IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1007

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

against

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 RESPONDENT STATE OF NEW YORK

ROBERT ABRAMS
Attorney General of the
State of New York
Two World Trade Center
New York, N.Y. 10047

Attorney for Respondent
State of New York

SHIRLEY ADELSON SIEGEL
Solicitor General

ARNOLD D. FLEISCHER
BARBARA E. LEVY
Assistant Attorneys General

Of Counsel

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Questions Presented

1. Does Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2), which provides that at least 10% of federal grants for local public works projects shall be set aside for minority business enterprises, violate the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Does Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2), violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d?

Statement

The Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116-121, 42 U.S.C. §§ 6701-6736 ("PWEA"), was enacted by Congress to extend the provisions of the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999-1012, 42 U.S.C. §§ 6701-35 ("LPWA"). Under the LPWA, Congress appropriated $2 billion for direct grants to state and local governments to fund public works projects that would generate employment nationwide in the economically depressed construction industry. Section 109 of the PWEA, 42 U.S.C. § 6708, authorized the expenditure of $4 billion, and Congress subsequently appropriated $2 billion, for such projects. The PWEA also provided that work on the funded projects was to be performed by private firms, rather than by the state or local government grantees. Pursuant to these statutes, respondent State of New York received grants of approximately $42,119,000 (36a).*

Petitioners in this action include several associations of construction contractors and subcontractors and an air conditioning contractor who seek to prevent the Secretary of Commerce, as program administrator under the statute, and the State and City of New York, as grantees, from enforcing and implementing Section 103(f)(2) of the PWEA ("the MBE requirement") which requires that "10 per centum of the amount of each grant be expended for minority business enterprises." Petitioners argue that Section 103(f)(2) violates the Due Process Clause of the Fifth

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* Unless otherwise indicated, parenthetical references are to the Appendix.

Amendment, the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

In a decision dated December 19, 1977, District Judge Werker denied petitioners' request for a preliminary injunction and declaratory relief and dismissed the complaint. The opinion of the District Court (443 F. Supp. 253 [S.D.N.Y. 1977]) concluded that the MBE requirement satisfied the strict scrutiny analysis that must be applied to legislative classifications based on race, and, therefore, did not deprive petitioners of due process or equal protection under the Fifth and Fourteenth Amendments to the Constitution. The District Court further held that the MBE requirement did not violate Title VI of the Civil Rights Act of 1964, pointing out that "it defies credulity to argue that measures intended to correct the invidious effects of racial discrimination must be limited to remedies which are not race sensitive" (202a-203a).

The Court of Appeals unanimously affirmed, 584 F. 2d 600 (2d Cir. 1978). Noting that "a large measure of judicial restraint must be accorded to Congress in its enactment of legislation to remedy past discrimination" (214a), the Court of Appeals held that the MBE requirement was constitutional (211a).

Statute Involved

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

> "2. Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any 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 pur-

poses 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."

Summary of Argument

The MBE provision was enacted by Congress in the exercise of its powers to enforce the Civil War Amendments to the Constitution. Judicial review of such action by Congress properly entails greater deference than that accorded comparable state, administrative or private activity.

The 10% set-aside for minority business enterprises was designed to remedy the effects of past discrimination. Congress had a clear basis upon which to determine the compelling need for this legislation, in view of the well-established history of discrimination in the construction industry and government surveys which reveal the insignificant participation of minority businesses in the economy.

Moreover, the MBE requirement is necessary to alleviate discriminatory conditions that still exist because alternative methods of relieving them have failed. The challenged legislation is directed at minority groups that are the most prominent victims of discrimination in our society. Thus, the MBE requirement is consistent not only with the Constitution, but with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, as well. The statutes share the goal of ending discrimination and its effects, and Congress has clearly indicated that the use of race-sensitive measures in order to achieve this aim is both permissible and desirable.

ARGUMENT

I

Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2), Does Not Violate the Constitution.

A. The MBE Provision Is A Proper Exercise Of Congressional Authority

The federal Constitution grants Congress special powers to establish the terms and conditions for federal expenditures, *e.g., Lau* v. *Nichols,* 414 U.S. 563, 569 (1974), and to enforce the terms and intent of the Civil War Amendments, *e.g., Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968); *Katzenbach* v. *Morgan,* 384 U.S. 641, 650-651 (1966); *South Carolina* v. *Katzenbach,* 383 U.S. 301, 327 (1966). Specifically, in relation to remedying the effects of past discrimination, the enabling clauses of the Civil War Amendments authorize Congress "to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of . . . [those Amendments]." *Katzenbach* v. *Morgan, supra,* 384 U.S. at 651.

The MBE provision of the PWEA is a legitimate exercise of Congressional authority to fashion remedies for past discrimination pursuant to Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment. As this Court emphasized in *Lau* v. *Nichols, supra,* 414 U.S. at 569, not only does Congress have the "power to fix the terms on which its money allotments to the State shall be disbursed", but it also has the affirmative power to ensure that "public funds . . . not be spent in any fashion which encourages, *entrenches,* subsidizes or results in racial discrimination." (Emphasis added.) *Cf. Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964).

The constitutional powers of Congress are distinct from and, where national interests are at stake, greater than whatever authority the states, an administrative agency or private parties* may have to fashion affirmative efforts to eliminate the effects of racial or ethnic discrimination. See *Hampton* v. *Mow Sun Wong,* 426 U.S. 88, 100 (1976). Petitioners phrase their arguments as though addressing the authority of these other entities. When Congress exercises its powers pursuant to the Thirteenth and Fourteenth Amendments, it is particularly appropriate for this Court to defer to Congress' special role under these Amendments and to display marked restraint in its review of the challenged legislation. See *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 302 n. 41 (1978) (Powell, J.); *Katzenbach* v. *Morgan, supra,* 384 U.S. at 653.

B. The Challenged Statute Serves The Compelling State Interest Of Overcoming The Effects Of Discrimination Upon Minority Business Enterprises And Uses Narrowly Drawn Means To Accomplish That Purpose

Contrary to petitioners' argument, the Court of Appeals correctly subjected the MBE requirement to the strict scrutiny necessitated by a statutory classification of this kind. *Dunn* v. *Blumstein,* 405 U.S. 330 (1972). Petitioners' claim that the Second Circuit instead incorrectly "fashioned a new 'fundamental fairness' test" contradicts the record itself (211a-212a) and distorts the analysis of the Circuit Court, which concluded that "even under the most exacting standard of review the MBE provision passes constitutional muster [footnote omitted]" (211a).

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* See *United Steelworkers of America* v. *Weber,* —— U.S. ——, 47 U.S.L.W. 4851 (U.S. June 27, 1979).

1. The MBE Requirement Serves A Compelling State Interest

In *Katzenbach* v. *Morgan, supra,* 384 U.S. at 653, in discussing the basis for Congress' enactment of § 4(e) of the Voting Rights Act of 1965 and the resulting prohibition of New York City's English literacy requirement for voters, this Court stated:

> "It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did . . . Any contrary conclusion would require us to be blind to the realities familiar to the legislators [footnote omitted]."

This language is especially pertinent to the instant case, where petitioners contend that the record does not support the conclusion of the Court of Appeals that Congress perceived a compelling interest requiring the enactment of the challenged statute. The courts may not substitute their judgment for that of Congress in assessing and weighing the factors involved in the enactment of legislation.

Petitioners attribute particular significance to the admittedly "sparse" legislative history of the MBE requirement and vehemently attack the Court of Appeals for having noted that Congress' "lack of extended discussion clearly indicates the knowledge of the congressmen concerning the well-established history of past discrimination in the construction industry" (217a n. 10).

However, this Court, too, has recently commented that "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." *United Steelworkers of America* v. *Weber, supra,* 47 U.S.L.W. at 4852 n. 1. Indeed, petitioners operate in areas which the federal

courts, including those sitting in New York, have repeatedly characterized as following a clear-cut, historical pattern of racial discrimination. See, *e.g., United States* v. *Wood, Wire and Metal Lathers International Union, Local No. 46,* 471 F. 2d 408, 413-14 (2d Cir.), *cert. den.* 412 U.S. 939 (1973); *Associated General Contractors of Massachusetts* v. *Altschuler,* 490 F. 2d 9, 18 (1st Cir. 1973), *cert. den.* 416 U.S. 957 (1974); *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F. 2d 159, 173 (3rd Cir.), *cert. den.* 404 U.S. 854 (1971). See generally *Rios* v. *Enterprise Association Steamfitters, Local No. 638,* 501 F. 2d 622 (2d Cir. 1974); *Equal Employment Opportunity Commission* v. *Steamfitters Local No. 638, Sheetmetal Workers, Local No. 28,* 401 F. Supp. 467 (S.D.N.Y. 1975), *aff'd. as mod.* 532 F. 2d 821 (2d Cir. 1976).

The Court of Appeals and the District Court in this case are not alone in recognizing that Congress does not enact legislation in a vacuum. In *Rhode Island Chapter, Associated General Contractors of America, Inc.* v. *Kreps,* 450 F. Supp. 338 (D.R.I. 1978), another District Court, in commenting on the legislative history of the MBE requirement, stated:

> ". . . the lack of detailed debate may reflect a sufficient consensus to pass the minority business requirement without major legislative battle. More specifically, Congress has sufficiently familiarized itself over the past decade with the nature of discrimination that it need not repeat lengthy legislative findings of fact." 450 F. Supp. at 348 n. 4.

This Court has recognized Congress' "special competence . . . to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures" pursuant to its powers under § 2 of the Thirteenth Amendment. *Regents of the University of California* v. *Bakke, supra,*

438 U.S. at 302 n. 41. In this case, the Congressional findings with respect to the MBE requirement are implicit in the legislation itself. Moreover, even in the absence of extensive legislative history containing designated "findings", Congress is presumed to have acted with full knowledge of the area addressed by the statute, particularly where, as here, its purpose is unambiguous. See *Katzenbach* v. *Morgan, supra,* 384 U.S. at 655-56; *East New York Savings Bank* v. *Hahn,* 293 N.Y. 622, 628 (1944), *aff'd.* 326 U.S. 230 (1945). See also *Cannon* v. *University of Chicago,* —— U.S. ——, 60 L. Ed. 2d 560, 574 (1979).

Like the veterans' preference laws considered by this Court in *Personnel Administrator of Massachusetts* v. *Feeney,* —— U.S. ——, 60 L. Ed. 2d 870 (1979), affirmative action measures like the MBE requirement "have been challenged so often that the rationale in their support has been essentially standardized." 60 L. Ed. 2d at 879 n. 12. Thus, not only is Congress' purpose in enacting the MBE requirement as self-evident as the classification itself,* but the basis for Congress' action is equally apparent from the historical context for the factors reviewed by the Court of Appeals.

The lack of participation by minority business enterprises "in our total business system generally, or in the construction industry, in particular" has been attributed by the House Subcommittee on Small Business Administration Oversight and Minority Business Enterprise to "a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities." Summary of Activities of the Committee on Small Business, House of Representatives, 94th Congress, 182-83 (November, 1976); 218a-219a. As a result,

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* "The amendment [adding the MBE requirement] makes no sense unless it is construed as a set-aside to benefit minority subcontractors", declared the Court of Appeals with appropriate succinctness (214a).

as noted by the Court in *Constructors Association of Western Pennsylvania* v. *Kreps*, 441 F. Supp. 936, 951 (W.D. Pa. 1977), *aff'd.* 573 F. 2d 811 (3rd Cir. 1978):

> "Despite a minority population of about 17%, minority individuals control only about 4% of the businesses in the United States, and minority businesses account for less than 1% of national gross business receipts and total business assets. (Interagency Report on the Federal Business Development Programs, March 1974, at 24; Minority Business Opportunity Committee Handbook, August, 1976, at I-1). And it has been estimated that minority businesses obtain less than 1% of government contracts. (Minorities and Women as Government Contractors, U.S. Commission on Civil Rights Report, May 1975, at 2, 86 and 89)."

These statistics, which were considered by both courts below (193a-194a, 221a-222a), may also be gleaned from the U.S. Bureau of the Census, 1972 Census of Construction Industries: Industries Series, United States Summary—Statistics for Construction Establishments With and Without Payrolls, Table A1 (Aug. 1975) and the U.S. Bureau of the Census, 1972 Survey of Minority-Owned Business Enterprises: Minority-Owned Businesses, Table 1 (May 1975).* Against this background, the re-

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* Petitioners claim that these figures are "unreliable and inconclusive" because the number of minority contractors and the amount of dollar receipts of minority-owned construction businesses increased 34.28% and 84.45%, respectively, between 1969 and 1972. The obvious flaw in petitioners' argument, however, is that the base from which these allegedly "dramatic" increases were generated is so small that the subsequent participation of minority business enterprises in the economy, as indicated above, is still virtually without significance. Petitioners' additional objection to consideration of surveys of minority participation in the construction industry prior to the effective date of Titles VI and

(footnote continued on following page)

marks by Representative Mitchell, sponsor of the amendment which added the MBE requirement to the PWEA (123 Cong. Rec. H. 1437-41 [daily ed. Feb. 24, 1977]), cannot be dismissed as mere "debate rhetoric", notwithstanding the contrary view of the Court 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, *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). His remarks and those of Representative Conyers, noted by the Court of Appeals below (216a), accurately point out the real obstacles faced by minority business enterprises in this country, and, in fact, they are confirmed by the statistics cited above.

> "From this perspective, it seems illogical and unsound to distinguish between those aspects of the social history of racism that can be traced to identified discrimination on the part of governmental and private entities, and those that cannot. What Justice Powell [in *Bakke*] called 'societal discrimination' is nothing more than an accumulation of wrongs on the part of governmental and private entities that cannot be identified with particularity at the present time. But their consequences are no less enduring because they cannot be so identified. The non-identifiable nature of the discrimination does not obviate the government's valid and substantial interest in redressing its consequences. It merely converts that interest from

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(footnote continued from preceding page)

VII of the Civil Rights Act of 1964 in order to establish the historical framework within which to evaluate the need for the MBE requirement is similarly ill-founded. This case does not involve the imposition of remedies for discrimination pursuant to these statutes, and, therefore, it need not be limited to facts occurring after their effective date.

> a constitutionally mandated to a constitutionally permissible one." Sedler, *Beyond Bakke: The Constitution and Redressing the Social History of Racism,* 14 Harv. Civ. Rights—Civ. Lib. L. Rev. 133, 157 (1979).

The courts below, therefore, had a sufficient basis to discern Congress' remedial purpose in enacting the MBE requirement (*Constructors Association of Western Pennsylvania* v. *Kreps, supra,* 441 F. Supp. at 952) and to conclude that a compelling interest did, indeed, exist.

2. The MBE Requirement Constitutes Effective Yet Narrowly Drawn Means

In *Dunn* v. *Blumstein, supra,* 405 U.S. at 343, this Court said:

> "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. If it acts at all, it must choose 'less drastic means'. *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960)." (Emphasis added)

The MBE requirement was enacted because Congress was aware that no "other, reasonable ways" existed to remedy the effects of discrimination against minority business enterprises and "because existing programs which had utilized alternative approaches had not succeeded in raising minority business participation in government contracts above 1%." *Constructors Association of Western Pennsylvania* v. *Kreps, supra,* 441 F. Supp. at 952. "The legislative history, if it indicates anything, shows that other, less-restrictive alternatives have not worked."

Ohio Contractors Association v. *Economic Development Administration,* 452 F. Supp. 1013, 1022-23 (S.D. Ohio 1977), *aff'd.* 580 F. 2d 213 (6th Cir. 1978).

This situation was described at the trial conducted by the District Court in the instant case. James F. McNamara, Assistant Commissioner of the New York State Division of Human Rights, testified that the problems of minority contractors have been "manifold":

> "Very often although they may have the capacity to perform certain work, they are unable to overcome all of these hurdles. It gets to be a vicious cycle because the insurance companies and the banks will not cooperate with them if they don't have an established track record. They can not establish a track record if they don't get a chance to perform. So that type of program that I have observed and have been involved with particularly with the City, have [*sic*] largely been ineffectual." (112a-113a)

Petitioners argue that the 10% MBE set-aside ignores other socially and economically disadvantaged groups attempting to do business in the areas covered by the PWEA. However, "[t]he minorities listed in the MBE definition [Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts] are among those historically discriminated against in our society and were among those considered as minorities for purposes of the government reports on minority businesses." *Constructors Association of Western Pennsylvania* v. *Kreps, supra,* 441 F. Supp. at 952. Petitioners cannot seriously claim that the government is compelled either to remedy every aspect of a social and economic problem or to do nothing at all. *Cf. Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489 (1955).

The MBE requirement's effect upon petitioners' reasonable expectations is minimal, as noted by the Court of

Appeals (221a). To the extent that petitioners' expectations are greater than they would be in the absence of the history of discrimination against minority contractors, they surely "may be modified by statutes furthering a strong public policy interest." *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 778 (1976).

As previously noted, the class of non-minority contractors to which petitioners belong already comprises 96% of the business enterprises and accounts for 99% of the gross business receipts in the area subject to the MBE requirement. Petitioners' argument that they are also entitled to participate in a governmental program to counteract the effects of discrimination against minority businesses is totally without merit.*

In *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977), in discussing New York's use of racial criteria in redistricting under the Voting Rights Act of 1965, this Court commented that while "New York deliberately increased the non-white majorities in certain districts in order to enhance the opportunity for election of non-white representatives from those districts", "even if voting in the county occurred strictly according to race, whites would not be underrepresented relative to their share of the population." 430 U.S. at 165-66. The MBE requirement, similarly race-sensitive, is an appropriate means to remedy one of "our society's most intransigent and deeply rooted inequalities." *Associated General Contractors of Massachusetts* v. *Altschuler, supra*, 490 F. 2d at 16.

Furthermore, the program implemented by the MBE requirement is of limited duration. Like the hiring pro-

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* Given the provision for waiver of the MBE requirement under certain conditions (136a-144a), its temporary, "one-shot" character and the small number of existing minority contractors able to take advantage of the MBE requirement, its diminution of non-minority participation in the relevant market may well be even less than that anticipated by the statute.

gram approved by this Court in *United Steelworkers of America* v. *Weber, supra:*

> "It thus operates as a temporary tool for remedying past discrimination without attempting to 'maintain' a previously achieved balance. See *University of California Regents* v. *Bakke,* 438 U.S. 265, 342 n. 17 (1978) (Brennan, White, Marshall, and Blackmun, JJ.). Because the duration of the program is finite, it perhaps will end even before the 'stage of maturity when action along this line is no longer necessary.' *Id.* at 403 (Blackmun, J.)." 47 U.S.L.W. at 4857 (Blackmun, J., concurring).

Petitioners' claims under the Fifth and Fourteenth Amendments represent an attempt to preserve an "equality" that is all too frequently encountered in American society. Petitioners construe "equality" to mean nothing more than maintenance of the very *status quo* that insures their own current privileged position. Their conception of equal protection transforms it from a "principle based on a perception of social needs" into another means of perpetuating discrimination. Karst and Horowitz, *Affirmative Action and Equal Protection,* 60 Vir. L. Rev. 955, 957-61 (1974).

In essence, the question posed in this case is, "when should what appears to be formal inequality be regarded as true equality"? Kaplan, *Equal Justice In an Unequal World: Equality For the Negro—The Problem Of Special Treatment,* 61 N.W.U.L. Rev. 363 (1966). The MBE requirement can be deemed unconstitutional only if viewed through the blinders of legal and historical abstraction, which have been thoroughly discredited in our time. In the words of Mr. Justice Marshall, concurring in *Regents of the University of California* v. *Bakke, supra,* 438 U.S. at 387:

> ". . . it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this

Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effect of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier."

II

Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2), Does Not Violate Title VI of the Civil Rights Act of 1964.

In *Regents of the University of California* v. *Bakke, supra,* this Court reviewed the voluminous legislative history of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and concluded that Congress enacted Title VI to insure that the executive branch of the federal government had the power to condition the allocation of federal funds upon recipients' compliance with constitutional requirements:

> "Congress recognized that Negroes, in some cases with congressional acquiescence, were being discriminated against in the administration of programs and denied the full benefits of activities receiving federal financial support . . . Congress' solution was to end the Government's complicity [in this] . . . by providing [for termination of] financial support of any activity which employed racial criteria in a manner condemned by the Constitution." *Regents of the University of California* v. *Bakke,* 438 U.S. at 335-336 (Brennan, J., concurring and dissenting, joined by White, Marshall and Blackmun, JJ.).

This Court found in *Bakke* that Title VI was not enacted as a strict "colorblind" scheme. The majority in *Bakke*

held that Title VI only prohibited those race-conscious plans which violated the Constitution.

> "In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* at 287 (Powell, J.).

Just as the MBE provision is a legitimate exercise of Congressional authority and is clearly within constitutional bounds, it is also consistent with the intent and purpose of Title VI. Both statutes have the common goal of eradicating unlawful discrimination and its effects. In *Bakke,* Justice Brennan stated that, in light of the legislative history and the language of Title VI itself, "[Congress] clearly desired to encourage all remedies, including the use of race, necessary to eliminate racial discrimination in violation of the Constitution. . . ." *Id.* at 337. The MBE provision, as an affirmative allocation of federal funds, was specifically intended to serve as a remedy for the effects of discrimination. It is fully consistent with the similar purpose of Title VI.*

Furthermore, the opinion by Justice Brennan in *Bakke, id.* at 348-350, specifically describes the MBE provision as an act of Congress which:

> "eliminates any possible doubt about Congress' views . . . [and] confirms that Congress did not intend to prohibit and does not now believe that Title VI prohibits the consideration of race as part of a remedy for societal discrimination. . . ." *Id.* at 348.

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* In this regard it should be noted that the regulations applicable to recipients of financial assistance from the federal government pursuant to Title VI not only mandate affirmative action to overcome the effects of prior discrimination but also permit similar action to be taken by recipients without a history of prior discrimination. 45 CFR Part 80, § 80.3(b)(6)(i),(ii). *Cf. United Steelworkers of America* v. *Weber, supra; Lau* v. *Nichols, supra.*

Therefore, not only does the Brennan opinion view these two acts of Congress as consistent with each other, it also emphasizes that the subsequent enactment of the MBE provision, as well as the other legislation cited in footnote 25, 438 U.S. at 350, clearly demonstrates "that Congress believes race-conscious remedial measures to be both permissible and desirable. . . ."

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Decision of the Second Circuit Court of Appeals be affirmed.

Dated: New York, New York
September 5, 1979

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent
State of New York

SHIRLEY ADELSON SIEGEL
Solicitor General

ARNOLD D. FLEISCHER
BARBARA E. LEVY
Assistant Attorneys General
of Counsel