IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1007

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

v.

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

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

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

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INDEX

Page

Page

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ARGUMENT

I. A Question Exists As To The Derivation Of Constitutional Authority For The MBE Set-Aside Provision [1]

The Secretary of Commerce and the City of New York, the New York City Board of Higher Education,

[1] Petitioner, General Building Contractors of New York State, Inc., the New York State Building Chapter, Associated General Contractors of America, Inc. (hereafter "GBC"), intends to address only specific concepts argued in opposing briefs. Matters not argued herein should not be construed as an agreement with any position raised in those opposing briefs or as a waiver of any defense. This Reply Brief is intended to be a supplement to GBC's initial Brief on the merits filed with this Court on August 6, 1979.

and the New York City Health and Hospitals Corporation (hereafter referred to as "SOC Brief" and "State of N.Y. Brief," respectively), argue that the 10 percent MBE set-aside provision, Section 103(f)(2), 42 U.S.C. § 6705(f)(2) (hereafter "MBE" or "set-aside" provision), enacted by Congress in the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116-121 (hereafter PWEA), is a proper exercise of congressional authority under the Thirteenth and Fourteenth Amendments and/or Article I of the Constitution.[2] This conclusion is far from clear.

This Court established long ago that the Federal Government is one of "enumerated powers." Thus, the Congress can basically exercise only those powers granted to it under the Constitution. *McCulloch* v. *Maryland,* 4 Wheat. 316, 405 (1819). However, this Court's determination whether a constitutional basis exists for the MBE set-aside provision, requires in the first instance a clear understanding of the purpose of that provision. The Government argues (see, *e.g.,* SOC Brief at 26; State of N.Y. Brief at 6,8) that the MBE provision was enacted as a remedy to eliminate the

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[2] The Government (SOC Brief at 8-9 n.5) raises an issue of "case and controversy" as to whether Petitioners established that they have been "injured" by the set-aside provision. This issue was not raised by the Government in response to the Petition for *cert.* Notwithstanding this factor, the Government admits in footnote 5 that the record below does contain evidence of harm. This alone satisfies the "case and controversy" issue. *See Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U.S. 252 (1977); *Ass'n of Data Processing Serv. Organization* v. *Camp,* 397 U.S. 159 (1970). Additionally, the Government concedes the harmful impact the set-aside provision has on non-minority contractors (see State of N.Y. Brief at 22-23). An association of such contractors has standing to assert, as here, the rights of its members who are or may be injured. *See Sierra Club* v. *Morton,* 405 U.S. 727 (1972).

effects of discrimination in the construction industry. The dearth of legislative history of the set-aside provision in no way establishes this proposition. In fact, GBC asserts that if any conclusion can be drawn, it is that Congress intended through the set-aside to increase the number of MBE's in federally-funded projects in hopes of achieving a balance or parity in the construction industry between minority and non-minority businesses.

Representative Biaggi stated in reference to the MBE provision (123 Cong. Rec. H1440, Feb. 24, 1977; also see SOC Brief at 47-48):

> "It is time that the thousands of minority businessmen enjoyed a sense of economic parity. *This amendment will go a long way toward helping to achieve this parity and more importantly, to promote a sense of economic equality in this Nation.*" (Emphasis added)

Representative Mitchell described the MBE provision in the following light (*id.* at H1436-H1437; also see SOC Brief at 46):

> "We spend a great deal of Federal money under the SBA program creating, strengthening and supporting minority businesses and yet when it comes down to *giving those minority businesses a piece of the action,* the Federal Government is absolutely remiss. All it does is say that, 'We will create you on the one hand and, on the other hand, we will deny you.'"

As argued in GBC's initial Brief, the MBE set-aside provision has not been established as based on findings of identified discrimination in the construction industry. Rather, as the above indicates, it would appear that the preference was enacted in an attempt to increase

MBE participation in federally-funded programs in order to achieve economic parity for minority-business-enterprises in construction. Even the Government would appear to agree with this conclusion by its statement (SOC Brief at 56) that the MBE provision is "positive legislative action to *guarantee* a place for minority contractors in funded project construction." (Emphasis added)

GBC asserts, therefore, that the question of constitutional authority for this provision must be analyzed with respect to this purpose of increasing MBE participation in federally-funded projects, of seeking *parity* for MBEs in the construction industry, and *not* as a congressional remedy for legislative findings of discrimination as asserted by the Government.

A. The MBE provision is not within the scope of the enabling clause to the Thirteenth Amendment

The Government asserts that the MBE provision is a proper exercise of congressional authority under the Thirteenth Amendment (see, *e.g.*, SOC Brief at 19).[3] GBC disagrees.

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[3] The "Brief for the Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae*," p.11 n.2, raises a question of mootness in these proceedings. Neither the District nor Appellate Courts below found the issue "moot." Further, neither Government Brief argued the case was "moot." In fact, they clearly concede that the case is not moot since money under the project still remains to be let in the project area which "may result in a requirement that the grantee expend other project funds for an acceptable minority contract." SOC Brief at 6-7 n.4. Moreover, the issue is *not* "moot" notwithstanding these facts. Several bills were introduced *after* the effective date of the PWEA in Congress in 1978 providing for further funding. The MBE provision was not deleted. *See AGC of California* v. *Secretary of Commerce*, 459 F. Supp. 776 (C.D. Calif., 1978), *appeal filed* Sup. Ct. No. 78-1108, November 6, 1978. In fact, the House passed the Economic Development and Public

The Thirteenth Amendment, Sec. 1, provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2 provides:

> Congress shall have power to enforce this article by appropriate legislation.

The historical importance of this Amendment, of course, was that it completed the abolition of slavery and involuntary servitude as well as prohibited the badges and incidents thereof. The Amendment is not a declaration in favor of a particular people, but reaches every race and individual. *Bailey* v. *Alabama,* 219 U.S. 219, 240-241 (1911); *Hodges* v. *United States,* 203 U.S. 1, 16-17 (1906). While the applicable scope of the Amendment has never been completely defined, this

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Works Act, H 2063, on November 14, 1979. That bill contains the MBE set-aside provision after Rep. Ashbrook's amendment to delete the provision was defeated. Furthermore, the Court is directed to President Carter's statement of October 17, 1979, where he pledged to triple the government purchases from MBEs. 86 CCH-*Employment Practices,* Issue No. 949 (Oct. 25, 1979). In light of the foregoing as well as the short-term duration of these grants, it is therefore obvious that the MBE provision is capable of repetition and yet may evade review. Under these circumstances, the issue should not be considered as "moot." *See Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 546-547 (1976); *So. Pacific Terminal Co.* v. *I.C.C.,* 219 U.S. 498, 515 (1911). Finally, GBC respectfully indicates to the Court that numerous courts which have faced this issue have not found the case "moot." *See, e.g., Constructors Ass'n of W. Pa.* v. *Kreps,* 573 F.2d 811 (3d Cir. 1978); *Ohio Contractors Ass'n* v. *EDA,* 580 F.2d 213 (6th Cir. 1978); *Virginia Chapter, AGC* v. *Kreps,* 444 F. Supp. 1167 (W.D. Va., 1978); *Wright Farms Constr. Inc.* v. *Kreps,* 444 F. Supp. 1023 (D. Vt. 1977).

Court has never indicated that it applies to anything but the *eradication of existing conditions* which prevent one race from exercising certain rights. The emphasis, however, is that Congress under the enabling clause has been permitted to *eliminate* existing racial barriers. *See Griffin* v. *Breckenridge,* 403 U.S. 88 (1971) (where the Court stated that Congress could determine what are the badges and incidents of slavery, and could pass legislation to *eliminate* it); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968) (where the Court found that passage of 42 U.S.C. § 1982 was within the authority of Congress under the enabling clause to the Thirteenth Amendment to *eliminate* the conditions that prevented blacks from buying and renting property because of their race).

The MBE set-aside provision, however, is not intended to "eliminate" an existing racial barrier, but to increase the number of Minority Business Enterprises participating in federally-funded programs and to build a *parity* in the construction industry between "minority" and non-minority contractors. This Court has never construed the Thirteenth Amendment as a basis for this type of Congressional enactment. Indeed, the very purpose of the MBE provision of excluding on the basis of race in order to achieve this objective runs afoul of the historical purpose of the Thirteenth Amendment.

B. The MBE provision is not within the scope of the enabling clause to the Fourteenth Amendment

The Fourteenth Amendment, Section 1, provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

> the United States; nor shall any State 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.

Section 5, provides that:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

While the full extent of Congress' powers under Section 5 has never been determined, *Griffin* v. *Breckenridge, supra* at 107, this Court has stated that the enabling clause authorizes Congress "to enforce the *prohibitions* [of the Amendment] by appropriate legislation." *Katzenbach* v. *Morgan,* 384 U.S. 641, 648-649 (1966) (Emphasis added). The "prohibition" which the set-aside is supposed to enforce is, of course, the equal protection clause. GBC asserts that the passage of the MBE provision to obtain "economic parity" for MBEs in the construction industry by use of a racial classification, is *not* legislation to assure that persons are not denied rights or benefits given to others, but to create a classification to achieve a racial balance in the construction industry. Congress created in the MBE provision a racial barrier to increase MBE participation in federally-funded projects in order to satisfy its theory as to how society ought to be organized. Justice Douglas correctly stated in *DeFunis* v. *Odegaard,* 416 U.S. 312, 337-44 (1974):

> "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."

Consequently, GBC does not believe the MBE provision falls within the permissible scope of Section 5

to the Fourteenth Amendment. In fact, it violates, not enforces, the equal protection prohibition.

C. The MBE provision is not a proper exercise of congressional authority under Article I of the Constitution

The Government also asserts that the Congress had authority to pass the MBE set-aside provision under the "necessary and proper" Clause of Article I, Section 8, Cl. 18 (see SOC Brief at 19, etc; State of N.Y. Brief at 11, etc.). This provides that Congress shall have powers:

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers. . . ."

The Government indicates in its briefs (SOC Brief at 19; State of N.Y. Brief at 16) that the "foregoing powers" relevant here are (1) the spending powers clause, Article I, Section 8, Cl. 1,[4] and (2) the commerce clause, Article I, Section 8, Cl. 3.[5]

This Court has long held that under Cl. 1's "general welfare" language, Congress may spend money in a manner "necessary and proper" to effectuate that purpose. *See, e.g., Helvering* v. *Davis,* 301 U.S. 619 (1937); *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1937). However, this Court has never determined whether the limit of this power is only to tax and spend, or whether it also permits Congress to legislate

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[4] This provision provides: "The Congress shall have the power to lay and collect taxes . . . to . . . provide for the . . . general welfare of the United States. . . ."

[5] This provision provides that the Congress shall have the power: "To regulate commerce . . . among the several states. . . ."

generally under this provision.[6] This Court would have to expand the construction of the spending powers clause to include the authority for Congress to legislate generally if the set-aside provision is to be construed as derived therefrom.

With respect to the commerce clause, this Court has concluded that certain legislation concerning civil rights is authorized by this provision. This has occurred, however, where (1) there was a clear record of past discrimination affecting interstate commerce to which the legislation was addressed, and (2) the legislation was intended to eliminate that discrimination. *See, e.g., Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964). It is GBC's position that the MBE provision has no legislative record of past discrimination in the construction industry and is not intended to eliminate any discrimination. Rather, the purpose of the set-aside provision is to increase MBE participation in federally-funded projects in order to achieve a "parity" with non-minority contractors.

Even, however, if the Court concludes that constitutional authority exists under either the spending powers clause or the commerce clause for Congress to enact the MBE preference provision, no question exists that Congressional authorization under either provision is not unbridled. For example, in *King* v. *Smith,* 392 U.S. 309, 333 n.34 (1968), the Court stated:

> "the Federal Government, *unless barred by some controlling constitutional prohibition,* may impose the terms . . . and conditions upon which its money allotments shall be disbursed . . . ." (Emphasis added)

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[6] See Corwin, *The Constitution and What it Means Today,* pp. 37-38 (1974).

Also see *Buckley* v. *Valeo,* 424 U.S. 1 (1976); *Lau* v. *Nichols,* 414 U.S. 563 (1974). If the Court finds constitutional authority for Congress to pass the set-aside preference legislation, the question becomes whether it is constitutionally prohibited elsewhere. We now turn to that issue.

II. Constitutional Restrictions On Racial Preferences

A. Equal protection—race may not be used as the sole determinative for receipt of governmental benefits in the absence of findings of discrimination

Justice Powell stated in *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 98 S. Ct. 2733, 2757-58 (1978), that the Supreme Court has never:

> "approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."

In cases involving statutory classifications, such "findings" must be a result of a detailed legislative consideration of the various indicia of previous constitutional or statutory violations. *Bakke, supra* at 2755 n.41.[7] The reason for this is clear. No compelling in-

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[7] The Government (State of N.Y. Brief at 9-10) argues that less "detailed" legislative findings of discrimination are required when Congress passes a race-based classification than if the same provision were passed by a state legislature. The basis for this assertion is this Court's opinion in *Hampton* v. *Mow Sun Wong,* 426 U.S. 88, 103 (1976). It should be noted, however, that Justice Steven's language was dicta in this case, that two concurring Justices specifically reserved ruling on this issue, and that four other Justices dissented. Additionally, even if we were to assume that this view represented a majority of the Court, *some* findings of discrimination are necessary in the limited circumstances of race-

terest is established to justify the use of race in the absence of such findings. Justice Powell stated, *Bakke, supra* at 2758:

> "Without such findings, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no *compelling justification* for inflicting such harm." (Emphasis added) [8]

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based preference legislation in order to determine that Congress' purpose is not invidious. Since there are no findings by Congress under the PWEA of discrimination in the construction industry, the MBE provision does not even pass the *Hampton* test. Further, contrary to the Government's assertion (SOC Brief at 31, n.14), requiring findings of discrimination where Congress intends to pass a race-based preference provision would not hamper Congress' ability to perform its lawmaking function. As is the case with most provisions in bills before Congress, a racial preference provision need only be reviewed and considered in committee during development of the bill. This would not impose any undue hardship on Congress nor impede its law-making function.

[8] The Government (SOC Brief at 23-24) cites certain Supreme Court cases as sustaining race-conscious affirmative action. Aside from the question of whether all of these cases stand for that proposition, *see, e.g., Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), specific findings of discrimination were found in each case cited. Any remedies imposed were thus to remedy that discrimination. Here, no specific findings of discrimination in the construction industry have been made. As previously stated, the set-aside was passed to increase the number of MBEs in the construction industry, to achieve "economic parity" for MBEs in the words of Representative Biaggi, *supra* at 3. Consequently, the cases are inapposite to the issue here. Also, the "Brief for the Lawyers Committee for Civil Rights Under Law as *Amicus Curiae,*" p. 90, asserts that there was evidence before Congress in passing the PWEA of "discrimination by government contracting officers . . . in the disbursement of federal funds." The citations referenced by Amicus do not establish that there was any discrimination in the disbursement of federal funds.

The Court noted below that in enacting the MBE set-aside provision Congress created an explicitly race-based condition on the receipt of PWEA funds. *Fullilove* v. *Kreps,* 584 F.2d 600, 602 (2d Cir. 1978).[9] Since, as more fully explained in GBC's initial Brief, there were no legislative findings of any indicia of discrimination in the construction industry, a "compelling" justification for Congress to benefit one class of citizens solely on the basis of race over all others has not been established.[10] This provision was intended to give

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[9] The Government's assertions (SOC Brief at 60-63) that the set-aside provision may not work as a quota to exclude non-minority contractors is misleading. The Government first asserts it is not an exclusion because non-minority contractors are not excluded "from any particular 10 percent of the funded work." The point is not from which 10 percent they are excluded, but the fact that they are excluded 100 percent from the opportunity of participating in at least 10 percent of *any* portion of the project because of race. The Government also implies that the waiver procedure under the Act means the set-aside provision is not a quota. The applicability of the waiver procedure to this requirement applies only when MBEs are not available. *Bakke, supra* at 2778 (Brennan, White, Marshall & Blackmun, JJ., dissent). Furthermore, the Government's assertion that non-minority contractors have lost no right or expectation by § 103(f)(2) also misses the point. Equal protection demands that "public funds, to which all taxpayers of all races contribute, not be spent in any fashion which . . . results in racial discrimination." *Lau* v. *Nichols, supra* at 569.

[10] The Government attempts a *post hoc* justification of the lack of any findings of the indicia of discrimination under the PWEA by making numerous references to the legislative history of other Acts. (SOC Brief at 34-41, for example). Since many such references date back several years preceding the PWEA, there is no indication that the Congress which passed the PWEA was necessarily aware of the history of those other Acts, or even if they were, that they took into consideration reports made by subcommittees under such Acts. Additionally, the Government's citation to reports and statistical studies not part of any congressional record does not establish that any Congress was aware of such

MBEs "a piece of the action" (Rep. Mitchell), 123 Cong. Rec. H 1436 (Feb. 24, 1977), to achieve in the construction industry an "economic parity" between MBEs and non-minority contractors. (Rep. Biaggi), *id.* at H 1440. All races are constitutionally protected from congressional abuse of one group's rights in order to enhance the position of another group. The MBE provision is nothing more than Congress' desire to improve the position of one racial class at the expense of the opportunity to compete of another in order to achieve a societal parity. As one of the most liberal members to have ever sat on this Court stated:

> "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. . . . So far as race is concerned, *any* state-sponsored preference to one race over another . . . is . . . 'invidious' and violative of the Equal Protection Clause." (Emphasis added). *De-*

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information. Moreover, the statistical references by the Government (See, *e.g.*, SOC Brief at 38-39) appear to be irrelevant here. First, the MBE provision concerns contractors, not employees in crafts (SOC Brief at 38 n.22). Furthermore, statistics concerning the number of MBE contractors in a particular industry, the number of contracts let in the area related to that type of business, the number of MBEs who actually bid, and the percentage of acceptance of such bids in comparison to the acceptance of bids of non-minority contractors, could have some meaning. The Government's statistics, however, do not address these areas. GBC would also like to note that it is not clear that the information contained in the Appendix to the Government's Brief (SOC Brief at 1a-20a) is part of the record in this case and properly before the Court under Rule 36 of the Supreme Court's Rules, 28 U.S.C. If this information is not part of the record and not subject to judicial notice, GBC believes it should not be considered here. *Cf, United States* v. *Snyder,* 428 F.2d 520, 523 (9th Cir. 1970), *cert. denied,* 400 U.S. 903; also see Stern & Gressman, *Supreme Court Practice,* p. 174 (1978).

Funis v. *Odegaard, supra* at 337-344. (Douglas, J. Dissent)

B. Least means—the MBE set-aside is not the least harmful method to increase the number of MBE contractors

Assuming, *arguendo,* that a "compelling" justification exists for the MBE provision, the Government seems to assume that the means chosen, the 10 percent set-aside, is automatically constitutional. There is neither evidence in the legislative history of the PWEA nor in the record in this case establishing that the set-aside would cause the least harm to non-minority contractors. In fact, as pointed out in GBC's initial Brief (see pp. 18-31), the means chosen would not even effectuate this result. The focal point must be on the purpose of the provision, the results of the means chosen, and whether other, less harmful alternatives would have achieved the purpose.

As stated, the purpose of the MBE set-aside provision is to increase the number of MBE contractors in federally-funded projects. The Government asserts the set-aside is necessary to achieve this purpose because 42 U.S.C. 1981, Titles VI and VII of the Civil Rights Act of 1964, and the Equal Credit Opportunity Act "had made little progress by 1977, toward increasing the participation of minority business enterprises in the national economy." (SOC Brief at 54).[11] These

[11] The United States Department of Justice warned a group of MBE contractors that a proposed agreement whereby MBE contractors would receive 10 percent of the subcontracting work in publicly-financed projects would "foreclose enterprises not owned by minorities from competing" and contemplates a competitive restraint to effect a societal goal. This letter raises a question whether such exclusion would be a violation of Federal Antitrust laws. See U.S. Department of Justice *Press Release,* September 21, 1977, 700 BNA-*Fed. Contract Rept.,* A-15 (1977).

statutes, however, did not have as their purpose to increase the participation of MBEs in the economy. Rather, they were intended to afford all persons equal opportunity to compete. The Government also asserts that "[w]ithout some positive legislative action to guarantee a place for minority contractors in funded project construction, minority firms would have been largely excluded from the local public works program." While this, of course, is purely speculative, GBC does wish to indicate to the Court that the SBA program discussed in GBC's initial Brief, serves to aid minority business even though it is not drawn in such onerous racial terms as the MBE set-aside provision. Reports of that program demonstrate that of approximately 1,500 businesses participating in the 8(a) program, 95 percent are minority even though the program does not exclude non-minority contractors from participating because of race. "Newsletter," *Black Enterprise* at 9 (Nov. 1977).

Moreover, even if one assumes, as does the Government, that the set-aside was necessary to increase MBE participation in the projects, there is nothing in the PWEA which would indicate that MBEs would be brought into the construction industry because of this legislation. As pointed out in GBC's initial Brief, page 19, the difficulties that minority contractors have faced have not concerned discrimination as such but problems such as inadequate working capital, difficulty in obtaining bonding, and problems with Federal paperwork. These are concerns of any contractor attempting to become viable. Because of the short-term duration and the structure of the MBE program, and because none of these problems are addressed by the set-aside provision, it would therefore appear unlikely that any

minority business enterprise would enter into the construction business because of this provision. The set-aside, in effect, provides only a temporary shield from competition, not a stimulus to increase the number of MBEs in construction.

With respect to less harmful alternatives than the MBE set-aside to achieve Congress' purpose of increasing the number of MBEs in the federally-funded projects, the Government indicates less onerous alternatives Congress could have chosen by referencing problem areas for companies trying to become viable in the construction industry. For example, lack of capital, exclusion from trades, lack of credit-worthiness, and insurability with lenders and insurers (SOC Brief at 34-37). However, these alternatives are not addressed by the set-aside, nor is there any indication they were considered by Congress. Some of the alternative means discussed by GBC in its initial Brief (pp. 21-31), *e.g.*, joint ventures, technical, financial and educational assistance, actually would train persons in some of these crucial areas, such as bonding.[12] Neither the Government nor supporting amici in any way analyze these alternatives except for Section 211 of the 1978 Amendment to the Small Business Act, Pub. L. No. 95-507 (SOC Brief at 66). As to all of the others, the Government's position appears to be that the alternatives are not any less harmful in a constitutional sense because they also use race as a criterion. This position misses the point.

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[12] Other alternatives have been proposed to the Department of Commerce, including a proposal submitted by the Associated General Contractors of America, Inc., on February 14, 1979, entitled "Training Program for Socially/Economically Disadvantaged Construction Specialty Contractors." This proposal concerned the de-

First, GBC is not advocating *any* particular approach. In fact, an approach using "disadvantage" would be preferable to using a racial designation.[13] Secondly, the means proposed all involve to one degree or another less harmful impact to excluded non-minorities since race is either not the sole factor or even a factor in some of these approaches.[14] The point of the matter, however, is that the legislative history of the

velopment of a technical services program in conjunction with the University of Colorado. The program proposal contained a full range of courses concerning areas crucial to any business attempting to become viable in the construction industry.

[13] In *Bakke,* Justice Powell believed that race could be used as a factor, but not the only factor for a governmental race-based classification where there were no findings of discrimination. Justices Burger, Rehnquist, Stewart and Stevens have not announced their views on this proposition. However, GBC respectfully directs the Court's attention to an unpublished article submitted to the Court in this case where argument is made that the equal protection standard in cases such as this should not permit the use of race as a criterion altogether, not simply that it could be used only if the "strict scrutiny" test is met. Van Alstyne, "Rites of Passage: Race, the Supreme Court, and the Constitution." The following portion in regard to the proper equal protection standard is significant for this Court to consider in cases of congressional preferences based on race without any findings of discrimination: "Those for whom racial equality was demanded are [now] to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution. If discrimination based on race is constitutionally permissible when those who hold the reins can come up with compelling reasons to justify it, then constitutional guarantees acquire an accordianlike quality. . . . [O]ur Constitution was designed to avoid these ends by avoiding these beginnings." *Id.* at 14.

[14] The Government asserts that a distinction based on "disadvantage" under the SBA program as opposed to minority or racial status is not any clearer in providing guidance. In support of this proposition (SOC Brief at 67-68 n.42), the Government notes that because of the state of the economy, "all construction contractors might have considered themselves economically disadvantaged in

PWEA does not establish that Congress ever considered less harmful means when in fact there were other ways to increase MBE participation in federally funded projects that either did not infringe or had a lesser impact on non-minority contractors' equal protection rights.[15] The MBE set-aside provision is not constitutionally permissible under these circumstances.[16]

1977." This not only does not support the Government's position, but works to further the question as to why the set-aside provision was enacted if all contractors were suffering equally.

[15] Even if a quota can be justified from asserted legislative concern about the effectiveness of the means to increase MBE contractors, a mini-scale test of its effectiveness to substantiate its necessity in light of its racially-based exclusions should have been tried first. See Haley, "How Socio-Economic Government Procurement Can Be Improved," 10 *National Contract Management J.* at 57-72 (1976).

[16] The "Brief Amicus Curiae of the Minority Contractors Ass'n, Inc," raises an issue that the proper standard for review under this Court's decisions, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 548 (1974), for Indians is the "rational basis" test irrespective of the standard to otherwise be applied. Aside from the question of whether Congress' special concern under the Constitution, (*e.g.*, Article I, Section 8, Cl. 3) towards Indians means that no higher level of scrutiny than the "rational basis" test should ever be used, the *Morton* case as well as the others cited by Amicus are distinguishable from the MBE provision. In *Morton*, the Court specifically found that the preference was not racial, but a congressional purpose to further the cause of Indian self-government. No such finding in this case has been made, nor does the legislative history of the PWEA support any such conclusion. The set-aside was passed to increase the number of MBEs in the federally-funded projects. This included American citizens who are Negroes, Spanish-speaking, Orientals, Eskimos, Aleuts, as well as "Indians." There is no indication the set-aside is to further the cause of Indian self-government. Consequently, a dual standard of review, one for Indians and one for all others, is not warranted here even assuming it may be in other situations. Furthermore, even though the set-aside was designed to increase "minority," including "Indian," participation, Congress failed to define a workable standard of the persons who would qualify for the preference. For example,

C. The MBE set-aside provision does not serve "important governmental objectives" and raises questions of stigma

Justice Brennan stated on behalf of Justices Marshall, White, and Blackmun, *Bakke, supra* at 2784-2785, that the test to be applied in cases such as this is that racial classifications:

> "Must serve important governmental objectives and must be substantially related to achievement of those objectives. . . . [T]o justify such a classification, an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of the benign program."

The Brennan group concluded in *Bakke, supra* at 2785, with respect to "important governmental objectives" that the record established an *articulated purpose* of remedying the effects of past societal discrimination. That is not the case here. The Government, as well as the Appellate Court below, only assume a purpose to remedy the effects of past discrimination.

"Indians" could mean *only* those of American origin or it could also include those of Asian origin. "Spanish-speaking" could be construed in a manner to include all persons of non-Latin antecedents who are fluent in Spanish. This lack of definition for classifying persons who are to receive the benefits on the basis of race under the set-aside provision means that the classification used to achieve the statute's objective is arbitrary and does not meet the standard required by due process. *See A. B. Small Co.* v. *Am. Sugar Refining Co.*, 267 U.S. 233, 240 (1925). Moreover, there is no understanding why certain racial and ethnic classes were included while others were not. Even if one assumes Negroes should be included because they may allegedly be suffering adverse effects of past societal discrimination, there is no evidence that other groups are of similar status. The Government itself pointed out in its Brief in *Bakke* that "orientals" as a race are not demonstrably suffering the adverse effects of discrimination. 183 BNA-*Daily Labor Rept.* D-12 n.39 (1977).

The Court below held, as quoted by the Government in its Brief, that "[i]n view of the comprehensive legislation which Congress has enacted during the past decade and a half . . . *any purpose Congress might have had other than to remedy the effects of past discrimination is difficult to imagine.*" (Emphasis added) The *only* articulated purpose which appears from the legislative history of the PWEA and this record is to increase the MBE participation in the construction industry—to achieve an "economic parity" for MBE's.

The Brennan group would also require:

> "a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the [industry] . . . ."

Neither the legislative history of the PWEA nor the record in this case indicates *any* basis for concluding that MBE representation in the construction industry is "substantial and chronic." Further, there is no evidence that any past societal discrimination is "impeding access" of minorities to the construction industry as MBEs.

Furthermore, minority businesses could be stigmatized by the set-aside quota. Although the meaning of this term was not fully defined by the Brennan group in *Bakke, supra* at 2783, they did indicate that racial classifications "drawn on the presumption that one race is inferior to another" may be such a stigma. Notwithstanding the dearth of legislative history of the MBE provision, some statements imply that MBE's may be "inferior," that they cannot make it on their own. Representative Mitchell stated, for example:

> "to the extent we are willing to let minorities do business with the government, we will be able to

> reduce survival support programs now paid for by the Federal government." 123 Cong. Rec. H. 1437.

Preferential programs, such as the MBE set-aside, may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. *See Bakke,* 438 U.S. at 298. Practices which classify employees in terms of race tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals. *City of Los Angeles, Dept. of Water & Power* v. *Manhart,* —— U.S. ——, 98 S.Ct. 1370, 1376 (1978). The deliberate exclusion of contractors by race, which is done even though an MBE may not be as "qualified" as a non-minority contractor, creates, in the words of Justice Douglas, *DeFunis* v. *Odegaard, supra* at 343:

> "suggestions of stigma and caste no less than a segregated classroom, and in the end may produce that result despite its contrary intention."

D. The MBE provision constitutes an unlawful bill of attainder

The Government, in response to an *Amicus* Brief, argues that the MBE provision does not constitute an unlawful bill of attainder (SOC Brief at 60-61 n.34). GBC disagrees.

Article I, Section 9, Cl. 3 of the Constitution forbids Congress from passing any law which constitutes a bill of attainder. Although derived from English history as a legislative wrath against a person's life, this Court has construed this clause as now including a protection of a person's livelihood. *See United States* v. *Brown,* 381 U.S. 437 (1965); *Cummings* v. *Missouri,* 71 U.S. 277, 320-321 (1867). These cases establish the principle

that legislative acts that apply to easily ascertainable members of a group in such a way as to inflict punishment without a judicial trial, which includes disqualification from the pursuits of a lawful avocation, are forbidden.

GBC asserts that the MBE provision has this effect. This legislative provision restricts an ascertainable class, i.e., non-minority contractors, from pursuing the opportunity to bid for, and having an opportunity to receive, work on 10 percent of the funds of each grant. There is thus a deprivation of the right to bid without the safeguard of a judicial trial. The disqualification here is from the opportunity to participate in certain government-sponsored work as a result of being categorized by Congress in a certain class. This congressional exclusion of such an identifiable class falls within the evolved scope of those legislative enactments prohibited by the bill of attainder clause.

CONCLUSION

Racial quotas have as their heritage a history of evil. They create systems of caste of the "chosen" and are dividers of society because they reject concepts fundamental to equal protection. The MBE set-aside provision is a congressionally enacted racially-based classification for distribution of certain governmental funds as a means to increase the number of minority business enterprise contractors in the construction industry and, specifically, in federally-funded projects. This provision was intended to achieve on the basis of race a parity in the construction industry between minority and non-minority businesses. Such an object is precisely what the equal protection clause was designed

to eliminate, not permit. Equal Protection commands the elimination of racial barriers, not, as Justice Douglas stated in *DeFunis* v. *Odegaard,* their creation in order to satisfy our theory about how society ought to be organized. A non-minority contractor is entitled to no advantage by reason of that fact; nor should he or she be subject to an explicit exclusion from a government benefit as a result.

Accordingly, the decision below should be reversed. The 10 percent MBE set-aside provision is not a proper exercise of congressional authority under the Constitution and it also violates the equal protection principles embodied in the due process clause of the Fifth Amendment.

Sincerely,

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