minority business enterprise participation in federal procurement programs.[17] Civil Rights Report at 24. Further, the District Court did not determine that the Congress examined or even was aware of these documents when it passed the MBE provision.[18]

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[16] In *Montana Contractors' Ass'n* v. *Secretary of Commerce,* 460 F.Supp. 1174, 1177-1178, (D.Mont. 1978), the District Court found that the racial preference in the MBE provision was unjustifiable because there were no legislative findings of discrimination. In this regard the District Court stated:

> "If it be assumed that the debates on the floor of the House and the report of government agencies not made in connection with the MBE requirement . . . are findings, (footnote omitted), they do no more than find that minority races do not participate in equal proportion in government bidding and state the conclusion this is because of discrimination."

[17] Additionally, a Report by the Comptroller General of the United States, dated January 16, 1979, lists several problems which minority business enterprises encounter in participation in federal procurement programs but does not include discrimination among them.

[18] The District Court also references a report of the House Committee on Small Business, H.R. Rep. No. 1791, 94th Cong. 2d Sess. 124 (1977) as support for its determination that the Congress made findings of discrimination. *Fullilove* v. *Kreps,* 443 F. Supp. at 259, (Pet. App. 13a). While this Report makes a couple of generalized statements as to problems that minorities face in the construction

The government has not met its heavy burden of justification to show that there were findings of identified discrimination made by the Congress. *Bakke, supra* at 2754 (Powell, J.) and cases cited therein.[19] Thus, the government has not shown a compelling interest for the 10 percent MBE interest which is a preferential classification which denies non-minority business enterprises the opportunity to obtain 10 percent of each grant under the PWEA.[20]

Under the strict scrutiny standard, a race-based classification must be structured with precision and narrowly tailored to serve a compelling governmental interest. *See San Antonio Independent School District* v. *Rodriguez, supra* at 16-17; *Dunn* v. *Blumstein, supra*

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industry, it does not find that contractors presently or in the past have discriminated against minority business enterprises. Furthermore, this report was from a previous Congress and was not authored by the Committee which reported the PWEA. There is no indication that the Congress ever examined this report in its consideration of the MBE provision.

[19] With respect to the need for findings of discrimination, in *Bakke, supra* at 308-309 Justice Powell stated:

> "Without such findings . . . it cannot be said that the government has any greater interest in helping one interest than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm."

[20] The MBE provision also denies procedural due process to non-minority business enterprises in violation of the Fifth Amendment. *See Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 103 (1976). In *Hampton* v. *Mow Sun Wong, supra* at 103, this Court found that, in the case of a rule which "deprives a discrete class of persons of an interest in liberty on a wholesale basis" . . . "such a deprivation must be accompanied by due process." In the instant case, the 10 percent MBE provision completely excludes non-minority business enterprises from participation in 10 percent of the grants awarded under the PWEA. This total exclusion from eligibility to compete for 10 percent of the grants made under the PWEA

at 343, and cases cited therein. In *Bakke, supra* at 299, Justice Powell stated:

> When they [political judgments] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background. *Shelley* v. *Kraemer,* 334 U.S. 1, 22 (1948) . . ; *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337, 351 (1938). . . .

As noted above, the legislative history indicates that very little consideration was given to precisely tailoring the statute. Minority Group Members are simply defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Sec. 103(f)(2) of PWEA, 42 U.S.C. 6705(f)(2). There is no further discussion in the legis-

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"is of sufficient significance to be characterized as a deprivation of an interest in liberty." *Id.* Under the standard set forth in *Hampton* v. *Mow Sun Wong, supra* at 104

> When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest.

In the instant case, the Government asserts that the purpose of the statute was to remedy the adverse effects of past and present discrimination against minority business enterprises. As discussed above (pages 10-15, *supra*), the legislative history of the 10 percent MBE provision is devoid of legislative findings as to the purposes and interests to be served by the provision. Furthermore, Petitioner submits that the interest asserted by the Government as justification for this provision is not rationally served by this provision. There is no indication that this provision will achieve that objective. *See* page 19, *infra.* Thus, the enactment of the 10 percent MBE provision denies procedural due process to non-minority business enterprises in violation of the Fifth Amendment.

lative history as to the definition of individuals targeted to receive a benefit under this provision. For example, neither the statute nor the legislative history provide guidance as to whether a person who is a part "Negro" is eligible, or whether "Spanish-speaking" persons eligible to receive a benefit include persons of Spanish ancestry. It should also be noted that the Congress did not "precisely" determine that each of the different minorities given favored treatment under the MBE provision had in fact been victims of discrimination in the construction industry.[21] Also, as implied by the Government, if the aim of the statute is to open business opportunities to those who have previously been foreclosed from them, it is difficult to understand why no consideration was given to according preferential treatment on the basis of whether persons are socially and economically disadvantaged rather than solely on the basis of race or national origin.

Neither the statute itself nor the legislative history indicate that Congress structured with precision and narrowly tailored the MBE provision to achieve its purported objective. Thus, the 10 percent MBE provision is not precisely tailored to serve a compelling governmental interest and therefore does not meet the first tier of the strict scrutiny test set forth by this Court in *San Antonio Independent School District* v. *Rodriguez, supra* at 16-18.

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[21] In *Montana Contractors Ass'n, supra* at 1178, the District Court recognized this failure of the Congress to precisely tailor the statute, stating: "They make no distinction between races and there are no findings justifying an all-inclusive preference for all members of a race regardless of the degree of dilution of blood."

C. The 10 Percent MBE Provision is not the less drastic means of effectuating its objective

As noted above, under the strict scrutiny standard, even if a statute serves a compelling governmental interest, it may only be justified if the Government has selected "the less drastic means for effectuating its objectives." *San Antonio* v. *Independent School District* v. *Rodriguez, supra,* at 17. In *Dunn* v. *Blumstein, supra* at 343, this Court stated: "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'." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960)." In *Bakke, supra,* at 308, Justice Powell noted it is necessary to assure remedial action "will work the least harm possible to other innocent persons competing for the benefit." [22]

The Court of Appeals completely disregards this second part of the strict scrutiny test. *Fullilove* v. *Kreps,* 584 F.2d at 606, (Pet. App. 36a).[23] Petitioner submits that the 10 percent MBE provision does not withstand

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[22] In *Bakke, supra* at 357 (Brennan J.), Justice Brennan noted that under the strict scrutiny test a statute can be justified only if it serves a compelling government interest and is shown to be the less restrictive alternative.

[23] Instead, the Court of Appeals considers whether the bounds of fundamental fairness have been exceeded, citing Justice Powell's concurring and dissenting opinion in *Franks* v. *Bowman Transp. Co.,* 424 U.S. 747, 784-786 (1976). In this opinion, Justice Powell discusses the limits of affirmative action as a remedy for past discrimination under Title VII. Nowhere in Justice Powell's concurring and dissenting opinion or in the majority opinion in *Franks* v. *Bowman Transp. Co.,* does the Court indicate a departure from the "less drastic means" tier of its strict scrutiny analysis, as set forth in *San Antonio Independent School District* v. *Rodriguez, supra* at 16-17.

this second tier of strict scrutiny review because it is neither an effective means or the less drastic means of achieving its purported objective.

1. *Non-Effective Means*

The Government asserts that the objective behind the MBE provision is to increase the number of minority business enterprises who contract with the federal government.[24] However, it has not been shown that the MBE provision will achieve this purported objective. The 10 percent MBE provision does not address the problems which are the true stumbling blocks to minority business enterprise viability not only to participation in federal contracting, but to participation in the construction industry generally.

The Report of the Comptroller General of the U.S., (Jan. 16, 1979) [hereinafter the GAO Report] indicates that minority business enterprise firms face the following problems: inadequate working capital; difficulty in obtaining bonding; problems with federal paperwork and problems with the competitive bid procedure. *Id.* at ii, iii 16, 32. These same problems were found to be impediments to minority business enterprise participation in the Report of the United States Commission on Civil Rights, "Minorities and Women as Government Contractors", May 1975 [hereinafter Civil Rights Report] The Civil Rights Report specifically cited ten problems which minority business enterprises face, including: insufficient working capital; no knowledge of future bidding opportunities

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[24] In its brief in the Court of Appeals, the Government characterized the purpose of the MBE provision as "removing barriers preventing MBE's from sharing in federal construction funds." Brief for Defendant-Appellee (Respondent), at 3. *Fullilove* v. *Kreps*, 584 F.2d 600 (2d Cir. 1978) (Pet. App. 28-41a).

or preselection before the formal advertising process; inadequate marketing staff; overbidding; inadequate track record; no understanding of bonding; no understanding of government contracting regulations; preparation of bids and proposals, and inadequate staff.[25] Civil Rights Report at 24.

The GAO Report on the MBE program implemented pursuant to Sec. 103(f)(2) of the PWEA criticizes the program and raised questions as to its effectiveness. The GAO Report indicates that there were serious problems in identifying who is a bona fide minority business enterprise. Some minority business enterprises were established to take advantage of the program with no intent of staying in business after the program lapsed. *Id.* at iii. It was also evident that very often the so called minority owners had little role in management of the firm and were usually fronts for non-minority firms. GAO Report at 25-27. The GAO Report indicates that, in order to comply with the MBE requirement, contractors used suppliers serving no useful commercial function, who were an unnecessary intermediary between the regular suppliers and the prime contractors, existing merely to take advantage of the 10 percent requirement. GAO Report at 26. Another problem occurred with respect to eligibility, where minority subcontracting firms subcontracted out most of the work to non-minority subcontractors. GAO Report at 27.

In fact, as the GAO Report indicates, the MBE provision approach actually encourages the development

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[25] As previously noted (see page 14, *supra*), neither the GAO Report nor the Civil Rights Report lists "discrimination" as a problem for minority business enterprises in the construction industry.

of non-bona fide minority business enterprises. The time available for setting up a viable minority business enterprise to take advantage of the minority quota is totally inadequate. The GAO Report evidences that many MBE's would not last beyond the life of the program. Existing minority business enterprises are not helped long term by the mandatory quota, which does little to make them more self-reliant and able to compete on an equal basis with other firms in the open competitive market.

If the goal of the MBE provision was to "develop a viable economic system for minorities in this country" and thereby "reduce survival support programs now paid for by the federal government", as stated by Representative Mitchell, the sponsor of the amendment, then it is necessary to make minority business enterprises stable and competitive. (Remarks of Representative Mitchell, 123 Cong. Rec. H 1436-37, daily ed. February 24, 1977). However, by not assisting minority business enterprises with their basic problems (see pages 19-20, *supra*), but instead simply removing them from the competition, the MBE provision is nothing more than another "support survival program" and neither a means of increasing participation of minority business enterprises in federal procurement nor increasing viability of minority businesses generally in the construction industry.

2. *Not the Less Drastic Means*

The legislative history of the PWEA indicates that Congress did not "select" the MBE provision among other alternatives. It did not consider any means other than the 10 percent MBE provision for accomplishing the purported objective of increasing participation of

minority business enterprises in government contracting. There is a dearth of statements in the legislative history with respect to considerations of alternatives to the quota provision. As previously noted (see page 11, *supra*) there was no committee consideration of the provision in either the House or the Senate. The MBE provision was an amendment offered on the floor in both the Senate and the House. There was no discussion in the floor debate concerning other alternatives. The quota was selected solely as the most obvious, simplistic method of "giving minority business a piece of the action." (Remarks of Representative Mitchell, 123 Cong. Rec., H. 1436, daily ed. Feb. 24, 1977.) No conclusion is possible but that Congress made a purely arbitrary selection both as to the means of bolstering minority participation, i.e., the quota, as well as the specific percentage by which to do so, i.e., a 10 percent allocation.

The 10 percent MBE requirement constitutes a race-based quota which deprives non-minority contractors from participation in at least 10 percent of the PWEA.[26] It is clear that the MBE provision "forces innocent persons . . . to bear the burdens of redressing

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[26] The 10 percent MBE requirement also places a grave burden on prime contractors. Specifically, prime contractors must find a minority business enterprise firm with whom to subcontract. The GAO Report indicated that contractors faced great difficulties in finding MBE's. GAO Report at ii. 48 percent of the rural projects and 51 percent of the urban projects had difficulties in finding minority business firms. Further, the guidelines issued by the Economic Development Administration to implement the MBE provision placed a burden on prime contractors by requiring them to help minority firms to obtain bonding or working capital or waive the bonding requirement when feasible. GAO Report at 30.

grievances not of their making."[27] *Bakke, supra* at 298 (Powell, J.). In sum, the 10 percent MBE set aside was an eleventh hour *ad hoc* measure which imposes a heavy burden on non-minority contractors solely on the basis of their race.[28] However, there are numerous other means which presently exist or which have been proposed that accomplish the Government's claimed objective and that most importantly are less constitutionally offensive.

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[27] In its more detailed consideration of P.L. 95-507, the Small Business Act Amendments of 1978, 92 Stat. 1757, 15 U.S.C. 683 *et seq.* Congress recently specifically rejected imposition of a subcontracting quota requirement for minority business enterprises and also refused to give a contracting agency the authority to reject a best faith efforts plan submitted by a low bidder, on the ground it is non-responsive. One of the original House versions (H.R. 567) of what became P.L. 95-507 provided for a flat MBE quota requirement. This provision was considered in subcommittee and dropped. There was no flat quota provision in the Committee bill (H.R. 11318). H.Rep.No. 95-949, Select Committee on Small Business, 95th Cong. 2d Sess., 1978. The final version passed by the House established a system whereby agencies or grantees would give "preferences" and "incentives" to bidders with the "best" minority and small business subcontracting plans. The Senate version of this legislation required simply that the apparent low bidder submit a plan reflecting his best faith efforts to contract with small and minority businesses. The Conference Committee adopted the House version with respect to negotiated contracts and the Senate version with respect to competitively bid contracts. H. Rep. No. 85-1714, 95th Cong. 2d Sess., 1978 at 3885-3886. 15 U.S.C. 637(d).

[28] In *Truax* v. *Raich*, 239 U.S. 33, 42-43 (1915), this Court rejected the argument that, because a quota for a preferred class did not totally eliminate employment opportunities for the non-preferred class, it did not violate the Equal Protection Clause.

3. *Less Drastic Means* [29]

a. *Joint Venture*

One less drastic and yet effective means of achieving the Government's claimed objective is to provide for joint ventures between minority and non-minority contractors. A program could be established which encourages contractors to enter into joint ventures with individuals who own minority business enterprises, by providing tax incentives. The joint venture could be on a project basis or for a fixed period of time (hours, months, etc.). The advantage of the joint venture is that it would enable the minority business enterprise entrepreneur to work with the contractor over a period of time in a "partnership-type arrangement." This arrangement would assist minority business enterprise individuals in the development of general management skills, and specific expertise in such areas as finance, labor, bidding procedures, marketing, and bonding, which as previously indicated (see pages 19-20, *supra*) are some of the real problems which minority business enterprises face.

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[29] In setting forth the following alternatives which exist to the MBE provision, Petitioner intends solely to point out to this Court that there are less drastic means to achieve its Government claimed objective, which should have been considered by the Congress. It does not endorse any of the alternatives set forth herein nor does it intend to indicate that the list is exclusive. Additionally, although it discusses the alternatives for the most part in terms of addressing the needs of minority individuals who own businesses, i.e. those covered in Section 103(f)(2), Petitioner submits that all programs discussed *infra* would be more effective and less onerous from a constitutional viewpoint if they were structured to address the needs of socially and economically disadvantaged individuals who own businesses.

Joint ventures allow for flexibility. The level of participation in the joint venture would hinge on the minority individual's experience with participation on a 90/10, 80/20 or greater basis. If the joint venture extended over a substantial period of time, a greater share of the jont venture could be given to the minority individual as he or she acquired more experience. The joint venture concept would serve to improve the skills of minority business individuals and thereby provide greater guarantees that they will be able to compete not only for federal contracts but for contracts generally in the construction market place. It also does not deprive non-minorities of their right to competitively bid on a portion of the grant, and thus is a less drastic means of achieving the Government's claimed objective.

b. *Technical, Financial, and Educational Assistance Programs*

Another less drastic means of achieving the Government's claimed objective is to redirect the efforts of government agencies to provide for greater availability of "realistic programs and services in the areas of managerial, technical, and financial assistance" [30] and educational assistance to minority business enterprises. Such programs could provide minority business enterprises with the assistance they need to achieve stability and self-reliance, which would enable them to compete effectively in the competitive market for government contracts.

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[30] Testimony of Associated General Contractors of America, Inc., on H.R. 567 and H.R. 2379 before the Subcommittee on Minority Business Enterprise and General Oversight of the House Committee on Small Business, September 27, 1977.

TECHNICAL SERVICES

Technical services could include assistance in: taking steps to become prequalified or licensed as a contractor, subcontractor, vendor or supplier; understanding bonding requirements; and understanding how to obtain loans and working capital, or any other matters related to the construction industry. These services could take the form of either a toll-free number which would furnish information on bidding solicitation and answer questions or in-field assistance by support personnel who would visit minority business owners at their place of business to provide technical services. Another support service would be to compile a directory of interested MBE's and distribute it to prime contractors.[31]

FINANCIAL ASSISTANCE

In all reported studies on minority business a problem always cited is obtaining working capital to get the business off the ground and to make it grow. Financial assistance programs, either individually or collectively with other programs, would greatly assist in increasing the number of viable minority business enterprises. There is no end to the type of financial assistance that can be provided. However, one program could be direct loans similar to those which the Department of Health, Education and Welfare provides to students at a reduced rate and payable at a later period of time.[32] Such a program applied to in-

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[31] Since May 1977, the Montana Contractors Association, Inc., Helena, Montana, through a supportive service contract with the State of Montana, has operated an MBE program which provides these types of technical services.

[32] Title IV, Part B, Higher Education Act of 1965 (P.L. 89-329), 20 U.S.C. 1071-1087.

dividuals owning or operating minority business enterprises could furnish needed capital at an extremely low rate which could be payable at a later time at a sliding scale of interest, thereby not placing an undue burden on the enterprise just as it is becoming viable.

EDUCATIONAL TRAINING

Many individuals who are socially and economically disadvantaged would perhaps like to get into a business of their own but cannot afford the money to abandon current employment to attend school and acquire the necessary skills. Thus, there exists a gap that could be filled by a program similar to that used for veterans to allow them certain direct educational grants to get them into the main stream to make up for lost time. Additionally, money could be channeled to the universities to establish work-study progras which would assist individuals who own or operate minority business enterprises to acquire skills needed to effectively operate a business by learning and applying these skills in a realistic business situation.[33]

c. *Assistance Through Trained Workers*

One of the greatest sources of training for persons entering into the business market for the first time is to learn from the experience of those already there or who have been there. As noted above, one program

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[33] Programs such as these could be modeled after Associated General Contractors of America, Inc.'s Education and Research Foundation Programs which acquaint individuals in colleges with the practical aspects of the construction industry. Throughout each school year, AGC Education and Research Foundation sponsors various programs in order to acquaint students at numerous universities about careers in the construction industry. The curriculum for these programs include the following: brick laying; commercial carpentry; cement masonery, and construction craftsmen.

that can be considered to utilize this expertise is that of a joint venture. Another type of program which could be established with minimal financial assistance from the government would be to establish a "pool" of trained individuals, e.g. business executives, familiar with the construction industry, who would be loaned to minority business enterprises. These executives could provide training on a short-term basis similar to what is done on a minor scale in Junior Achievement.[34] Another source of expertise would be the utilization of retired personnel who would be willing to share with "would be" minority entrepreneurs the knowledge and experience gained from their prior employment. Another method of learning from experienced individuals would be to establish an internship program to allow individuals who own or wish to own minority business enterprises to spend time (six months/one year) with a "host contractor." The purpose of the internship would be to allow the intern to acquire experience in business administration, construction management, estimation, bidding process, bonding, and banking; and thereby as a result be able to operate viable minority business enterprises.

d. *Bonding*

A major difficulty of any enterprise entering into the construction market is obtaining bonding. Almost all construction projects, particularly those involving the government, require contractors to post bonds covering the completion of work and payments to their employees for work performed. For an existing viable contractor, this presents no real problem. How-

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[34] *JA: What's It All About,* Junior Achievement, Inc. U.S.A. 1976.

ever, where a person is entering the market, he faces the possibility that many bonding companies will not provide a bond at any price or are only willing to provide a bond at a very high cost.[35] Thus, in a competitive bid situation, a minority contractor might not be able to compete because he cannot obtain a bond or cannot compete effectively because he has the added cost of the high bond. Greater assistance could be provided to the minority enterprise to ensure that there exists a source of bonds at a fair rate for minority businesses.

While all of these programs discussed *supra* furnish benefits in the form of technical assistance to minority business enterprises, they are less onerous in that they do not constitute a race-based classification which guarantees an absolute preference to minority business enterprises on account of race, at the same time absolutely depriving non-minority business enterprises of the right to obtain at least 10 percent of each grant under the PWEA.

e. *Sec. 211(d)(5) of P.L. 95-507*

The subcontracting requirements for direct competitively bid contracts let by any federal agency, found in Sec. 211 of P.L. 507, the Small Business Act Amendments of 1978, 92 Stat. 1767, 15 U.S.C. § 637 (d)(5) are also a less drastic means to achieve the government's claimed objective.[36] The program per-

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[35] As noted *supra*, the GAO Report indicates that obtaining bonds is difficult for a minority business enterprise. *GAO* Report at 30-32.

[36] The Office of Federal Procurement Policy has promulgated regulations to implement Sec. 211, at 44 Fed. Reg. No. 78, April 20, 1979.

tains to small business concerns owned and operated by socially and economically disadvantaged individuals but provides that there are certain minorities which are presumed to be socially and economically disadvantaged (Black Americans, Hispanic Americans, and Native Americans). 15 U.S.C. § 637(d)(3). Sec. 211 requires that a low bidder for a direct competitively bid federal contract submit a plan which shows his best faith efforts to subcontract with businesses owned and controlled by socially and economically disadvantaged individuals.[37] 15 USC § 637(d)(5).

The less onerous nature of this requirement is clear; no individual would absolutely be awarded or denied a contract under the grant solely because of his race.[38] This program is structured to assisting businesses of socially and economically disadvantaged individuals. While contractors must make best faith efforts to utilize businesses owned by socially and economically disadvantaged individuals, there is no mandatory quota or goal requirement imposed by the Government.[39]

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[37] The approach taken in Sec. 211 of P.L. 95-507 is similar to the race-conscious approach taken by Harvard College in its admission program, which Justice Powell has found constitutional. *Bakke, supra* at 316. (Powell, J.)

[38] As previously noted (see page 23, n. 27, *supra*), in its consideration of P.L. 95-507, the Congress considered and rejected a flat quota provision. Sec. 211 of P.L. 95-507, in the case of competitively bid contracts, under the contracting officer may in the solicitation indicate a goal, but it is purely informational in nature. 15 U.S.C. 637(d)(5), 44 Fed. Reg. at 23,612 (1979). Additionally, only the contractor who is the low bidder is required to submit a plan.

[39] Petitioner submits that the Government's claimed objective can be achieved without resort to goals or quotas mandated by Congress or imposed by the Government. Even if this Court were to

In sum, it is not evident that the 10 percent MBE provision will have any significant effect on the problems. *See Bakke, supra,* at 311 (Powell, J.). Second, the 10 percent MBE provision in the PWEA cannot be justified since it has not been shown to be the "less drastic means" of effectuating the objective behind the provision. As set forth, supra, there are clearly less drastic alternatives which the Congress could have been selected to achieve the Government's claimed objective and which should have been considered by the Congress. Assuming *arguendo* that there was a compelling governmental interest for the MBE inasmuch as it was not the less drastic alternative, it fails the strict scrutiny test and violates the Due Process Clause of the Fifth Amendment.

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find that goals and quotas were necessary to achieve the claimed objective, Petitioner submits that there are programs far less drastic than the MBE program implemented by the EDA pursuant to the MBE provision set forth in Sec. 103(f)(2) of the PWEA. For example, another less drastic approach is the following program: 1) inclusion of a specific provision requiring the use of minority subcontractors in certain contracts determined according to the size of the contract, the nature of the work, and current availability of minority firms; 2) a provision for low bidder to request a waiver or modification after making good faith efforts; 3) a provision for granting of a waiver by the contracting agency to the contractor upon a determination such contractor used good faith efforts and a determination that willing and able minority contractors are not available; 4) a requirement that the contracting agency assist general contractor to meet the prescribed goal where it determines not to waive or modify the special provision; 5) modification or waiver of the specific provision if after fifteen days the contracting agency is unable to locate enough ready, willing and able minority contractors to achieve the goal of the specific provision. *See* "The Illinois MBE Program, A Different Approach That Could Work", Constructor, Vol. LX, No. 10 (October 1978).

D. Sec. 103(f)(2) of the PWEA fails to meet the standard set forth by Justice Brennan in Regents of California v. Bakke, *supra*.[40]

The 10 percent MBE provision does not withstand the test set forth by Justice Brennan in *Bakke, supra.* The legislative history of the MBE provision is sparse. It clearly has not been shown (*see* pages 10-23, *supra*) that the 10 percent MBE provision is "substantially related to the achievement of its objectives, and that there is an important and articulated purpose for its use." *Bakke, supra* at 359, 361.

Further, the 10 percent MBE requirement does not comply with Justice Brennan's standard because it stigmatizes minority business enterprises. The great majority of American people oppose preferences based on race instead of merit. In a recent Gallup Poll, 83 percent of the population and 64 percent of the non-white population thought that merit should be the standard by which one is judged.[41] The 10 percent MBE provision is a race-based quota and as such "may imply to some the recipients' inferiority and especial need for protection." (footnote omitted). *United Jewish Organizations* v. *Carey,* 430 U.S. 144 (1977).

The belief that those who must rely on quotas cannot and would not make it on their own merits harms

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[40] In *Bakke, supra* at 359, 361, Justice Brennan stated that the test to be used for reverse discrimination cases based on race is:

> ". . . that racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives' . . . [and] to justify such a classification an important and articulated purpose for its use must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program."

[41] *See* N. Y. Times, May 1, 1977, at 33 (Column 1).

those who want the opportunity to be judged on their own merit. Thus, a MBE who receives a contract under the PWEA may actually be stigmatized as a result and harm not only his own image but the image of minority contractors generally. This is especially true in the construction industry which is grounded on commitment to the competitive bidding system.

The 10 percent MBE provision also singles out those least well represented in the political process to bear the brunt of a benign program. Socially and economically disadvantaged enterprises not owned by the minorities singled out in the MBE provision are excluded from favored treatment even though they could and do face the same obstacles as the minorities protected by the provision. Inasmuch as the 10 percent MBE requirement has not been shown to be substantially related to the achievement of its purported objective, stigmatizes the favored minorities, and forces other socially and economically disadvantaged groups not given favorable treatment in the provision to "bear the brunt of this benign program", it does not meet the standard set forth by Justice Brennan in *Bakke*.

II.

Sec. 103(f)(2) of the PWEA Violates Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d et seq.

Sec. 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d 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."

Under the PWEA, the Secretary of Commerce distributes grants (federal financial assistance) to state and local governments for the construction of public works contracts. State and local grantees contract with private contractors for the construction of these public works projects. The state and local governments, in accordance with the 10 percent MBE provision and its implementing regulations and guidelines excluded nonminority contractors from participation in at least 10 percent of each grant made under the PWEA solely on the basis of race.

It is clear that the 10 percent MBE provision of the PWEA violates the plain language of Title VI, which provides that "race cannot be the basis of excluding anyone from participation in a federally funded program." [42] *Bakke supra* at 2814-15. (Stevens, J., concurring and dissenting, joined by the Chief Justice, Justice Rehnquist, and Justice Stewart.) [hereinafter referred to as Stevens, J.] The legislative history of Title VI reveals that its purpose was to prohibit the exclusion of any individual from a federally funded program on the ground of race.[43] *Id.* at 2811, citing H.R. Rep. No. 914, Part I, 88th Cong. 1st Sess. 25 (1963) U.S. Code Cong. & Admin. News 1964, p. 2401.

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[42] *See Flanagan* v. *President and Directors of Georgetown College*, 417 F.Supp. 377 (1976). In *Flanagan* v. *President and Directors of Georgetown College, supra* at 385, the Court held that Defendants who are recipients of federal financial assistance violated Title VI by discriminating against plaintiff, a white (Caucasian) student on the basis of race in the allocation of federal financial aid to students at Georgetown University Law Center.

[43] If this Court were to conclude that Title VI and Section 103 (f)(2) of the MBE provision conflicts and are irreconcilable, then a question of due process arises with respect to contractors having to comply with both statutory provisions.

In *Bakke, supra,* at 418, Justice Stevens held that Title VI prohibits any person from being excluded from participation in a program receiving federal financial assistance and found that the Davis admissions program, which excluded Bakke because of his race, violated Title VI. Justice Powell reads Title VI as proscribing only those racial classifications which would violate the Equal Protection Clause of the Fourteenth Amendment or the Fifth Amendment. In holding that the Davis Admissions program violated the Equal Protection Clause of the Fourteenth Amendment, Justice Powell thereby finds that the Davis Admissions program violated Title VI.

In *Associated General Contractors of California* v. *Secretary of Commerce,* 441 F.Supp. 955, 969, (C.D. Cal. 1977), *vacated and remanded,* 438 U.S. 909 (1978),[44] the District Court, finding the MBE a "glaring and flagrant violation of both the congressional intent and national policy . . ." which is set forth in Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.,* held that the MBE provision is invalid and illegal under Title VI. In sum, the MBE provision violates the clear language of Title VI and its legislative history as recognized by Justice Stevens.[45]

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[44] On remand, the District Court determined that the issues ruled upon in its initial decision were not moot and reaffirmed its prior decision. 459 F.Supp. 766 (C.D. Cal. 1978), *appeal pending,* —— U.S. ——, No. 78-1382 (March 9, 1979).

[45] The decision of this Court in *Weber, supra* is not determinative of the instant case. The statute, which was the basis of the challenge was Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* rather than Title VI which is the statutory basis for challenging the MBE provision in the instant case. In *Weber,* this Court narrowly held that Title VII does not prohibit private voluntary race-conscious affirmative action plans which are designed

CONCLUSION

Petitioner respectfully submits that this Court should reverse the decision of the Court of Appeals and hold that the 10 percent MBE provision of the PWEA violates the Fifth Amendment of the Constitution and Title VI of the Civil Rights Act of 1964, as amended.

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to eliminate conspicuous racial inbalance in segregated job categories. This Court specifically noted that Title VI and Title VII are clearly distinct statutory provisions with different purposes and different statutory authorities. *Weber, supra,* (slip op., 10-11, n.6).