IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1007

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

against

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

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Page

The Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitutional Provisions Involved 3

Statutes Involved 3

Statement of the Case:

A. The Proceedings 4

B. The Facts 5

The Reasons for Granting A Writ:

I. The question of minority set-asides in federally funded projects is a topical issue of pervasive and substantial proportions. 7

II. The decision below is in conflict in principle with this Court's decision in *Bakke* and raises significant questions of constitutional and federal law not decided therein. 9

A. Least Discriminatory Means Available 9

B. Prior Discrimination and Congressional Findings 11

C. The MBE Amendment's Conflict with Title VI of the Civil Rights Act of 1964 12

Conclusion 13

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Associated General Contractors of California v. Secretary of Commerce, 441 F. Supp. 955 (C.D. Cal. 1977), vacated and remanded, 98 S. Ct. 3132 (1978), on remand, ____ F. Supp. ____ (C.D. Cal. 1978) 7, 11, 13

Dunn v. Blumstein, 405 U.S. 330 (1972) 9

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 12

Katzenbach v. Morgan, 384 U.S. 641 (1966) 12

Loving v. Virginia, 388 U.S. (1967) 9

Montana Contractors' Ass'n v. Secretary of Commerce, CV77-62-M (D. Mont. filed November 24, 1978) 7

Regents of the University of California v. Bakke, 98 S. Ct. 1733 (1978) 7, 8, 9, 10, 11, 12

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) 9, 10

Wright Farms Constr., Inc. v. Kreps, 444 F. Supp. 1023 (D. Vt. 1977) 7

Statutes Cited:

Local Public Works Capital Development & Investment Act of 1976, 90 Stat. 999-1012, Pub. L. No. 94-369 .....5, 6

28 U.S.C. §1252 7

Contents

Page

62 Stat. 928, 28 U.S.C. §1254(1) 2

Public Works Employment Act of 1977:

Section 103(f)(2) 2, 3, 5, 6

42 U.S.C. §6705(f)(2) 2, 3, 5, 6

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et seq. 2, 4, 5, 12

United States Constitution Cited:

Amendment Five 3

Amendment Fourteen, Section 1 3

Other Authority Cited:

Slaughter House Cases, 16 Wall. 36 (1872) 10

APPENDIX

Decision of the United States District Court For the Southern District of New York Dated December 19, 1977 (Werker, J.) 1a

Opinion of the Court of Appeals For the Second Circuit Dated September 22, 1978 ..... 23a

Public Works Employment Act of 1977 ..... 42a

In The

Supreme Court of the United States

October Term, 1978

No.

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

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.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

THE OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit,[1] not yet officially reported, appears in the Appendix hereto (23a). 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), and appended hereto (1a) 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"), which provides for a set-aside of 10% participation in programs under the Act for minority business enterprises as defined therein.

JURISDICTION

This petition for certiorari has been filed within 90 days of the entry of judgment of the Court of Appeals on September 22, 1978. This 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.*

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

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 . . ."

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."

The provisions of the PWEA are appended hereto (42a).

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

A. The Proceedings

This action was commenced on November 30, 1977. The complaint sought, along with other relief, a judgment declaring that portion of the federally enacted Public Works Employment Act of 1977, which provides for an appropriation set-aside to minorities, contrary to statute and unconstitutional. Petitioners moved for a temporary restraining order, which was denied by the District Court (Hon. Henry F. Werker, Judge). The Court thereupon consolidated petitioners' application for a preliminary injunction with a trial on the merits, which was held on December 2, 1977.

The trial consumed one day, during the course of which the District Court heard three witnesses and received eleven exhibits. On December 19, 1977, the District Court issued its Opinion and Order upholding the constitutionality and legality of the applicable portion of the statute.

On September 22, 1978, the Court of Appeals for the Second Circuit affirmed the decision below.

B. The Facts

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.

Petitioners challenge the constitutionality and compliance with Title VI of the Civil Rights Act of 1964, of Section 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), 42 U.S.C. §6705(f)(2), which is set forth at p.43a, *supra.*

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. 999-1012, Pub. L. No. 94-369 (hereinafter "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 problems of national unemployment, and;

(2) to stimulate the national economy by assisting state and local governments to build badly needed public facilities.

The LPWA charged the Economic Development Administration ("EDA"), under the direction of the Secretary of Commerce, with the task of processing applications from the various state and local governments seeking assistance thereunder for local public works projects (designated as "Round I").

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, which contained certain objectives to be met in the next round of funding ("Round II"). 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 those objectives mentioned above. 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.), which, with slight modification, was approved and eventually enacted as Section 103(f)(2), 42 U.S.C. §6705(f)(2), and is now known as the Minority Business Enterprise ("MBE") provision. This provision had not been previously considered by any House committee or subcommittee, and after brief debate following its introduction, the amendment was approved on the floor of the House.

The final version of the PWEA, containing the MBE provision, was enacted by Congress on May 13, 1977.

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. These projects have been and continue to be let under contacts, the terms of which include the various MBE requirements.

THE REASONS FOR GRANTING A WRIT

I.

THE QUESTION OF MINORITY SET-ASIDES IN FEDERALLY FUNDED PROJECTS IS A TOPICAL ISSUE OF PERVASIVE AND SUBSTANTIAL PROPORTIONS.

The issue of the constitutionality of congressional action in formulating this minority set-aside was before this Court in *Associated General Contractors of California v. Secretary of Commerce,* 441 F. Supp. 955 (C.D. Cal. 1977), *vacated and remanded,* 98 S. Ct. 3132 (1978) which was remanded to the lower court for a determination on the question of mootness. The lower court has since determined that the matter has not been mooted. Accordingly, a notice of appeal to this Court under 28 U.S.C. §1252 has been filed by the City of Los Angeles. There the lower court had found the set-aside provision unconstitutional and invalid under the provisions of Title VI. Similarly in *Montana Contractors' Ass'n v. Secretary of Commerce,* CV 77-62-M (D. Mont. filed November 24, 1978) it is anticipated that the Secretary of Commerce will file a direct appeal to this Court from a determination of the lower court's holding the set-aside provision unconstitutional. A third district court has found the statute in issue to be unconstitutional as applied. *Wright Farms Constr., Inc. v. Kreps,* 444 F. Supp. 1023 (D. Vt. 1977).

The permissible scope of federal legislation which effectuates broad based social policies through the use of racial classifications is a question the parameters of which must be clearly delineated in the wake of *Regents of the University of California v. Bakke,* 98 S. Ct. 2733 (1978) (hereinafter "*Bakke*"). There, this Court was confronted with the issue of voluntary quotas imposed by a state medical school to alleviate a discrepancy in enrollment it perceived between non-minority and minority students. In the instant case, the question transcends

the imposition of voluntary quotas and goes directly to the competence of the congressional branch of government to formulate a quota system respecting minority involvement when federal funds are utilized in municipal construction projects.

This Court in *Bakke* questioned the imposition of affirmative action remedies in the absence of "a judicial determination of constitutional violation as a predicate for the formulation of a remedial classification." *Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2754. The Court likewise would uphold racial preferences "where a legislative or administrative body charged with the responsibility made determinations of past discrimination . . ." *Id.* The instant case presents squarely the question of the propriety of Congress to act in fashioning remedies which involve what might be deemed invidious racial classifications. To what extent and in what manner Congress, as a branch of government, can act in such a situation is a question of paramount importance. If congressional action and the ability to obtain federal funding can be conditioned on the imposition of racial classifications, it is of primary constitutional import that Congress satisfy those precise constitutional safeguards formulated by this Court to test legislative action in the area of such classifications.

The instant case involves the precise issue of the standards to be complied with when Congress acts in this area. The cases are legion in formulating standards of procedural due process to guide the courts in all areas, including race discrimination cases. The standards to be followed by Congress or any legislative body in formulating precisely the same remedies are anything but clear. The lower court in the instant case abandoned the strict scrutiny test in favor of a test of "fundamental fairness" (37a). The Court in *Bakke* spoke both in terms of the strict scrutiny test to be applied to all racial classifications, *Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2753 (Powell opinion) and a test formulated to measure classifications based on race which were formulated to rectify instances of past discrimination. *Id.* at 2787 (Brennan opinion).

This Court has recognized the need for legislative determinations in the area of race discrimination. *Id.* at 2757-58. It is of paramount interest that the tests of legislative action be precisely formulated so that the action of the legislative bodies in so delicate an area can be accurately measured. The instant case calls into question the actions of Congress in formulating a nationwide racial classification where the congressional record is devoid of any findings of discrimination in the construction industry and utterly devoid of any legislative inquiry in the area of alternative means involving less discriminatory methods. *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 16-17 (1973). It accordingly involves the scope of judicial inquiry into acts of Congress involving due process and equal protection classifications and the deference, if any, accorded Congress when it imposes such classifications. Since Congress has undertaken to act affirmatively in the area of civil rights, the general welfare requires that Congress not be used as an instrument of discrimination.

II.

THE DECISION BELOW IS IN CONFLICT IN PRINCIPLE WITH THIS COURT'S DECISION IN *BAKKE* AND RAISES SIGNIFICANT QUESTIONS OF CONSTITUTIONAL AND FEDERAL LAW NOT DECIDED THEREIN.

A. Least Discriminatory Means Available

While completely ignoring the two prong directives that this Court established in *Loving v. Virginia,* 388 U.S. 1, 11 (1967) and *Dunn v. Blumstein,* 405 U.S. 330, 342-43 (1972), that when a classification is based upon race, it must be shown to be necessary *and* the least discriminatory means available to the accomplishment of a valid state objective, the Court of Appeals paid mere lip service to 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, supra, 98 S. Ct. at 2753, 2758. 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 (36a-37a). This novel Court of Appeals' fashioned test does not even subject the classification to the more relaxed standard as expressed in Mr. Justice Brennan's opinion in *Bakke,* that not only must such remedy be substantially related to 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.[2] *Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2784-85. The stigmatization in the case at bar is obvious. Similar to the special admission program utilized in *Bakke,* those contractors who do not fit within the select MBE category are never afforded a chance to compete for the special set-aside monies, no matter what the quality of their work product or the extent of their underbid of an MBE for a public work project. *(See, e.g., Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2764.) So, for example, a small business owned perhaps by a Caucasian immigrant, which is every bit as disadvantaged as a similarly situated MBE, is, by operation of the PWEA, excluded from obtaining at least 10% of the construction work funded under the Act. It is this very portion of the work which is preempted under the Act that such

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2. In fact, the Brennan position even acknowledged that the least onerous alternative test is still viable if "fundamental rights" are restricted. *Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2782. In *Bakke,* however, it was noted that education was not afforded implicit or explicit protection under the Constitution, and accordingly no fundamental right involved. *Id.* at 2783 *citing San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 29-36 (1973). It is undeniable, however, that at issue in the instant petition is the right to work which this Court has traditionally found to be a fundamental right. Slaughter House Cases, 16 Wall. 36 (1872).

a disadvantaged non-MBE is most likely to strive to obtain due to his limited size and capabilities. Conversely, similar to those racially preferred students in *Bakke,* the preferred minority business enterprises can compete for the full extent of the appropriated monies. The stigma is not one of mere semantics where a disregard of individual rights due to a person's color is sanctioned by the Congress of the United States.

If indeed the least onerous alternative requirement of the two prong test utilized in legislative classifications based upon race is to be abandoned in favor of either the Brennan position or the Court of Appeals' designed test, it should take place only at the behest and with the express sanction of this Court.

B. Prior Discrimination and Congressional Findings

This Court in *Bakke* left unresolved whether in fact race conscious remedies were permissible in the absence of express findings of past discrimination or discriminatory impact. While Justice Brennan concluded that such findings were not a prerequisite, Justice Powell's opinion stated that benign classifications are invalid in the absence of detailed legislative, judicial or administrative consideration found in the record, of prior discrimination with a consequent definition of the extent of injury caused by such discrimination. *Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2789 (Brennan findings); *id.* at 2757, 2755 n. 41 (Powell opinion). Here, the 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 (33a-34a). These scant remarks, characterized by one court as the mere debate rhetoric of a partisan, *Associated General Contractors of California v. Secretary of Commerce,* 441 F. Supp. 955, 969 (C.D. Cal. 1977), *vacated and remanded,* 98 S. Ct. 3132 (1978), *on remand,* ____F. Supp.____(C.D. Cal. 1978), coupled with the Court of Appeals'

completely unsupportable statement that the lack of congressional discussion was understandable in light of "the knowledge of the congressmen concerning the well-established history of past discrimination in the construction industry" (34a n.10), formed the basis for the upholding of this wholesale indictment of the construction industry. The Court of Appeals' analysis of the record thus presumed the very fact in issue, aided only by the unexpressed mental processes of Congress.

Moreover, although alluding to that portion of Justice Powell's opinion which noted a "special competence" accorded Congress where it sought to abolish the badges and incidents of slavery either by broadening such fundamental rights as voting, [*Katzenbach v. Morgan,* 384 U.S. 641 (1966)], or by prohibiting private discrimination [*Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968)],[3] the Court of Appeals failed to recognize that legislation which is based upon racial classification does not warrant that degree of judicial restraint and/or deference as it does when its goal is to afford equality. In fact, this Court has not yet addressed the issue of the proper standard of judicial review where legislation, albeit benign, classifies, discriminates and excludes from participation a segment of the population based upon race. As the benign discriminatory purposes of the set-aside in appropriations become the ever-increasing topic of the future, it becomes imperative for this Court to define the parameters of judicial review.

C. The MBE Amendment's Conflict with Title VI of the Civil Rights Act of 1964.

In addition to the constitutional shortcomings of this expenditure program, the MBE provision in its express terms represents a patent conflict with the clear and explicit provisions of Title VI of the Civil Rights Act of 1964, Section 601, 42 U.S.C. §2000d. The two congressional enactments represent

3. *See Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2755 n. 41.

statements of congressional policy which by their terms, are contradictory. When national policy objectives are fully understood, it is clear that the congressional mandate embodied in Title VI requires that the race quota embodied in the MBE provision be invalidated as a "flagrant violation of both the congressional intent and national policy" represented by the Civil Rights Act, *Associated General Contractors of California v. Secretary of Commerce,* 441 F. Supp. 955 (C.D. Cal. 1977). The circuit court, in its decision, failed to even consider the Title VI violation.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: Garden City, New York
December 18, 1978

Respectfully submitted,

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