IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1007

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

vs.

JUANITA KREPS, Secretary of Commerce, et al., *Respondents.*

BRIEF FOR PETITIONERS

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No. 78-1007

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Petitioners,

-against-

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.

BRIEF FOR PETITIONERS

THE OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit,[1] is reported at 584 F.2d 600 (1978). It affirms the decision of the United States District Court for the Southern District of New York (Werker, J.), reported at 443 F. Supp. 253 (S.D.N.Y. 1977), which upheld the constitutionality of Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2) (hereinafter "PWEA" or the "Act").

JURISDICTION

A Petition for Certiorari was filed on December 21, 1978, within 90 days of the entry of judgment of the Second Circuit Court of Appeals on September 22, 1978. Certiorari was granted by this Court on May 21, 1979. The Court's jurisdiction to review the judgment below is invoked under 62 Stat. 928, 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Congress' requirement that 10% of federal grants for local public works projects be set aside for minority business enterprises is constitutionally permissible under the Due Process or Equal Protection Clauses of the Federal Constitution.

2. Whether the minority set-aside is in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution provides:

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

1. Oakes, Circuit Judge; Blumenfeld, Senior District Judge for the District of Connecticut; Mehrtens, Senior District Judge for the Southern District of Florida.

Amendment XIV, Section 1 of the United States Constitution provides:

> "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2) provides for the 10% minority business set-aside:

> "2. 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 business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 percent of which is owned by minority group members or, in the case of a publicly owned business, at least 51 percent 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."

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."

STATEMENT OF THE CASE

The petitioners are comprised of various individuals and contractor groups which perform both general contracting and specialty subcontracting work on various construction projects including those let by the State and City of New York and their various agencies (A8a-9a).*

Petitioners challenge the constitutionality of Section 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), 42 U.S.C. §6705(f)(2) (A7a-8a), and its compliance with Title VI of the Civil Rights Act of 1964.

The PWEA was enacted by Congress on May 13, 1977. Purportedly, it was intended to correct certain inadequacies in the Local Public Works Capital Development and Investment Act of 1976, 90 Stat. 999-1002, Pub. L. No. 94-369 (the "LPWA") and to increase the funding of the LPWA by an additional four billion dollars.

The intentions of Congress in enacting the LPWA, as reported by the Committee on Public Works and Transportation of the House of Representatives were twofold: (1) to alleviate the problem of national unemployment, and (2) to stimulate the national economy by assisting state and local governments to build badly needed public facilities. *See,* H.R. Rep. No. 94-1077, 94th Cong., 2nd Sess., 1976 U.S. Code Cong. & Ad. News, Vol. 3, pp. 1746-7 (1976).

Pursuant to the enactment of the LPWA on July 22, 1976, the Economic Development Administration (the "EDA"), under

* Numbers in parentheses preceded by "A" are references to pages of the Appendix to the brief.

the direction of the Secretary of Commerce, commenced processing applications from state and local governments for assistance under that Act for the construction of local public works projects. Between October 26, 1976 and February 9, 1977 (hereinafter referred to as "Round I"), the EDA processed and approved approximately 2,000 projects and thereby exhausted the full two billion dollar Congressional appropriation for the LPWA.

When it became clear that the LPWA was not adequately fulfilling the intentions of Congress, public hearings were held by the House Subcommittee on Economic Development during January and February of 1977, which hearings clearly showed:

> ". . . that the next round of funding should do a better job of —
>
> 1. Insuring a more equitable distribution of projects.
>
> 2. Simplifying administration by making the program regulations more easily understood.
>
> 3. Reflecting local priorities.
>
> 4. Eliminating 'gerrymandering' of project areas so that program investments are oriented more toward the areas of greatest distress."
>
> H.R. Rep. No. 95-20, 95th Cong., 1st Sess., 1977 U.S. Code Cong. & Ad. News, Vol. 5, pp. 717-18 (1977).

That same subcommittee thereafter recommended that H.R. 11, the House version of PWEA, be enacted as reported and concluded that the amendments made by the bill to the LPWA

would meet the four (4) objectives set forth above, H.R. Rep. No. 95-20, *supra,* at pp. 3, 11. This report was issued on February 16, 1977. On February 24, 1977, on the floor of the House, during the debate on H.R. 11, an amendment was offered by Representative Parren Mitchell (D. Md.) 123 Cong. Rec. H. 1441 (February 24, 1977). This amendment, with slight modification, was approved and eventually enacted as Section 103(f)(2), 42 U.S.C. Section 6705(f)(2), and is now known as the Minority Business Enterprise ("MBE") provision. (*See,* p. 3, *supra*). The Mitchell amendment had not been previously considered by any House committee or subcommittee and there is no legislative history surrounding its passage. However, after brief debate, primarily concerning whether or not areas without a sufficient MBE population would be hindered, the amendment was approved on the floor of the House. *See,* 123 Cong. Rec. H. 1436-1441 (February 24, 1977).

The final version of PWEA, containing the MBE provision, was enacted by Congress on May 13, 1977 and initiated a second flow of funding (hereinafter referred to as "Round II").

Pursuant to the terms of the PWEA, the local Grantees, including the City and State of New York, have received federal funding for various municipal projects (A4a). These projects have been let under contracts, the terms of which include the various MBE requirements.

SUMMARY OF ARGUMENT

For the first time this Court is presented with the question of the validity of a Congressional enactment providing for a mandatory racial classification in the form of an employment quota for contractors on federally funded public works projects. Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2), creates a classification based upon race by providing that 10% of the monies appropriated thereunder must be expended for minority business enterprises. The present state

of the law on the subject is that racial classifications are presumptively invalid and can be invoked only upon a showing of extraordinary justification. In order for a racial classification to pass constitutional muster, a compelling state interest must be shown, and such classification must be both necessary and the least discriminatory means available.

No compelling state interest was recognized by Congress as a reason for creating such a classification, as is demonstrated by the fact that such set-aside was an 11th hour amendment added to a public works appropriation bill, and was not the subject of any meaningful debate.

Moreover, there exist several less discriminatory means available to Congress to accomplish the intended purpose, such as a racially neutral set-aside similar to that provided under the Small Business Act, 15 U.S.C. §637. In any event, the record is barren of any indication that Congress even attempted a search for a less discriminatory means.

Additionally, the set-aside is in direct violation of Title VI of the Civil Rights Act of 1964 which has established a deep-rooted, carefully-considered policy of colorblindness in the distribution of federal funds. The overwhelming principles of equality and non-discrimination embodied in Title VI cannot give way to a racially based set-aside offered only as a result of an afterthought to an appropriations measure designed to stimulate the economy. That portion of the Public Works Employment Act of 1977 mandating a racially based set-aside must therefore be held void and unenforceable.

ARGUMENT

I.

SECTION 103(f)(2) OF THE PUBLIC WORKS EMPLOYMENT ACT OF 1977, 42 U.S.C. §6705(f)(2), IS VIOLATIVE OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE CONSTITUTION.

It should be noted at the outset that this is *not* a case involving employment discrimination or an attempt to remedy the effects of some perceived past employment discrimination. The challenged amendment to the PWEA concerns itself only with a racial classification, that is the setting aside and obtaining for Minority Business Enterprises exclusively at least ten percent of the funding provided for under the Act. Accordingly, we are dealing here with an attempt to secure, *on the enterpreneurial level,* work for a limited class of minority controlled *businesses.* In attempting to accomplish this purpose, Congress has established a *mandatory,* fixed racial quota in regard to participation in the funding provided under the Act.[2]

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2. The foregoing distinction (employment discrimination as opposed to the alleged underutilization of minority businesses) is important to the Court's determination herein because it narrows the issues significantly and eliminates from unnecessary consideration that body of cases dealing with minority employment discrimination and the various remedies imposed to eradicate it. We submit that, contrary to the findings of the courts below, cases such as *Contractors Association of Eastern Pennsylvania v. Secretary of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971); *Associated General Contractors of Massachusetts, Inc. v. Altshuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); and *Equal Employment Opportunity Commission v. Local 638,* 532 F.2d 821 (2d Cir. 1976), to name only a few, have no application to the case at bar. Those cases deal with court or administratively fashioned affirmative action remedies for found patterns and practices of employment discrimination by labor unions. The facts of those cases do not warrant tarring the entire construction industry with the same brush.

For the first time this Court is being asked to pass upon the constitutionality of a Congressionally imposed racial quota where there has been no expressed finding of active racial discrimination in the area covered by the statute, namely, the hiring of minority business enterprises in the construction industry at large. As with the special admissions program in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), the MBE set-aside is unquestionably a classification based on race and ethnic background.

The threshold consideration in this case is the fact that racial quotas are presumptively invalid. As this Court stated in *Personnel Administrator of Massachusetts v. Feeney,* 99 S. Ct. 2282, 2292 (1979):

> "Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." (citations omitted)

This presumption of invalidity and its necessary ramifications was totally ignored by the Court of Appeals for the Second Circuit in this case.[3] Instead, that court adopted the

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3. This failure is understandable in view of the fact that the *Feeney* case was decided subsequent to the Circuit Court's decision in this case, and accordingly, that court did not have the benefit of this Court's definitive statement quoted above.

somewhat deferential position that "a large measure of judicial restraint must be accorded Congress in its enactment of legislation to remedy past discrimination . . ." (A214a). Having adopted this approach initially (and in so doing decided the issue) the court went on to strain at every turn to uphold the validity of the racial classification contained in the legislation.

There is, we submit, an obvious and critical difference between a judicial inquiry into the validity of a statute where there is a "presumption of invalidity" requiring an "extraordinary justification," and the deferential approach to the racial classifications embodied in the Second Circuit Court's decision herein. In view of the presumed invalidity of racial quotas, the proper standard of review by the court below should have been the "strict scrutiny" test developed by this Court in *Loving v. Virginia,* 388 U.S. 1 (1967) and *Dunn v. Blumstein,* 405 U.S. 330 (1972). Instead, the Second Circuit Court fashioned a new "fundamental fairness" test — a test which does not comport with any presently recognized judicial standard of review in cases such as this. It is respectfully submitted that the following observation of Chief Justice Burger in his dissenting opinion in *United Steelworkers of America v. Weber,* 47 U.S.L.W. 4851 (1979) is apropos to the decision below:

> "What Cardozo tells us is beware the 'good result' achieved by judicially unauthorized or intellectually dishonest means on the appealing notion that the desirable ends justify the improper judicial means. For there is always the danger that the seeds of precedent sown by good men for the best of motives will yield a rich harvest of unprincipled acts of others also aiming at 'good ends'." *Id.* at 4858 (Burger, J. dissenting).

If the imposition of mandatory racial quotas is to become a valid and acceptable means of eradicating the

effects of past societal discrimination then more is required by way of "extraordinary justification" than the mere imputation of a Congressional perception of past discrimination and the application of a "fundamental fairness" test to the proposed remedy as the courts below have done. We turn now to an analysis of why this Court should apply the proper test and, by so doing, reach the conclusion that the imposed racial quota is unconstitutional.

Strict Scrutiny Is the Appropriate Standard

It is petitioners' contention that the 10% MBE requirement, which established a racial classification in the form of a quota system, invidiously discriminates against them and other non-minority businesses in violation of their constitutional rights under the Fifth and Fourteenth Amendments. As cited in Justice Powell's opinion in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978): "Racial and ethnic classifications, however, are subject to stringent examination . . . ." They "call for the most exacting judicial examination." *Id.* at 290-91. Under either the Fifth or Fourteenth Amendments, extraordinary justification and strict scrutiny is therefore applicable to all racial preference cases.

In order to justify a classification based upon race, it must first be shown to be necessary to the furtherance of a compelling state interest and, secondly, be the least discriminatory means available to accomplish a valid state objective. As outlined above, the Circuit Court not only found no extraordinary justification for the racial classification but it also failed to heed Mr. Justice Powell's formulation in *Bakke* that such racial classification must be *precisely tailored* and work the *least* harm possible to innocent persons. *Regents of the University of California v. Bakke,* 438 U.S. at 308. Rather, the Court of Appeals in this case merely substituted its judgment in place and stead of the appropriate standard and found that so long as

the remedies based upon the classification are "appropriately drawn", and do not exceed "fundamental fairness", such reverse discrimination will be sustained (A219a-220a). This novel Court of Appeals fashioned test does not even subject the racial classification to the more relaxed standard of review as expressed by Mr. Justice Brennan's opinion in *Bakke,* namely, that not only must such remedy be substantially related to the achievement of important governmental objectives, but it also must not stigmatize any group or single out those least represented in the political process to bear the brunt of the benign program. *Regents of the University of California,* 438 U.S. at 360-61.[4]

The stigmatization in the case at bar is obvious. Similar to the special admission program struck down in *Bakke,* those contractors who do not fit within the select MBE category are denied a chance to compete for the special set-aside monies no matter what the quality of their work product or the extent that they underbid an MBE on a public works project. *See e.g., Regents of the University of California v. Bakke,* 438 U.S. at 319-21. By like token, there is no limit to the amount of work which the preferred MBE class can secure. In addition, as noted by the court below, when Congress exercises its spending powers, it must do so in a non-discriminatory manner since:

> "[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." *Lau v. Nichols,* 414 U.S. 563, 596 (1974) (quoting from the remarks of Senator Humphrey, 110 Cong. Rec. 6543 (1964)).

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4. Mr. Justice Brennan's opinion in *Bakke* also held that in reviewing racial classifications, it is inappropriate to inquire, as the Circuit Court in this case has done, only as to whether there is any conceivable basis that might sustain such a classification. 438 U.S. at 361.

Further, consideration must be given to the stigmatization attendant upon the awarding of contracts where the individual or entity involved is shielded from competition and receives a business benefit solely on the basis of race. Not only is such a situation individually demeaning, but in addition, it perpetuates a system of non-accomplishment which hardly serves as a stepping stone for entrance into a system of free enterprise.

In regard to the use of quotas, perhaps one of the most incisive commentaries on the issue comes from two distinguished members of the minority community, Messrs. Bayard Rustin and Norman Hill of the A. Phillip Randolph Institute:

> "There are those who argue that, on a short term basis, quota hiring schemes represent an effective and expedient means of resolving a difficult social problem. But we are convinced that the inherent dangers of the quota principle far outweight any temporary gains they might bring.
>
> One of the most serious dangers of the quota doctrine is that it will perpetuate the stereotypical — and profoundly mistaken — view that blacks lack the ability and the will to make it on their own. Should quotas become institutionalized as government policy, society, as black educator Thomas Sowell has warned, would no doubt conclude that Negroes 'must be given something in order to have something.'
>
> Quotas would further entrench the tendency of society to respond to the call for equal opportunity with tokenism. Quotas, in fact, are tokenism taken to its logical conclusion. Blacks object to the token because it downgrades the dignity and abilities of the individual, cheapening

> both his or her accomplishments and the accomplishments of other blacks to follow. The same is true of the quota, only to a greater degree. The black who benefits from the quota suffers the uncertainty of never knowing whether he made it on his merits, or was simply hired to meet a government decree. As for the dominant white society, it would automatically question the abilities of all blacks, including the overwhelming majority who have succeeded because of their intelligence, skills and self-discipline."[5]

A.

As to the Lack of a Compelling Governmental Interest

In an effort to prove the first prerequisite, a compelling governmental interest, the government argued in the District Court that such interest is shown by (1) the legislative history behind passage of the MBE requirement; (2) the statistical studies showing a lack of MBE participation in the economy; and (3) various executive orders and programs which evidence a governmental interest in aiding minorities. None of these factors, however, support a compelling governmental interest or an "extraordinary justification" sufficient to sustain a racially discriminatory federal statute.

The Legislative History Fails to Evince Findings of Prior Discrimination Sufficient to Justify Upholding the MBE Amendment

It is important to note that Congress' expressed purpose in enacting the PWEA was "to help revitalize the nation'

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5. Testimony, *Federal Higher Education Programs — Institutional Eligibility: Hearings on Civil Rights Obligations Before Special Subcommittee on Education of the House Committee on Education and Labor,* 93d Cong., 2d Sess., Part 2A at 253 (1974).

financially pressed communities and reactivate the distressed construction industry with its hundreds of thousands of jobless workers . . ." H.R. Rep. No. 95-20, 95th Cong., 1st Sess. 1 (1977). Wholly absent from the legislative history is any indication that Congress truly considered the advancement of MBEs to be of compelling governmental concern *within the context of the PWEA.*

As noted above, the imposition of a racial classification requires "extraordinary justification". Justice Powell's opinion in *Bakke* also states that "preferential classifications" are invalid in the absence of detailed legislative, judicial or administrative findings of proven constitutional or statutory violations. *Regents of the University of California v. Bakke,* 438 U.S. at 302 n. 41.[6] The question therefore is whether or not Congress has made the requisite detailed findings of constitutional or statutory violations sufficient to constitute the extraordinary justification required to sustain the racial classification in question. The answer clearly is that Congress has not.

It is submitted that the legislative history of the PWEA is completely devoid of any legislative findings or any other material sufficient to satisfy the extraordinary justification required to uphold the racial classification provided in Section 103(f)(2) of the Act. Indeed, the remarks of various advocates of the set-aside amendment on the floor of the House clearly show that the set-aside amendment in favor of MBEs was an afterthought designed to give the minority business community a "share of the action from this public works legislation." 123 Cong. Rec. H. 1736 (1977).

The scant remarks of Representative Mitchell in connection with sponsoring the amendment have been accurately

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6. Mr. Justice Brennan's opinion in *Bakke* likewise required appropriate findings by the legislative body with competence to act in this area. *See* 438 U.S. at 363-64.

characterized by one court as being far from legislative history and merely "the debate rhetoric of a partisan who sponsored the amendment." *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, *on remand,* 459 F. Supp. 766 (C.D. Cal. 1978), *appeal docketed sub nom. Armistead v. Associated General Contractors of California,* 47 U.S.L.W. 3563 (U.S. Jan. 15, 1979) (No. 78-1107). As further pointed out in *Associated General Contractors, supra,* Representative Mitchell's remarks concerning the rate of underutilization of MBEs were merely naked assertions on his part and never the subject of a Congressional study. *Id.* at 965. Thus, the record is totally devoid of the detailed legislative findings necessary to support the racial classification in question.[7]

Even in the context of upholding the statute, another court has found this complete lack of legislative history to support the purpose of the statute to be "troublesome". *Constructors Association of Western Pa. v. Kreps,* 441 F. Supp. 936, 952 (W.D. 1977), *aff'd,* 573 F.2d 811 (3d Cir. 1978).

As noted above, what is legislative history showing the clear intent of the Congress, as opposed to mere debate rhetoric, is the fact that the PWEA, Round II, was intended to focus upon the sole objective of reducing unemployment. [*See, Hearings on H.R. 11 and Related Bills, Subcommittee on Economic Development of the Committee on Public Works and Transportation,* H. Rep. No. 95-14, pp. 2-3 (1977).] The four billion dollars provided by the PWEA was expected to generate 300,000 construction industry jobs and 300,000 jobs in other industries. No mention of any special assistance to MBEs was ever indicated or suggested until Representative Mitchell introduced his last minute amendment to the Bill on the floor of the House.

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7. The MBE amendment sponsored by Representative Mitchell was never even considered by the House Judiciary Committee, nor by House Report No. 914, which reported the Bill to the House Floor without the amendment. *Associated General Contractors of California, supra,* 441 F. Supp. at 969.

Under such circumstances and especially in the face of a presumption of invalidity it is not the function of the courts to embark on a search outside of the legislative record in an effort to sustain the racial classification. Yet, this is exactly the procedure the courts below utilized.

The Second Circuit Court of Appeals, although reaching the obvious conclusion that legislative consideration of the MBE amendment was indeed "sparse", relied upon its sponsor's off the cuff remarks in concluding that the construction industry had been guilty of past discrimination (A217a). These limited remarks, coupled with the Second Circuit Court of Appeals' totally unsupportable statement that the lack of Congressional discussion was understandable in light of "the knowledge of the congressman concerning the well-established history of past discrimination in the construction industry" (A217a n. 10), formed the basis for upholding what amounts to a wholesale indictment of the construction industry at large. The Second Circuit Court of Appeals' analysis of the record thus presumed the very fact in issue, aided only by the unexpressed mental processes of Congress.

The Statistical Shell Game

The District Court also felt compelled to reach outside the realm of the Congressional debates surrounding the MBE amendment. Noting that the available empirical data resolved any doubt that the Congressional purpose in enacting the amendment was to remedy prior wrongs to minority groups, (A193a-195a), the District Court concluded from the statistical evidence, that Congress could reasonably have found prior racial discrimination as the cause of the underrepresentation of MBEs in the economy and accordingly fashioned an appropriation set-aside (A196a). The District Court thus, in effect, conducted a broad and far-reaching survey of MBE participation in the economy, and came to an overall conclusion that such participation was "disgraceful" (A198a).

Thus, the statistical evidence considered related *not* solely to one employer's hiring practices with respect to minorities, as would be relevant in a Title VII action. Rather, the Court's conclusion was based upon its own nationwide survey of the construction industry. In this regard, the Supreme Court has held that:

> "It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and *one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." Craig v. Boren,* 429 U.S. 190, 204 (1976). (emphasis added)

The District Court's undertaking of the statistical analysis, as it did, was in essence a sociological evaluation of the overall scheme of minority participation in the construction industry. If relevant at all to the constitutionality of the MBE provision, it was necessary for such a finding to be made by the Congress alone.

In order to justify Congress' action in this case, the District Court merely utilized the statistics contained in Government's Exhibit 2 relating to minority businesses and their receipt of national gross business receipts (A193a-197a). However, the statistical evidence considered by the District Court was, at best, unreliable and inconclusive. The Court failed to note that the government's critique of its own data-collecting processes found those procedures to be "inadequate and inconsistent" (Gov. Ex. 1 at p. 111).[8] Other indicators demonstrated that between the

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8. Page references with respect to Gov. Ex. are to the page in the Exhibit itself and not the Appendix.

years 1969-1972, there has been a dramatic *increase* of minority contractors and dollar receipts of minority owned construction businesses, to wit, 34.28% and 84.45% respectively. [1972 Survey of Minority Owned Business Enterprises, Table i at pp. 16-17 (U.S. Dept. of Commerce, Bureau of The Census Special Report 1975) (hereinafter "1972 Survey").] Furthermore, in the *three year period* between 1969-72, gross receipts of minority firms with paid employees increased a total of 54.4% (1972 Survey at 16-17) as opposed to a parallel increased of only 60% for *all* construction firms with a payroll for the *five (5)* year *period* 1967-72, rather than a three (3) year period. [1972 Census of Construction Industries at pp. 1-7 (U.S. Dept. of Commerce, Bureau of the Census 1976)].

Moreover, any surveys considered by the court below are classified *not* according to the incoming MBE participation with respect to the overall participation in the construction industry *subsequent* to 1965 (the effective date of Titles VI and VII of the Civil Rights Act of 1964), but rather are predicated upon the combined percentage of minority participation both *before and after* the effective dates of such acts. Such data formed the basis for the District Court's finding that MBEs have been historically excluded from the mainstream economy (A193a-194a). Additionally, it is to be pointed out that a low representation of minorities can be found only if *both* the pre-1965 and post-1965 periods are taken into account together. The relevant data to be considered by this Court in its determination as to whether the statistical data supports a compelling governmental interest and authorizes such a drastic remedy as racial quotas is the post-1965 data *only* relating to MBE participation in the economy. Contrary to the District Court's findings (A196a n.13), the Civil Rights Act of 1964 is not irrelevant when later legislation providing for a presumptively invalid racial classification is fashioned to remedy discrimination.

An analogous case, *Equal Employment Opportunity Commission v. Local 14,* 553 F.2d 251 (2d Cir. 1977), squarely

held that the relevant statistical evidence to be considered in determining whether a pattern and practice of discrimination warranted the imposition of a racial quota must be based upon data completed *subsequent* to the effective date of Title VII. *Id.* at 255. Where the post-1965 statistics show that minorities are receiving their "fair share" of the relevant employment opportunities, there is *no* compelling need for imposition of a quota. *Patterson v. American Tobacco Co.*, 535 F.2d 257, 275 (4th Cir. 1976). In this connection, the record is completely devoid of any evidence indicating that minority businesses have been the subject of discrimination *after* the effective date of Title VII. On the contrary, increases of 34% and 84% in numbers and dollar receipts, respectively, of MBE construction firms prove to the contrary (1972 Survey at pp. 16-17).

Finally, with respect to its statistical findings, the District Court referred to language from a House Subcommittee Report finding that past discriminatory practices affect our present economic system and noting a business system which "traditionally excluded measurable minority participation" (A195a-196a). However, careful examination reveals that the former statements were made by that subcommittee in connection with discrimination against minorities perpetuated by bonding sureties and *not* by other contractors or potential employers (Gov. Ex. 4 p. 182). And to the extent that the committee's assertion of "traditionally excluded minority participation" is supportive, it is respectfully submitted that Congress has already enacted remedial legislation in Title VII to combat the present consequences of past discrimination. *Patterson v. American Tobacco Co.*, 535 F.2d at 267. Thus, governmental or private actions under Title VII are a more appropriate means of fashioning a remedy for the vestiges of pre-Civil Rights Act discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 364-65 (1977).

The tortured analyses of the scant and unreliable data relied on by the courts below, as well as the comments of the court in *Constructors Association of Western Pennsylvania,* with respect to such data, 441 F. Supp. at 951, 953, should lead this Court to the conclusion that such data is insufficient to meet the traditional rigors of establishing a compelling governmental interest and extraordinary justification for the racial classification.

B.

As to the Least Onerous Means

The second test, which the challenged amendment must satisfy (assuming, *arguendo,* that the compelling governmental interest test, *supra,* has been met), is that the means used is both necessary to the accomplishment of the governmental interest *and* the least discriminatory means available. The judicial standard of review in this regard was set out by this Court in *Dunn v. Blumstein,* 405 U.S. at 342-43 where it was held:

> "Statutes affecting constitutional rights must be drawn with 'precision', *NAACP v. Button,* 371 U.S. 415, 438 (1963); *United States v. Robel,* 389 U.S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro v. Thompson, supra,* at 631 and if there are other reasonable ways to achieve these goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference, [but] must choose 'less drastic means'. *Shelton v. Tucker,* 364 U.S. 479, 488 (1960)." *Dunn v. Blumstein, supra,* 405 U.S. at 343.

Similarly, in *Bakke* this Court (Powell, J.) held that, assuming a legislative finding of constitutional or statutory

violations, the remedial action taken must work the least harm possible to other innocent persons competing for the benefits. *Regents of the University of California v. Bakke,* 438 U.S. at 308 (1978).

The questions presented here are whether a fixed racial quota is necessary to remedy the effects of societal discrimination and if so whether such quota imposes the least harm on those non-minority businesses that traditionally compete for that portion of the work now reserved for MBEs. We submit that the answer to both these questions is a resounding "No", particularly in view of the repugnance of racial quotas to the basic concepts of a democratic society.

It is first noted that the 10% MBE set-aside is not a necessary means to accomplish the governmental objective of getting MBEs into the mainstream of the economy. As pointed out above, the biggest problem among minority contractors is insufficient working capital. (Gov. Ex. 1 at p. 24, Table 7). The lack of knowledge of future bidding opportunities ranks second. (*Id.*). That same report accordingly recommended that various civilian agencies make cash advances to minority contractors to assist them in meeting working capital needs, as currently *authorized* by 41 C.F.R. §1-30.400 (Gov. Ex. 1 at p. 130 para. III). The existing Section 8A of the SBA program should also be utilized to its maximum benefit. (*Id.* at p. 132 para. V). (*See* Gov. Ex. 4 at p. 147, suggesting consideration of a set-aside for disadvantaged firms.)

In sum, mechanisms presently exist which, if judiciously and efficiently applied, will accomplish the desired result without having to exclude anyone from participation in federally funded construction work. In any event, on the federal, state and local level, Gov. Ex. 1 indicates that any effort to increase minority participation in government contracts should be commensurate with the present minority participation in the

economy. (Gov. Ex. 1 at p. 129, para, I; 138 para. A(1)). The systematic exclusion of non-minorities from participation in Round II is just not necessary to solve the problems of MBEs.[9]

Central to Justice Powell's idea of a constitutionally valid affirmative action program is governmental support of such program. Aside from the question of Congress' competence to act in the MBE situation, is the question of the basis for their acting at all. Clearly, the proponents of a program providing for mandatory racial quotas must bear the rigorous burden of showing that the program has as its basis a detailed examination of the problem to be remedied as well as an extensive examination of possible alternatives to the use of racial classifications. *Cf. Regents of the University of California v. Bakke,* 438 U.S. at 302-307; *Dunn v. Blumstein,* 405 U.S. at 343.

The prime consideration in this case is the effect which the MBE set-aside provision has on those non-minority subcontractors that traditionally perform the work now reserved for MBEs. The Second Circuit Court, in dealing with such subject found that since minority-owned businesses amount to only 4.3 percent of the total number of firms in the industry, "the burden of being dispreferred in .25 percent of the total opportunities in the construction industry was thinly spread among non-minority businesses comprising 96 percent of the industry." (A221a). In making this finding, such Court ignored the reality of the situation.

9. It is to be noted that the court in *Constructors Ass'n of Western Pennsylvania, supra,* suggests that the 10% preference given to minorities will increase their participation in terms of the MBE percentage with respect to *all* contractors. 441 F.Supp at 953. This is completely erroneous, since the EDA Guidelines (A129a-155a) stifle the current percentage of MBE participation in the construction industry as a whole, by refusing to recognize as a *bona fide* MBE one which is created *solely* to take advantage of the minority benefits under the Act. Thus, the anomolous effect of the EDA guidelines is to freeze the number of MBEs as of the effective date of the Act rather than increase the overall MBE participation as intended (132a, para. 2).

In practical application the work which is set aside pursuant to the PWEA is not work traditionally performed by 100 percent of the industry. Rather it is work which, because of its limited size or specialized nature, is customarily performed by a limited number of small firms which, due to their size and limited finances and expertise, specialize in performing such work (A65a-66a, A89a-91a). Thus, the dispreferred group is a limited, readily identifiable group of small specialty subcontracting firms, many of which may be every bit as socially and economically disadvantaged as are the minorities defined in the Act. The devastating impact of the Act's MBE set-aside on the business of a first generation non-minority immigrant sidewalk installer, for example, must be considered in determining whether an outright mandatory minority set-aside is the least onerous means of eradicating the effects of past discrimination. Surely, it is not constitutionally permissible to elevate the status of one group through the destruction of another, especially where there are less onerous alternatives available.

In *Kirkland v. New York State Dept. of Correctional Services,* 520 F.2d 420 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976), *reh. denied,* 429 U.S. 1124 (1977), a civil service examination for promotion to the grade of sergeant was found to be discriminatory against Blacks and Hispanics. The District Court ordered the preparation of a new examination and further ordered the promotion of at least one Black or Hispanic employee for every three white employees promoted until the combined percentage of Black and Hispanic sergeants equaled the combined percentage of Black and Hispanic correction officers. The Second Circuit Court, in reversing the District Court's imposition of this racial quota, referred to previous cases imposing racial quotas and noted that:

> "In each of these cases there was a clearcut pattern of long-continued and egregious racial discrimination. In none of them was there a showing of identifiable reverse discrimination. In the instant case, there is insufficient proof of the former and substantial evidence of the latter." 520 F.2d at 427.

The Circuit Court went on to hold:

> "A hiring quota deals with the public at large, none of whose members can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for promotion is an entirely different matter. Both these men and the court know in advance that regardless of their qualifications and standing in a competitive examination, some of them may be bypassed for advancement solely because they are white. As to such a situation, the following comments of Judge Mulligan in *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, supra,* are most pertinent:
>
> > 'We are discussing some 117 positions with time-in-grade requirements mandating three years' service as patrolman, sergeant and lieutenant postponing promotion to captain for a minimum of nine years. While this factor will delay those of the minority groups who will become patrolmen, the imposition of quotas will obviously discriminate against those Whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color

> alone. The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish racial attitudes.'" 520 F.2d at 429 (footnote omitted).

Thus, in a case where, after a full trial of the facts, discrimination was found to exist (which is not the case with the Congressional action at issue here), the Court, finding evidence of reverse discrimination in the imposition of a racial quota (which *is* the case here), refused to permit the quota to remain in effect, such Court noted in the process that:

> "The replacement of individual rights and opportunities by a system of statistical classifications based on race is repugnant to the basic concepts of a democratic society." 520 F.2d at 427.

Not sitting as a super legislature but just following that standard of review applicable in determining whether the MBE set-aside provision is necessary and the least discriminatory means, this Court can and must find that there are other alternatives available which do not systematically exclude non-minorities (disadvantaged or otherwise) from participating in federal employment solely because of their race. When the objective is to help disadvantaged minorities, the end may be achieved by making use of classifications less repugnant than fixed racial quotas. One alternative would be to aid the economically and socially disadvantaged of *all* races. As pointed out in *Associated General Contractors of California, supra,* racially neutral legislation invoking a 10% set-aside could be directed at those businesses which have experienced a low level of employment for a particular year. The Commerce Department could then take affirmative steps to ensure that businesses in areas of high unemployment become particularly aware of federally funded projects being planned, and assist such

businesses in familiarizing themselves with the larger general contractors who customarily bid on federally funded projects. Such an approach clearly would have less detrimental and discriminatory impact upon small non-minority contractors. It is also safe to assume that through the use of such an approach, many MBEs will be included in the preferred class, thus accomplishing, through racially neutral means, the desired objective of advancing MBEs.

In addition, not all preferential set-asides must be racially oriented. An example of a racially neutral set-aside is contained in the recent amendment of Section 8(d) of the Small Business Act (Public Law 95-507, effective October 24, 1978). This amendment provides that it is the policy of the United States that small businesses owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of federal contracts. In furtherance of this objective the amendment provides in substance that each solicitation of a bid for any federal contract shall contain a clause requiring a successful bidder to submit a subcontracting plan, which among other things, includes a recitation of the percentage goals for the utilization as subcontractors of small businesses owned and controlled by socially and economically disadvantaged individuals. The new law provides that the term "small business concern owned and controlled by socially and economically disadvantaged individuals" shall include "Black Americans, Hispanic Americans, Native Americans, and other minorities, *or any other individual found to be disadvantaged.*" 15 U.S.C. §637(d)(3)(C) (emphasis added).

Thus, Congress has removed from the amendment to the Small Business Act the two unconstitutional thorns contained in the PWEA. Congress has removed the mandatory set-aside in favor of a goal and, most importantly, eliminated the exclusively racial nature of the preference by making it apply to economically disadvantaged concerns, whether minority controlled or otherwise.

Whether Public Law 95-507 indicates a Congressional realization of the problems inherent in the PWEA set-aside is yet to be seen. However, unless the constitutionality of the set-aside is addressed by this Court, the concept of the minority preference or set-aside will continue long after the funding provided for in the PWEA has been expended. In enacting the PWEA set-aside amendment, Congress has, without doubt, inaugurated the age of racial quotas.

It is clear from the foregoing that, as a mere addendum to a Congressional funding bill, the 10% MBE set-aside provision does not meet the *Bakke* test of being precisely tailored to serve a compelling governmental interest. *Regents of the University of California v. Bakke,* 438 U.S. at 308. The provision, moreover, "does not work the least harm possible to other innocent persons competing for the benefit" as provided for in *Bakke* and is consequently not the least detrimental means of remedying any evidences of past societal discrimination. Under a strict scrutiny analysis, the 10% MBE requirement is therefore unconstitutional.

II.

SECTION 103(f)(2) OF THE PWEA, 42 U.S.C. §6705(f)(2) IS IN VIOLATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964.

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et. seq.* provides that:

> "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 financial assistance."

All federal departments and agencies which extend federal financial assistance are compelled to effectuate the provisions of this section. 42 U.S.C. §2000d-1. The Second Circuit Court of Appeals completely failed to consider whether the Congressional mandate embodied in §601, invalidated the MBE preferential disbursement of federal monies; rather, the Court therein looked only to the constitutional issues in reaching its decision. Before reaching constitutional questions, however, the better practice would have been for the Court of Appeals to consider whether the statutory grounds might be dispositive. *New York City Transit Authority v. Beazer,* 99 S. Ct. 1355, 1364 (1979); *see also, Rescue Army v. Municipal Court,* 331 U.S. 549, 568-69 (1946).

Title VI is a distinct statutory prohibition, enacted at a specific time in our history to "insure that *no person* in the United States is excluded from participation in, denied the benefits of, or subjected to discrimination on the grounds of race, color or national origin under any program or activity receiving Federal assistance." H.R. Rep. No. 914, Part I, 88th Cong., 1st Sess. 25 (1963) (emphasis added). Its provisions are unmistakable in terms of the Congressional policy in enacting a statutory framework of equal protection and nondiscrimination guarantees for *all* Americans. *See* 1964 U.S. Code Cong. & Ad. News at 2400-01 App. E. Accordingly, the plain language, policy and dictates of Title VI, prompted two District Courts in "reverse discrimination" cases to strike down the use of federal funds in favor of one race to the detriment of others. *See Flanagan v. President & Directors of Georgetown College,* 417 F. Supp. 377, 384 (D.D.C. 1976); *Cramer v. Virginia Commonwealth University,* 415 F. Supp. 673, 681 (E.D. Va. 1976).

In this Court's recent decision in *Regents of the University of California v. Bakke,* 438 U.S. 265, five justices reached the constitutional issue presented by Davis' Special Admission Program, stating that the term "discrimination", as it is used in §601, is susceptible to varying interpretations and was thus consciously chosen by the drafters to permit a flexible, constitutionally grounded view of what would be impermissible

differentiation under that Act. The majority found that Title VI proscribes only those racial classifications that violate the Equal Protection Clause or the Fifth Amendment. 438 U.S. at 287 (Powell, J.); *id.* at 328 (Brennan, J.).

Prohibiting "discrimination" in the distribution of federal funds however does not define the full extent of Title VI. The statutory scheme embodied therein also states that no person shall on the ground of race be "excluded from the participation in" or "be denied the benefits of" any program or activity receiving federal funds. Whether or not the prohibition against "discrimination" is or is not co-extensive with the flexibility of constitutional criteria, Title VI prohibits non-minorities' exclusion from the participation in and denial of the benefits of federal monies appropriated under the PWEA.

This Court has already clearly recognized the multi-pronged sweep of Title VI as prohibiting more than just discrimination. In *Lau v. Nichols,* 414 U.S. 563 (1974), this Court held that a racially neutral educational program had the effect of depriving the Chinese speaking minority of "a meaningful opportunity to participate in the educational program," had a discriminatory impact, and thus violated Title VI. 414 U.S. at 568. Discriminatory intent was not a prerequisite to finding a statutory violation. On the other hand, as this Court later held, such discriminatory intent was and is necessary to find a *constitutional* violation. *Washington v. Davis,* 426 U.S. 229, 249 (1976) (discriminatory impact not enough to find a constitutional violation). This dichotomy plainly establishes that a violation of Title VI may in some cases, require something less than is required to violate the more stringent standards of the Fourteenth Amendment.

The distinction was not overlooked in *Bakke.* Recognizing that a plain reading of *Washington* and *Lau* underscores the broader sweep of Title VI vis-à-vis the Constitution, the Brennan Group, at least implicitly, recognized the incongruity of its

finding of coextensiveness, 438 U.S. at 352-53, and did in fact sanction the special admissions program under pure Title VI standards without reference to the constitutional arguments. *Id.*[10] Accordingly, it is submitted that the *Bakke* Court left open the question of the scope of the constitutional dictates with respect to other facets of Title VI.

The legislative history of the Civil Rights Act of 1964 similarly supports such finding. Although the legislative history makes it apparent that the immediate object of Title VI was to prevent federal funding of segregated facilities,[11] it is equally apparent that its proponents intended a statutory framework which transcended constitutional mandates and included that which is morally just.[12] Senator Pastore, speaking of the basic purpose of VI, concluded that "[Title VI] will guarantee that the money collected by colorblind tax collectors will be distributed by Federal and State administrators who are equally colorblind." 110 Cong. Rec. 7055 (1964). Thus, notwithstanding the constitutional mandates for the distribution of federal funds, it is clear that the proponents of Title VI

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10. Mr. Justice Powell also discussed *Lau* but not the facet relating to statutory as opposed to constitutional standards 438 U.S. at 303-04.

11. *See, e.g.*, 110 Cong. Rec. 1521 (1964) (remarks of Rep. Allen); *id.* at 6544 (remarks of Sen. Humphrey).

12. "Title VI is sound; it is morally right; it is legally right; it is constitutionally right." 110 Cong. Rec. 7055 (1964) (Remarks of Sen. Pastore). Senator Humphrey similarly explained Title VI as expressing principles of both constitutional *and* moral understanding.

> "The purpose of Title VI is to make sure that funds of the United States are not used to support racial discrimination. *In many instances* the practices of segregation or discrimination, which Title VI seeks to end, are unconstitutional. . . . *In all cases,* such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, Title VI is simply designed to insure that federal funds are spent in accordance with the Constitution *and* the moral sense of the Nation." 110 Cong. Rec. 6544 (emphasis added).

intended that statute to provide for the flow of such funds so that no person, regardless of his race, should be denied the opportunity to compete for a benefit. In light of this Courts' decisions in *Lau* and *Washington,* and the strong supporting legislative history of Title VI, this Court should conclude that the language of Title VI still bars the exclusion from participation or denial of benefits of federally funded programs on racial grounds without reference to the Constitution.

Additionally, the term "discrimination" as used in §601 must be given its ordinary meaning as that term was defined in 1964. It is respectfully submitted that any finding of the *Bakke* Court to the contrary should be re-examined.

The legislative history of the Civil Rights Act of 1964, and particularly of Title VI, reinforces the plain meaning of the statute and confirms that Congress intended to accord all, blacks and whites alike, equal access to federally funded projects. The issue of the definition of the term "discrimination" was first raised by the opponents of Title VI who feared that "discrimination" would be read as mandating racial quotas and racial balance in all transactions. *See, e.g.* 110 Cong. Rec. 1619 (remarks of Rep. Abernathy); *id.,* at 5611-5613 (remarks of Sen. Ervin); *id.,* at 9083 (remarks of Sen. Gore). Senator Humphrey, however, speaking for the proponents of the legislation, gave assurance that Title VI would be "colorblind" in its application.

> "[T]he word 'discrimination' has been used in many a court case. What it really means in the bill is a distinction in treatment . . . given to different individuals because of their different race, religion or national origin. . . .
>
> The answer to this question is that if race is not a factor, we do not have to worry about discrimination because of race. . . . The Internal Revenue Code does not provide that colored

> people do not have to pay taxes, or that they can pay their taxes 6 months later than everybody else." 110 Cong. Rec. 5864 (Remarks of Sen. Humphrey).
>
> "[I]f we started to treat Americans as Americans, not as fat ones, short ones, tall ones, brown ones, green ones, yellow ones, or white ones, but as Americans. If we did that we would not need to worry about discrimination." 110 Cong. Rec. 5866 (Remarks of Sen. Humphrey).[13]

The remarks of Senator Humphrey set the obvious interpretive standard for the Act, and clearly show that "discrimination" of any manner was proscribed by the proponents of Title VI.

Further, it is an elementary cannon of construction that legislative and judicial statements must be considered in the historical context in which they were made. *Afroyim v. Rusk,* 387 U.S. 253, 261 (1967). There is no doubt that the reality of discrimination against Negroes provided the impetus for the passage of Title VI. But this fact by no means supports the proposition that Congress intended to permit the distribution of public funds so as to discriminate against non-blacks.

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13. This view was later reiterated in the "Bipartisan Civil Rights Newsletter No. 9" distributed to the Senate on March 19, 1964 by the supporters of the Civil Rights Act:

> "3. Defining discrimination: Critics of the Civil Rights Bill have charged that the word 'discrimination' is left undefined in the bill and, therefore, the door is open for interpretation of this term according to 'whim or caprice. . . .'
>
> There is no sound basis for uncertainty about the meaning of discrimination in the civil rights bill. It means a distinction in treatment given to different individuals because of their different race, religion, or national origin." 110 Cong. Rec. 7477 (1964).

At a time when Congress was not directly concerned with the problems of "reverse discrimination" or "affirmative action" programs,[14] the legislative history reinforces a reading of Title VI that *all* should have access to participation in federally funded programs.

Senator Humphrey, the Senate floor manager for the Act, expressed this position as follows:

> "What [Title VI] provides is already the law of the land, which the courts have upheld repeatedly. The Courts have held that when citizens pay taxes which go into the Treasury of the United States, and pay taxes, not on the basis of race, but on the basis of citizenship, they shall receive the benefit of the money that is spent, *not on the basis of race, but on the basis of citizenship,* and there shall be no discrimination or discriminatory use of such funds." 110 Cong. Rec. 5865. (emphasis added)

Similarly, Representative Celler, the House floor manager for the entire Civil Rights Act observed:

> "[Title VI] would require that each Federal agency which extends financial assistance of the type covered by Title VI must establish

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14. In fact, in discussing Title VI, Senator Moss concluded:

> ". . . we do not seek to create extraordinary rights or special privileges, for S. 1752 is in fact what it is in name — a Civil Rights Act. And its only purpose is to assure that those just claims which derive from membership in this society will no longer be denied on account of race, color, or national origin. There is no intent here — and no possibility — that a Negro will be given special preference. . . ." 110 Cong. Rec. 6749 (1964).

> nondiscriminatory standards of general application. *This means that it cannot apply one standard of conduct to one person and a different standard of conduct to another.*" 110 Cong. Rec. 1517 (1964) (emphasis added).[15]

It is clear that the proponents of Title VI assumed that the Constitution itself was to be "colorblind" in its application. The remarks of Senator Douglas, further support this view. In outlining the principles of the Fourteenth Amendment as they apply to the Civil Rights Act, Senator Douglas concluded:

> "This epochmaking amendment established a number of fundamental principles, of which full significance is only now being appreciated.
>
> 1. . . .
>
> 2. No distinctions were to be made as to the various types of citizenship. There were to be no second class or third class citizens. *All were to be first class citizens on equal terms with all others.*
>
> 3. . . .
>
> 4. *All citizens — white or black, rich or poor* — were therefore entitled to 'equal rights and privileges under the law', nor was any State to deprive them of the 'equal protection of the laws,'

15. *See also,* 110 Cong. Rec. 6047 (remarks of Sen. Pastore) (under Title VI it is not "permissible to say 'yes' to one person, but to say 'no' to another person, only because of the color of his skin."); 110 Cong. Rec. 1629 (remarks of Rep. Halpern). Similarly, Senator Muskie concluded in a lengthy defense of the entire act: "Every American citizen has the right to equal treatment — not favored treatment, not complete individual equality — just equal treatment." 110 Cong. Rec. 12614 (1964).

> nor could a State take a man's 'life, liberty, or property without due process of law.'
>
> 5. All this constituted an explicit obligation on the part of the State governments — and their subordinate local governments — *to refrain from any action which might deny to some rights and privileges granted to others. . . .*" 110 Cong. Rec. 6812 (1964) (emphasis added)[16]

When interpreting Title VI, this Court should not consider whether the 1964 Congress was mistaken in its view of the limits of the Fourteenth Amendment. Rather, it is incumbent on this Court "to construe the statute in light of the impressions under which the 88th Congress did in fact act." *Moor v. County of Alameda,* 411 U.S. 693, 709 (1973).

Nothing in the legislative history justifies the conclusion that the broad language of Title VI should not be given its natural meaning. In fact, the supporters of Title VI urged that:

> "Where federal funds are made available in order to provide jobs, it would be unconscionable to permit discrimination in the availability of these jobs." 110 Cong. Rec. 6545 (1964) (remarks of Senator Humphrey).

There can be no doubt that Congress responded to the problem of federal funding of segregated facilities by extending a broad prohibition against the exclusion of *any* individual from a federally funded project on the grounds of race.

In direct contrast to the legislative policy of non-discrimination embodied in Title VI is Section 103(f)(2) of the

16. *See also, e.g.,* 110 Cong. Rec. 5253 (remarks of Sen. Humphrey); and *id.,* at 7102 (remarks of Sen. Javits).

PWEA which is totally devoid of any legislative history, policy or goal, except the brief remarks of its sponsor, Representative Mitchell.[17]

As recognized by the court in *Associated General Contractors of California v. Secretary of Commerce,* 441 F. Supp. 955, 967-68 (C.D. Cal. 1977), rules of construction in cases involving conflicting statutes are not helpful where, as here, the court must go beyond that conflict and ascertain the purpose underlying the conflicting enactments to better determine which of the two will prevail. *See e.g., Fanning v. United Fruit Co.,* 355 F.2d 147, 149 (4th Cir. 1966).

When the overriding public interest is demonstrably clear and a prior general statute sets forth the true constitutional mandate, and the latter more particularized statute is less conducive to the public welfare, then the public good must control and the general statute takes precedence over and invalidates the specific statute. *Associated General Contractors of California, supra,* 441 F. Supp. at 968.

On this basis alone, Section 103(f)(2) of the PWEA should be held invalid as violating the overriding Congressional policy of Title VI of the Civil Rights Act of 1964.

It is difficult to believe that Title VI has been repealed or suspended by Congress, in whole or in part, by the enactment of the MBE provision.[18] In the absence of clear legislative intent to

17. The scant remarks of Representative Mitchell have been characterized by one court as being far from legislative history and merely "the debate rhetoric of a partisan who sponsored the amendment." *Associated General Contractors of California v. Secretary of Commerce,* 441 F. Supp. at 969. As further pointed out in *Associated General Contractors,* "the legislative history [of the PWE Act] includes no mention of the MBE provisions. . . ." 441 F. Supp. at 965.

18. On the contrary, the regulations direct compliance with Title VI. *See,* 13 C.F.R. §317.35(a)(2) (1977).

the contrary, those broad purposes set forth in Title VI must remain the viable and continued expression of Congressional policy. The applicability of the Civil Rights Act clearly indicates that the MBE provision in the instant statute must be struck down because, most obviously, it cannot co-exist with the applicable provision of Title VI.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the judgment of the District Court, as well as the affirmance by the Second Circuit Court of Appeals be reversed in all respects, and that plaintiffs' complaint be reinstated, and the relief sought therein granted, together with the costs and disbursements of this appeal, and such other and further relief as may be just and proper.

Respectfully submitted,

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