IN THE SUPREME COURT OF THE STATE OF NEVADA

JEROME MORETTO, Trustee of the Jerome F. Moretto 2006 Trust, Appellant, v. ELK POINT COUNTRY CLUB HOMEOWNERS ASSOCIATION, INC., Respondent.	Electronically Filed Sep 08 2021 08:39 a.m. Elizabeth A. Brown Clerk of Supreme Court Supreme Court Case No.: 82565 District Court Case No.: 19-CV-0242

EXHIBITS TO ANSWERING BRIEF -- VOLUME 2

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[4] Water Law—Existence and nature of navigational servitude or easement

"Navigational servitude" is an expression of notion that determination whether a taking has occurred must take into consideration important public interest in flow of interstate waters that in their natural condition are in fact capable of supporting navigation. U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 5.

158 Cases that cite this headnote

**384 *164 *Syllabus*

Through dredging and filling operations in developing a marina-style subdivision community, petitioners, the owner and lessee of an area which included Kuapa Pond, a shallow lagoon on the island of Oahu, Hawaii, that was contiguous to a navigable bay and the Pacific Ocean but separated from the bay by a barrier beach, converted the pond into a marina and thereby connected it to the bay. The Army Corps of Engineers had advised petitioners that they were not required to obtain permits for the development of and operations in the pond, and petitioners ultimately made improvements that allowed boats access to and from the bay. Petitioner lessee controls access to and use of the pond, which, under Hawaii law, was private property, and fees are charged for maintaining **385 the pond. Thereafter, the United States filed suit in Federal District Court against petitioners to resolve a dispute as to whether petitioners were required to obtain the Corps' authorization, in accordance with § 10 of the Rivers and Harbors Appropriation Act of 1899, for future improvements in the marina, and whether petitioners could deny the public access to the pond because, as a result of the improvements, it had become a navigable water of the United States. In examining the scope of Congress' regulatory authority under the Commerce Clause, the District Court held that the pond was "navigable water of the United States," subject to regulation by the Corps, but further held that the Government lacked authority to open the pond to the public without payment of compensation to the owner. The Court of Appeals agreed that the pond fell within the scope of Congress' regulatory authority, but held, reversing the District Court, that when petitioners converted the pond into a marina and thereby connected it to the bay, it became subject to the "navigational servitude" of the Federal Government, thus giving the public a right of access to what was once petitioners' private pond.

Held: If the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow the public free access to the dredged pond. Although the dredged pond falls within *165 the definition of "navigable waters" as this Court has used that term in delimiting the boundaries of Congress' regulatory authority under the Commerce Clause, this Court has never held that the federal navigational servitude creates a blanket exception to the Takings Clause of the Fifth Amendment whenever Congress exercises its Commerce Clause authority to promote navigation. Congress, in light of its extensive Commerce Clause authority over this Nation's waters, which does not depend on a stream's "navigability," may prescribe rules governing petitioners' marina and may assure the public a free right of access to the marina if it so chooses, but whether a statute or regulation that goes so far amounts to a "taking" is an entirely separate question. Here the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation involved in typical riparian condemnation cases as to amount to a taking requiring just compensation. Cf. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322. Pp. 387-393.

584 F.2d 378, reversed.

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Opinion

Mr. Justice REHNQUIST delivered the opinion of the Court.

The Hawaii Kai Marina was developed by the dredging and filling of Kuapa Pond, which was a shallow lagoon separated from Maunalua Bay and the Pacific Ocean by a barrier beach. Although under Hawaii law Kuapa Pond was private property, the Court of Appeals for the Ninth Circuit held that *166 when petitioners converted the pond into a marina and thereby connected it to the bay, it became subject to the "navigational servitude" of the Federal Government. Thus, the public acquired a right of access to what was once petitioners' private pond. We granted certiorari because of the importance of the issue and a conflict concerning the scope and nature of the servitude.[1] 440 U.S. 906, 99 S.Ct. 1211, 59 L.Ed.2d 453 (1979).

**386 I

Kuapa Pond was apparently created in the late Pleistocene Period, near the end of the ice age, when the rising sea level caused the shoreline to retreat, and partial erosion of the headlands adjacent to the bay formed sediment that accreted to form a barrier beach at the mouth of the pond, creating a lagoon. It covered 523 acres on the island of Oahu, Hawaii, and extended approximately two miles inland from Maunalua Bay and the Pacific Ocean. The pond was contiguous to the bay, which is a navigable waterway of the United States, but was separated from it by the barrier beach.

Early Hawaiians used the lagoon as a fishpond and reinforced the natural sandbar with stone walls. Prior to the annexation of Hawaii, there were two openings from the pond to Maunalua Bay. The fishpond's managers placed removable sluice gates in the stone walls across these openings. Water from the bay and ocean entered the pond through the gates during high tide, and during low tide the current flow reversed toward the ocean. The Hawaiians used the tidal action to raise and catch fish such as mullet.

Kuapa Pond, and other Hawaiian fishponds, have always been considered to be private property by landowners and by the Hawaiian government. Such ponds were once an integral part of the Hawaiian feudal system. And in 1848 they were *167 allotted as parts of large land units, known as "ahupuaas," by King Kamehameha III during the Great Mahele or royal land division. Titles to the fishponds were recognized to the same extent and in the same manner as rights in more orthodox fast land. Kuapa Pond was part of an ahupuaa that eventually vested in Bernice Pauahi Bishop and on her death formed a part of the trust corpus of petitioner Bishop Estate, the present owner.

In 1961, Bishop Estate leased a 6,000-acre area, which included Kuapa Pond, to petitioner Kaiser Aetna for subdivision development. The development is now known as "Hawaii Kai." Kaiser Aetna dredged and filled parts of Kuapa Pond, erected retaining walls and built bridges within the development to create the Hawaii Kai Marina. Kaiser Aetna increased the average depth of the channel from two to six feet. It also created accommodations for pleasure boats and eliminated the sluice gates.

When petitioners notified the Army Corps of Engineers of their plans in 1961, the Corps advised them they were not required to obtain permits for the development of and operations in Kuapa Pond. Kaiser Aetna subsequently informed the Corps that it planned to dredge an 8-foot-deep channel connecting Kuapa Pond to Maunalua Bay and the Pacific Ocean, and to increase the clearance of a bridge of the Kalanianaole Highway-which had been constructed during the early 1900's along the barrier beach separating Kuapa Pond from the bay and ocean-to a maximum of 13.5 feet over the mean sea level. These improvements were made in order to allow boats from the marina to enter into and return from the bay, as well as to provide better waters. The Corps acquiesced in the proposals, its chief of construction commenting only that the "deepening of the channel may cause erosion of the beach."

At the time of trial, a marina-style community of approximately 22,000 persons surrounded Kuapa Pond. It included approximately 1,500 marina waterfront lot lessees. The waterfront *168 lot lessees, along with at least 86 nonmarina lot lessees from Hawaii Kai and 56 boat owners who are not residents of Hawaii Kai, pay fees for maintenance of the pond and for patrol boats that remove floating debris, enforce boating regulations, and maintain the privacy and security of the pond. Kaiser Aetna controls access to and use of the marina. It has generally not permitted commercial use, except for a small vessel, the *Marina Queen*, which could carry 25 passengers and was used for about five years to promote sales of marina lots and for a brief period by **387 marina shopping center merchants to attract people to their shopping facilities.

In 1972, a dispute arose between petitioners and the Corps concerning whether (1) petitioners were required to obtain authorization from the Corps, in accordance with § 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403,[2] for future construction, excavation, or filling in the marina, and (2) petitioners were precluded from denying the public access to the pond because, as a result of the improvements, it had become a navigable water of the United States. The dispute foreseeably ripened into a lawsuit by the

United States Government against petitioners in the United States *169 District Court for the District of Hawaii. In examining the scope of Congress' regulatory authority under the Commerce Clause, the District Court held that the pond was "navigable water of the United States" and thus subject to regulation by the Corps under § 10 of the Rivers and Harbors Appropriation Act. 408 F.Supp. 42, 53 (D.Haw.1976). It further held, however, that the Government lacked the authority to open the now dredged pond to the public without payment of compensation to the owner. *Id.*, at 54. In reaching this holding, the District Court reasoned that although the pond was navigable for the purpose of delimiting Congress' regulatory power, it was not navigable for the purpose of defining the scope of the federal "navigational servitude" imposed by the Commerce Clause. *Ibid.* Thus, the District Court denied the Corps' request for an injunction to require petitioners to allow public access and to notify the public of the fact of the pond's accessibility.

The Court of Appeals agreed with the District Court's conclusion that the pond fell within the scope of Congress' regulatory authority, but reversed the District Court's holding that the navigational servitude did not require petitioners to grant the public access to the pond. 584 F.2d 378 (1978). The Court of Appeals reasoned that the "federal regulatory authority over navigable waters . . . and the right of public use cannot consistently be separated. It is the public right of navigational use that renders regulatory control necessary in the public interest." *Id.*, at 383. The question before us is whether the Court of Appeals erred in holding that petitioners' improvements to Kuapa Pond caused its original character to be so altered that it became subject to an overriding federal navigational servitude, thus converting into a public aquatic park that which petitioners had invested millions of dollars in improving on the assumption that it was a privately owned pond leased to Kaiser Aetna.[3]

*170 II

The Government contends that petitioners may not exclude members of the public from the Hawaii Kai Marina because "[t]he public enjoys a federally protected right of navigation over the navigable waters of the United States." Brief for United States 13. It claims the issue in dispute is whether **388 Kuapa Pond is presently a "navigable water of the United States." *Ibid.* When petitioners dredged and improved Kuapa Pond, the Government continues, the pond-although it may once have qualified as fast land-became navigable water of the United States.[4] The public thereby acquired a right to use Kuapa Pond as a continuous highway for navigation, and the Corps of Engineers may consequently obtain an injunction to prevent petitioners from attempting to reserve the waterway to themselves.

The position advanced by the Government, and adopted by the Court of Appeals below, presumes that the concept of "navigable waters of the United States" has a fixed meaning that remains unchanged in whatever context it is being applied. While we do not fully agree with the reasoning of the District Court, we do agree with its conclusion that all of this Court's cases dealing with the authority of Congress to regulate navigation and the so-called "navigational servitude" cannot simply be lumped into one basket. *171 408 F.Supp., at 48-49. As the District Court aptly stated, "any reliance upon judicial precedent must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case." *Id.*, at 49.[5]

[1] [2] It is true that Kuapa Pond may fit within definitions of "navigability" articulated in past decisions of this Court. But it must be recognized that the concept of navigability in these decisions was used for purposes other than to delimit the boundaries of the navigational servitude: for example, to define the scope of Congress' regulatory authority under the Interstate Commerce Clause, see, *e. g., United States v. Appalachian Power Co.*, 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1940); *South Carolina v. Georgia*, 93 U.S. 4, 23 L.Ed. 782 (1876); *The Montello*, 20 Wall. 430, 22 L.Ed. 391 (1874); *The Daniel Ball*, 10 Wall. 557, 19 L.Ed. 999 (1871), to determine the extent of the authority of the Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899,[6] and to *172 establish the limits of the jurisdiction of federal courts conferred by Art. III, § 2, of the United States Constitution over admiralty and maritime **389 cases.[7] Although the Government is clearly correct in maintaining that the now dredged Kuapa Pond falls within the definition of "navigable waters" as this Court has used that term in delimiting the boundaries of Congress' regulatory authority under the Commerce Clause, see, *e. g., The Daniel Ball, supra*, 10 Wall., at 563; *The Montello, supra*, 20 Wall., at 441-442; *United States v. Appalachian Power Co., supra*, 311 U.S., at 407-408, 61 S.Ct., at 299-300, this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation. Thus, while Kuapa Pond may be subject to regulation by the Corps of Engineers, acting under the authority delegated it by Congress in the Rivers *173 and Harbors Appropriation Act, it does not follow that the pond is also subject to a public right of access.

A

[3] Reference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce. It has long been settled that Congress has extensive authority over this Nation's waters under the Commerce Clause. Early in our history this Court held that the power to regulate commerce necessarily includes power over navigation. Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L.Ed. 23 (1824). As stated in Gilman v. Philadelphia, 3 Wall. 713, 724-725, 18 L.Ed. 96 (1866):

> "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress."

The pervasive nature of Congress' regulatory authority over national waters was more fully described in United States v. Appalachian Power Co., supra, 311 U.S., at 426-427, 61 S.Ct., at 308:

> "[I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . In truth the authority of the United States is the regulation of commerce on its waters. Navigability . . . is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control. . . . [The] authority is as broad as the needs of commerce. . . . The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government."

*174 *Appalachian Power Co.* indicates that congressional authority over the waters of this **390 Nation does not depend on a stream's "navigability." And, as demonstrated by this Court's decisions in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937), United States v. Darby, 312 U.S. 100, 657, 61 S.Ct. 451, 85 L.Ed. 609 (1941), and Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), a wide spectrum of economic activities "affect" interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved. The cases that discuss Congress' paramount authority to regulate waters used in interstate commerce are consequently best understood when viewed in terms of more traditional Commerce Clause analysis than by reference to whether the stream in fact is capable of supporting navigation or may be characterized as "navigable water of the United States." With respect to the Hawaii Kai Marina, for example, there is no doubt that Congress may prescribe the rules of the road, define the conditions under which running lights shall be displayed, require the removal of obstructions to navigation, and exercise its authority for such other reason as may seem to it in the interest of furthering navigation or commerce.

B

In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a "taking," however, is an entirely separate question. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). As was recently pointed out in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), *175 this Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Id., at 124, 98 S.Ct., at 2659. Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors-such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action-that have particular significance. *Ibid.* When the "taking" question has involved the exercise of the public right of navigation over interstate waters that constitute highways for commerce, however, this Court has held in many cases that compensation may not be required as a result of the federal navigational servitude. See, *e. g.*, United States v. Chandler-Dunbar Co., 229 U.S. 53, 33 S.Ct. 667, 57 L.Ed. 1063 (1913).

C

[4] The navigational servitude is an expression of the notion that the determination whether a taking has occurred must take into consideration the important public interest in the flow of interstate waters that in their natural condition are in fact capable of supporting public navigation. See United States v. Cress, 243 U.S. 316, 37 S.Ct. 380, 61 L.Ed. 746 (1917). Thus, in United States v. Chandler-Dunbar Co., supra, 229 U.S., at 69, 33 S.Ct., at 674, this Court stated that "the running water in a great navigable stream is [incapable] of private ownership . . . ." And, in holding that a riparian landowner was not entitled to compensation when the construction of a pier cut off his access to navigable water, this Court observed:

"The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes **391 no right of the riparian owner. Whatever the nature of the interest of *176 a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation." Scranton v. Wheeler, 179 U.S. 141, 163, 21 S.Ct. 48, 57, 45 L.Ed. 126 (1900).

For over a century, a long line of cases decided by this Court involving Government condemnation of "fast lands" delineated the elements of compensable damages that the Government was required to pay because the lands were riparian to navigable streams. The Court was often deeply divided, and the results frequently turned on what could fairly be described as quite narrow distinctions. But this is not a case in which the Government recognizes any obligation whatever to condemn "fast lands" and pay just compensation under the Eminent Domain Clause of the Fifth Amendment to the United States Constitution. It is instead a case in which the owner of what was once a private pond, separated from concededly navigable water by a barrier beach and used for aquatic agriculture, has invested substantial amounts of money in making improvements. The Government contends that as a result of one of these improvements, the pond's connection to the navigable water in a manner approved by the Corps of Engineers, the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property-the right to exclude others.

Because the factual situation in this case is so different from typical ones involved in riparian condemnation cases, we see little point in tracing the historical development of that doctrine here. Indeed, since this Court's decision in United States v. Rands, 389 U.S. 121, 123, 88 S.Ct. 265, 266, 19 L.Ed.2d 329 (1967), closely following its decisions in *177 United States v. Virginia Electric & Power Co., 365 U.S. 624, 628, 81 S.Ct. 784, 788, 5 L.Ed.2d 838 (1961), and United States v. Twin City Power Co., 350 U.S. 222, 226, 76 S.Ct. 259, 261, 100 L.Ed. 240 (1956), the elements of compensation for which the Government must pay when it condemns fast lands riparian to a navigable stream have remained largely settled. Distinctions between cases such as these, on the one hand, and United States v. Kansas City Life Ins. Co., 339 U.S. 799, 808, 70 S.Ct. 885, 890, 94 L.Ed. 1277 (1950), may seem fine, indeed, in the light of hindsight, but perhaps for the very reason that it *is* hindsight which we now exercise, the shifting back and forth of the Court in this area until the most recent decisions bears the sound of "Old, unhappy, far-off things, and battles long ago."

There is no denying that the strict logic of the more recent cases limiting the Government's liability to pay damages for riparian access, if carried to its ultimate conclusion, might completely swallow up any private claim for "just compensation" under the Fifth Amendment even in a situation as different from the riparian condemnation cases as this one. But, as Mr. Justice Holmes observed in a very different context, the life of the law has not been logic, it has been experience. The navigational servitude, which exists by virtue of the Commerce Clause in navigable streams, gives rise to an authority in the Government to assure that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce. Thus, when the Government acquires fast lands to improve navigation, it is not required under the Eminent Domain Clause to compensate landowners for certain elements of damage attributable to riparian location, such as the land's value as a hydroelectric site, *Twin City Power Co., supra*, or a port site, *United States v. Rands, supra*. But none of these cases ever **392 doubted that when the Government wished to acquire fast lands, it was required by the Eminent Domain Clause of the Fifth Amendment to condemn and pay fair value for that interest. See United States v. Kansas City Life Ins. Co., supra, 339 U.S., at 800, 70 S.Ct., at 886; *178 United States v. Virginia Electric & Power Co., supra, 365 U.S., at 628, 81 S.Ct., at 788; United States v. Rands, supra, 389 U.S., at 123, 88 S.Ct., at 266. The nature of the navigational servitude when invoked by the Government in condemnation cases is summarized as well as anywhere in United States v. Willow River Co., 324 U.S. 499, 502, 65 S.Ct. 761, 764, 89 L.Ed. 1101 (1945):

"It is clear, of course, that a head of water has value and that the Company has an economic interest in keeping the St. Croix at the lower level. But not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion."

We think, however, that when the Government makes the naked assertion it does here, that assertion collides with not merely an "economic advantage" but an "economic advantage" that has the law back of it to such an extent that courts may "compel others to forbear from interfering with [it] or to compensate for [its] invasion." *United States v. Willow River Co., supra,* at 502, 65 S.Ct., at 764.

Here, the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). More than one factor contributes to this result.[9] It is clear that prior to its improvement, Kuapa Pond was incapable of being used as a continuous highway for the purpose of navigation in interstate commerce. Its maximum depth at high tide was a mere two feet, it was separated from the adjacent bay and ocean by a natural barrier beach, and its principal commercial value was limited to fishing.[10] It *179 consequently is not the sort of "great navigable stream" that this Court has previously recognized as being "[incapable] of private ownership." See, *e. g., United States v. Chandler-Dunbar Co.,* 229 U.S., at 69, 33 S.Ct., at 674; *United States v. Twin City Power Co., supra,* at 228, 76 S.Ct., at 262. And, as previously noted, Kuapa Pond has always been considered to be private property under Hawaiian law. Thus, the interest of petitioners in the now dredged marina is strikingly similar to that of owners of fast land adjacent to navigable water.

We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation. But what petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the **393 consent of individual officials representing the United States cannot "estop" the United States, see *Montana v. Kennedy,* 366 U.S. 308, 314-315, 81 S.Ct. 1336, 1340-1341, 6 L.Ed.2d 313 (1961); *INS v. Hibi,* 414 U.S. 5, 94 S.Ct. 19, 38 L.Ed.2d 7 (1973), it can lead to the fruition of a number of expectancies embodied in the concept of "property"-expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property. In this case, we hold that the "right to exclude," so universally held to be a fundamental element of *180 the property right,[11] falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. Compare *Andrus v. Allard,* 444 U.S. 51 at 65-66, 100 S.Ct. 318, at 326-327, 62 L.Ed.2d 210, with the traditional taking of fee interests in *United States ex rel. TVA v. Powelson,* 319 U.S. 266, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943), and in *United States v. Miller,* 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943). And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation. See *United States v. Causby,* 328 U.S. 256, 265, 66 S.Ct. 1062, 1067, 90 L.Ed. 1206 (1946); *Portsmouth Co. v. United States,* 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287 (1922). Thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond while petitioners' agreement with their customers calls for an annual $72 regular fee.

Accordingly the judgment of the Court of Appeals is

Reversed.

Mr. Justice BLACKMUN, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

The Court holds today that, absent compensation, the public may be denied a right of access to "navigable waters of the *181 United States" that have been created or enhanced by private means. I find that conclusion neither supported in precedent nor wise in judicial policy, and I dissent.

My disagreement with the Court lies in four areas. First, I believe the Court errs by implicitly rejecting the old and long-established "ebb and flow" test of navigability as a source for the navigational servitude the Government claims. Second, I cannot accept the notion, which I believe to be without foundation in precedent, that the federal "navigational servitude" does not extend to all "navigable waters of the United States." Third, I reach a different balance of interests on the question whether the exercise of the servitude in favor of public access requires compensation to private interests where private efforts are responsible for creating "navigability in fact." And finally, I differ on the bearing that state property law has on the questions before us today.

I

The first issue, in my view, is whether Kuapa Pond is "navigable water of the United States," and, if so, why. The Court begins by asking "whether . . . petitioners' improvements to Kuapa Pond caused its original character to be so altered that it became subject to an overriding federal navigational servitude." **394 *Ante*, at 387. It thus assumes that the only basis for extension of federal authority must have arisen *after* the pond was "developed" and transformed into a marina. This choice of starting point overlooks the Government's contention, advanced throughout this litigation, that Kuapa pond was navigable water in its natural state, long prior to petitioners' improvements, by virtue of its susceptibility to the ebb and flow of the tide.[1]

*182 The Court concedes that precedent does not disclose a single criterion for identifying "navigable waters." I read our prior cases to establish three distinct tests: "navigability in fact," "navigable capacity," and "ebb and flow" of the tide. Navigability in fact has been used as a test for the scope of the dominant federal interest in navigation since *The Propeller Genesee Chief v. Fitzhugh*, 12 How. 443, 457, 13 L.Ed. 1058 (1852), and *The Daniel Ball*, 10 Wall. 557, 563, 19 L.Ed. 999 (1871). The test of navigable capacity is of more recent origin; it hails from *United States v. Appalachian Power Co.*, 311 U.S. 377, 407-408, 61 S.Ct. 291, 299-300, 85 L.Ed. 243 (1940), where it was used to support assertion of the federal navigational interest over a river nonnavigable in its natural state but capable of being rendered fit for navigation by "reasonable improvements." Ebb and flow is the oldest test of the three. It was inherited from England, where under common law it was used to define ownership of navigable waters by the Crown. In the early days of the Republic, it was regarded as the exclusive test of federal jurisdiction over the waterways of this country. See *The Thomas Jefferson*, 10 Wheat. 428, 429, 6 L.Ed. 358 (1825); *Waring v. Clarke*, 5 How. 441, 463-464, 12 L.Ed. 226 (1847).

Petitioners say that the ebb-and-flow test was abandoned in *The Propeller Genesee Chief* and *The Daniel Ball* in favor of navigability in fact. I do not agree with that interpretation. It is based upon language in those opinions suggesting that the test is "arbitrary," that it bears no relation to what is "suitable" for federal control, that it "has no application in this country," and indeed that it is not "any test at all." See *The Propeller Genesee Chief v. Fitzhugh*, 12 How., at 454; *The Daniel Ball*, 10 Wall., at 563. One may acknowledge the language without accepting petitioners' inference. *The Propeller Genesee Chief* and *The Daniel Ball* were concerned with *extending* federal power to accommodate the stark realities of *183 fresh-water commerce. In the former the question was whether admiralty jurisdiction included the Great Lakes. In the latter the question was the scope of federal regulatory power over navigation on a river. In either case it is not surprising that the Court, contemplating the substantial interstate fresh-water commerce on our lakes and rivers, found a test developed in England, an island nation with no analogue to our rivers and lakes, unacceptable as a test for the extent of federal power over these inland waterways. Cf. *The Propeller Genesee Chief v. Fitzhugh*, 12 How., at 454-457. But the inadequacy of the test for defining the interior reach of federal power over navigation does not mean that the test must be, or must have been, abandoned for determining the breadth of federal power on our coasts.

The ebb-and-flow test is neither arbitrary nor unsuitable when applied in a coastwise setting. The ebb and flow of the tide define the geographical, chemical, and environmental limits of the three oceans and the Gulf that wash our shores. Since those bodies of water in the main are navigable, they should be treated as navigable to the inner reach of their natural limits. Those natural limits encompass a water body such as Kuapa Pond, which is contiguous to Maunalua Bay, and which in its natural state must be regarded as an arm of the sea, **395 subject to its tides and currents as much as the Bay itself.

I take it the Court must concede that, at least for regulatory purposes, the pond in its current condition is "navigable water" because it is now "navigable in fact." See *ante*, at 389. I would add that the pond was "navigable water" prior to development of the present marina because it was subject to the ebb and flow of the tide. In view of the importance the Court attaches to the fact of private development,[2] *184 this alternative basis for navigability carries significant implications.[7]

II

A more serious parting of ways attends the question whether the navigational servitude extends to all "navigable waters of the United States," however the latter may be established.[8] The Court holds that it does not, at least where navigability is in whole or in part the work of private hands. I disagree.

The Court notes that the tests of navigability I have set forth originated in cases involving questions of federal regulation rather than application of the navigational servitude. *Ante*, at 388-389. It also notes that Congress has authority to regulate in aid of navigation far beyond the limitations of "navigability." *Ante*, at 389-390. From these indisputable propositions the Court concludes that "navigable waters" for these other purposes need not be the same as the "navigable waters" to which the navigational servitude applies.

Preliminarily, it must be recognized that the issue is *not* whether the navigational servitude runs to every watercourse over which the Federal Government may exercise its regulatory *185 power to promote navigation. Regulatory jurisdiction "in aid of" navigation extends beyond the navigational servitude, and indeed beyond navigable water itself. In United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 707-710, 19 S.Ct. 770, 776-777, 43 L.Ed. 1136 (1899), for example, the Court confirmed the Federal Government's power to enjoin an irrigation project above the limits of navigable water on the Rio Grande River because that project threatened to destroy navigability below. But this is not such a case. Federal authority over Kuapa Pond does not stem solely from an effect on navigable water elsewhere, although this might be a sound alternative basis for regulatory jurisdiction. Instead, the authority arises because the pond itself is navigable water.

Nor does it advance analysis to suggest that we might decide to call certain waters "navigable" for some purposes, but "non-navigable" for purposes of the navigational servitude. See *ante*, at 387-388. To my knowledge, no case has ever so held. Although tests of navigability have originated in other contexts, prior cases have never attempted to limit any test of navigability to a single species of federal power. Indeed, **396 often they have referred to "navigable" water as "public" water. See, *e. g.*, *The* Propeller Genesee Chief v. Fitzhugh, 12 How., at 455, 457; *The* Daniel Ball, 10 Wall., at 563. In any event, to say that Kuapa Pond is somehow "nonnavigable" for present purposes, and that it is not subject to the navigational servitude for this reason, is merely to substitute one conclusion for another. To sustain its holding today, I believe that the Court must prove the more difficult contention that the navigational servitude does not extend to waters that are clearly navigable and fully subject to use as a highway for interstate commerce.

The Court holds, in essence, that the extent of the servitude does not depend on whether a waterway is navigable under any of the tests, but on whether the navigable waterway is "natural" or privately developed. In view of the fact that *186 Kuapa Pond originally was created by natural forces, and that its separation from the Bay has been maintained by the interaction of natural forces and human effort, neither characterization seems particularly apt in this case.[9] One could accept the Court's approach, however, and still find that the servitude extends to Kuapa Pond, by virtue of its status prior to development under the ebb-and-flow test. Nevertheless, I think the Court's reasoning on this point is flawed. In my view, the power we describe by the term "navigational servitude" extends to the limits of interstate commerce by water; accordingly, I would hold that it is coextensive with the "navigable waters of the United States."

As the Court recognizes, *ante*, at 390, the navigational servitude symbolizes the dominant federal interest in navigation implanted in the Commerce Clause. See Scranton v. Wheeler, 179 U.S. 141, 159-163, 21 S.Ct. 48, 55-57, 45 L.Ed. 126 (1900); cf. Gibbons v. Ogden, 9 Wheat. 1, 189-190, 6 L.Ed. 23 (1824). To preserve this interest, the National Government has been given the power not only to regulate interstate commerce by water, but also to control the waters themselves, and to maintain them as "common highways, . . . forever free." See the Act of Aug. 7, 1789, 1 Stat. 50, 52, n. (a) (navigable waters in Northwest Territory). See United States v. Chandler-Dunbar Co., 229 U.S. 53, 62-64, 33 S.Ct. 667, 671-672, 57 L.Ed. 1063 (1913); Gilman v. Philadelphia, 3 Wall. 713, 724-725, 18 L.Ed. 96 (1866). The National Government is guardian of a public right of access to navigable waters of the United States. The navigational servitude is the legal formula by which we recognize the paramount nature of this governmental responsibility.

The Court often has observed the breadth of federal power in this context. In United States v. Twin City Power Co., 350

U.S. 222, 76 S.Ct. 259, 100 L.Ed. 240 (1956), for example, it stated:

"The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. *187 That Clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege which we have called 'a dominant servitude' or 'a superior navigation easement.' " (Citations omitted.) *Id.*, at 224-225, 76 S.Ct., at 261.

Perhaps with somewhat different emphasis, the Court also has stated, in cases involving navigable waters, that "the flow of the stream [is] in no sense private property," *United States v. Chandler-Dunbar Co.*, 229 U.S., at 66, 33 S.Ct., at 673, and that the waters themselves "are the public property of the nation." *Gilman v. Philadelphia*, 3 Wall., at 725.

The Court in *Twin City Power Co.* recognized that what is at issue is a matter of power, not of property. The servitude, in order to safeguard the Federal Government's paramount control over waters used in interstate commerce, limits the power of **397 the States to create conflicting interests based on local law. That control does not depend on the form of the water body or the manner in which it was created, but on the fact of navigability and the corresponding commercial significance the waterway attains. Wherever that commerce can occur, be it Kuapa Pond or Honolulu Harbor, the navigational servitude must extend.

III

The conclusion that the navigational servitude extends to privately created or enhanced waters does not entirely dispose of this case. There remains the question whether the Government's resort to the servitude requires compensation for private investment instrumental in effecting or improving navigability. The Court, of course, concludes that there is no navigational servitude and, accordingly, that assertion of public access constitutes a compensable taking. Because I do not agree with the premise, I cannot conclude that the right to *188 compensation for opening the pond to the public is a necessary result. Nevertheless, I think this question requires a balancing of private and public interests.

Ordinarily, "[w]hen the Government exercises [the navigational] servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone." *United States v. Kansas City Ins. Co.*, 339 U.S. 799, 808, 70 S.Ct. 885, 890, 94 L.Ed. 1277 (1950). See also *United States v. Willow River Co.*, 324 U.S. 499, 509-510, 65 S.Ct. 761, 767, 89 L.Ed. 1101 (1945); *Lewis Blue Point Oyster Co. v. Briggs*, 229 U.S. 82, 87-88, 33 S.Ct. 679, 680-681, 57 L.Ed. 1083 (1913); *Gibson v. United States*, 166 U.S. 269, 276, 17 S.Ct. 578, 580, 41 L.Ed. 996 (1897). The Court's prior cases usually have involved riparian owners along navigable rivers who claim losses resulting from the raising or lowering of water levels in the navigable stream, or from the construction of artificial aids to navigation, such as dams or locks. In these cases the Court has held that no compensation is required for loss in water power due to impairment of the navigable water's flow, *e. g., United States v. Twin City Power Co.*, 350 U.S., at 226-227, 76 S.Ct., at 261-262; *United States v. Chandler-Dunbar Co.*, 229 U.S., at 65-66, 33 S.Ct., at 672-673; for loss in "head" resulting from raising the stream, *United States v. Willow River Co.*, 324 U.S., at 507-511, 65 S.Ct., at 766-768; for damage to structures erected between low-and high-water marks, *United States v. Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 595-597, 61 S.Ct. 772, 774-776, 85 L.Ed. 1064 (1941); for loss of access to navigable water caused by necessary improvements, *United States v. Commodore Park, Inc.*, 324 U.S. 386, 390-391, 65 S.Ct. 803, 805-806, 89 L.Ed. 1017 (1945); *Scranton v. Wheeler*, 179 U.S., at 163, 21 S.Ct., at 57; or for loss of value to adjoining land based on potential use in navigational commerce, *United States v. Rands*, 389 U.S. 121, 124-125, 88 S.Ct. 265, 267-268, 19 L.Ed.2d 329 (1967). The Court also has held that no compensation is required when "obstructions," such as bridges or wharves, are removed or altered to improve navigation, despite their obvious commercial value to those who erected them, and despite the Federal Government's original willingness to have them built. See, *189 *e. g., Greenleaf Lumber Co. v. Garrison*, 237 U.S. 251, 256, 258-264, 35 S.Ct. 551, 552, 553-556, 59 L.Ed. 939 1915); *Union Bridge Co. v. United States*, 204 U.S. 364, 400, 27 S.Ct. 367, 380, 51 L.Ed. 523 (1907).

**398 These cases establish a key principle that points the way for decision in the present context. In most of them, the noncompensable loss was related, either directly or indirectly, to the riparian owner's "access to, and use of, navigable waters." *United States v. Rands*, 389 U.S., at 124-125, 88 S.Ct., at 268. However that access or use may have been turned to account for personal gain, and no matter how much the riparian owner had invested to enhance the value, the Court held that these rights were *190 shared with the public at large. Actions taken to improve their value for the many caused no reimbursable damage to the few who, by the accident of owning contiguous "fast land," previously enjoyed the blessings of the common right in greater measure. See, e. g., United States v. Commodore Park, Inc., 324 U.S., at 390-391, 88 S.Ct., at 805-806. The Court recognized that encroachment on rights inhering separately in the adjoining "fast land," United States v. Virginia Electric Co., 365 U.S. 624, 628, 81 S.Ct. 784, 788, 5 L.Ed.2d 838 (1961), or resulting from access to *nonnavigable* tributaries, see United States v. Cress, 243 U.S. 316, 37 S.Ct. 380, 61 L.Ed. 746 (1917), might form the basis for a valid compensation claim. But the principal distinction was that these compensable values had nothing to do with use of the navigable water.

Application of this principle to the present case should lead to the conclusion that the developers of Kuapa Pond have acted at their own risk and are not entitled to compensation for the public access the Government now asserts. See Union Bridge Co. v. United States, 204 U.S., at 400, 27 S.Ct., at 380. The chief value of the pond in its present state obviously is a value of access to navigable water. Development was undertaken to improve and enhance this value, not to improve the value of the pond as some aquatic species of "fast land."[7] Petitioners do not question the Federal Government's plenary control over the waters of the Bay, and they have no vested right in access to its open water. Since the value of the pond and the motive for improving it lie in access to a highway of commerce, I am drawn to the conclusion that the petitioners' interest in the improved waters of the pond is not subject to compensation. Whatever expectancy petitioners may have had in control over the pond for use as a fishery was surrendered in exchange for *191 the advantages of access when they cut a channel into the Bay.

In contrast, the Government's interest in vindicating a public right of access to the pond is substantial. It is the very interest in maintaining "common highways, . . . forever free." After today's decision, it is open to any developer to claim that private **399 improvements to a waterway navigable in interstate commerce have transformed "navigable water of the United States" into private property, at least to the extent that he may charge for access to the portion improved. Such appropriation of navigable waters for private use directly injures the freedom of commerce that the navigational servitude is intended to safeguard. In future cases, of course, the Army Corps of Engineers may alleviate this danger by conditioning permission for connection with other waterways on a right of free public access. But it seems to me that the inevitable result of today's decision is the introduction of new legal uncertainty in a field where I had thought the "battles long ago," *ante*, at 391, had achieved some settled doctrine.

IV

I come, finally, to the question whether Kuapa Pond's status under state law ought to alter this conclusion drawn from federal law. The Court assumes, without much discussion, that Kuapa Pond is the equivalent of "fast land" for purposes of Hawaii property law. There is, to be sure, support for this assumption, and for present purposes I am prepared to follow the Court in making it. See, *e. g., In re Application of Kamakana*, 58 Haw. 632, 574 P.2d 1346 (1978). Nonetheless, I think it clear that local law concerns rights of title and use between citizen and citizen, or between citizen and state, but does not affect the scope or effect of the federal navigational servitude.

The rights in Kuapa fisheries that have been part of Hawaii law since the Great Mahele are not unlike the right to the use of the floor of a bay that was at issue in *192 Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82, 33 S.Ct. 679, 57 L.Ed. 1083 (1913). There the Court found no entitlement to compensation for destruction of an oyster-bed in the course of dredging a channel. The Court reasoned: "If the public right of navigation is the dominant right, and if, as must be the case, the title of the owner of the bed of navigable waters holds subject absolutely to the public right of navigation, this dominant right must include the right to use the bed of the water for every purpose which is in aid of navigation." Id., at 87, 33 S.Ct., at 680. By similar logic, I do not think Hawaii or any other State is at liberty through local law to defeat the navigational servitude by transforming navigable water into "fast land." Instead, state-created interests in the waters or beds of such navigable water are secondary to the navigational servitude. Thus, I believe this case should be decided purely as a matter of federal law, in which state law cannot control the scope of federal prerogatives.

For all of the foregoing reasons, the judgment of the Court of Appeals was correct. I therefore dissent.

All Citations

444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332, 13 ERC 1929, 2000 A.M.C. 2495, 10 Envtl. L. Rep. 20,042

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 In the companion to this case, *Vaughn v. Vermilion Corp.,* 444 U.S. 206, 100 S.Ct. 399, 62 L.Ed.2d 365, the Louisiana Court of Appeal held that privately constructed canals, connected to navigable waters of the United States, navigable in fact, and used for commerce, are not subject to the federal navigational servitude. 356 So.2d 551, writ denied, La., 357 So.2d 558 (1978).

2 Title 33 U.S.C. § 403 provides:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

3 Petitioners do not challenge the Court of Appeals' holding that the Hawaii Kai Marina is within the scope of Congress' regulatory power and subject to regulation by the Army Corps of Engineers pursuant to its authority under § 10 of the Rivers and Harbors Appropriation Act, 33 U.S.C. § 403.

4 The Government further argues:
"The fact that the conversion was accomplished at private expense does not exempt Kuapa Pond from the navigable waters of the United States. To allow landowners to dredge their fast lands and reshape the navigable waters of the United States to more conveniently serve their land, and then to exclude the public from the navigable portions flowing over the site of former fast lands, would unduly burden navigation and commerce. The states lack the power under the Commerce Clause to sanction any such form of private property. . . ." Brief for United States 14-15.

5 Petitioners contend that the term "navigable waters of the United States," which has been traditionally employed to identify water subject to federal regulation and admiralty jurisdiction, see *infra,* this page and 389, "is so inherently unworkable with regard to Hawaiian fish ponds that it does not represent a meaningful or equitable standard under which public and private rights may be determined." Pet. for Cert. 8. The efforts to distinguish "fast lands" from public rights in waterways subject to the navigational servitude, however, has been the subject of litigation for more than a century, and in the absence of something more unusual than the situation presented here it is the Hawaiian fishpond that must fit into the decisions of this Court, rather than the latter being tailored to exclude the fishpond.

6 See, *e. g., United States v. Republic Steel Corp.,* 362 U.S. 482, 80 S.Ct. 884, 4 L.Ed.2d 903 (1960) (deposit of industrial solids into river held to create an "obstruction" to the "navigable capacity" of the river forbidden by § 10 of the Rivers and Harbors Appropriation Act of 1899).
The Corps of Engineers has adopted the following general definition of "navigable waters":
"Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity." 33 CFR § 329.4 (1978).

7 "Navigable water" subject to federal admiralty jurisdiction was defined as including waters that are navigable in fact in *The Propeller Genesee Chief v. Fitzhugh*, 12 How. 443, 13 L.Ed. 1058 (1852). See also, *e. g., The Belfast*, 7 Wall. 624, 19 L.Ed. 266 (1869). And in *Ex parte Boyer*, 109 U.S. 629, 3 S.Ct. 434, 27 L.Ed. 1056 (1884), this Court held that such jurisdiction extended to artificial bodies of water:

"Navigable water situated as this canal is, used for the purposes for which it is used,-a highway for commerce between ports and places in different states, carried on by vessels such as those in question here,-is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the constitution and statutes of the United States, even though the canal is wholly artificial, and is wholly within the body of a state, and subject to its ownership and control; and it makes no difference as to the jurisdiction of the district court that one or the other of the vessels was at the time of the collision on a voyage from one place in the state of Illinois to another place in that state." *Id.*, at 632, 3 S.Ct., at 435-36.

Congress, pursuant to its authority under the Necessary and Proper Clause of Art. I to enact laws carrying into execution the powers vested in other departments of the Federal Government, has also been recognized as having the power to legislate with regard to matters concerning admiralty and maritime cases. *Butler v. Boston S.S. Co.*, 130 U.S. 527, 557, 9 S.Ct. 612, 619, 32 L.Ed. 1017 (1889). See also, *e. g., In re Garnett*, 141 U.S. 1, 12, 11 S.Ct. 840, 842, 35 L.Ed. 631 (1891).

8 Thus, this Court has observed that "[c]onfiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." *Chicago, R. I. & P. R. Co. v. United States*, 284 U.S. 80, 96, 52 S.Ct. 87, 92, 76 L.Ed. 177 (1931).

9 We do not decide, however, whether in some circumstances one of these factors by itself may be dispositive.

10 While it was still a fishpond, a few flat-bottomed shallow draft boats were operated by the fishermen in their work. There is no evidence, however, that even these boats could acquire access to the adjacent bay and ocean from the pond.

Although Kuapa Pond clearly was not navigable in fact in its natural state, the dissent argue that the pond nevertheless was "navigable water of the United States" prior to its development because it was subject to the ebb and flow of the tide. *Post*, at 393, 394, 396. This Court has never held, however, that whenever a body of water satisfies this mechanical test, the Government may invoke the "navigational servitude" to avoid payment of just compensation irrespective of the private interests at stake.

11 See, *e. g., United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1394, 206 Ct.Cl. 649, 669-670 (1975); *United States v. Lutz*, 295 F.2d 736, 740 (CA5 1961). As stated by Mr. Justice Brandeis, "[a]n essential element of individual property is the legal right to exclude others from enjoying it." *International News Service v. Associated Press*, 248 U.S. 215, 250, 39 S.Ct. 68, 76, 63 L.Ed. 211 (1918) (dissenting opinion).

1 The District Court found that "the Pacific tides ebbed and flowed over Kuapa Pond in its pre-marina state." 408 F.Supp. 42, 50 (D.Haw. 1976). The tide entered through two openings in the barrier beach; it also percolated through the barrier beach itself. *Id.*, at 46. Although "[l]arge areas of land at the inland end were completely exposed at low tide," the entire pond was inundated at high tide. *Ibid.*

2 The Court's opinion also embraces, distressingly for me, an implication that the *amount* of the private investment somehow influences the legal result. *Ante*, at 386, 387, and 393. I would think that the consequences would be the same whether the developer invested $100 or, as the Court stresses, *ante*, at 387, "millions of dollars."

3 Essentially for the reasons stated by the District Court, 408 F.Supp., at 49-50, I stop short of agreeing with the Government's contention that the pond has been shown to be navigable under the *Appalachian Power* test. Although petitioners found it "reasonable" to deepen the pond for private development of the surrounding land, it does not follow that the same improvements would be equally "reasonable" if viewed solely in terms of benefits to navigational commerce.

4 In addressing this question, we quickly may cast aside any distinction based on the qualifying phrase "of the United States." As prior cases demonstrate, this phrase is intended to draw the line between waters that may be navigated only intrastate, and those that are subject to navigation in interstate and foreign commerce. See, *e. g., United States v. Utah*, 283 U.S. 64, 75, 51 S.Ct. 438, 440, 75 L.Ed. 844 (1931); *The Daniel Ball*, 10 Wall. 557, 563, 19 L.Ed. 999 (1871). Since Kuapa Pond opens onto a bay of the Pacific Ocean, there can be no doubt that it may be navigated in interstate and foreign commerce.

5 The natural and human contributions to the character of the pond are described by the District Court. See 408 F.Supp., at 46.

6 There have been cases where compensation was required for private investment in improvement of navigation. Petitioners place particular reliance on *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893). In that case, a private company had constructed locks and dams along the Monongahela River in order to improve its navigability. The company acted under express authority from the State of Pennsylvania, and at the invitation of the United States. Subsequently, Congress authorized the purchase or condemnation of one lock and dam in connection with a project to improve the upper waters of the river. Congress did not authorize compensation for the right to collect tolls. The Court emphasized the Government's role in encouraging the project, and held that, in consequence, "it does not lie in the power of . . . the United States to say that such lock and dam are an obstruction, and wrongfully there, or that the right to compensation for the use of this improvement by the public does not belong to its owner, the navigation company." *Id.*, at 335, 13 S.Ct., at 630. Subsequent decisions have limited *Monongahela Navigation Co.* to this rationale. See *Lewis Blue Point Oyster Co. v. Briggs*, 229 U.S. 82, 89, 33 S.Ct. 679, 681, 57 L.Ed. 1083 (1913); *Greenleaf Lumber Co. v. Garrison*, 237 U.S., at 265, 35 S.Ct., at 556; cf. *United States v. Rands*, 389 U.S. 121, 126, 88 S.Ct. 265, 268, 19 L.Ed.2d 329 (1967).

There is a striking difference between *Monongahela Navigation Co.* and this case. Although the Army Corps of Engineers originally may have acquiesced in the improvement of Kuapa Pond, it did not invite or actively encourage the development for the benefit of public navigation. The difference is significant. In *Monongahela Navigation Co.* the United States was required to compensate for the commercial value of navigational improvements it had promoted. In this case, in order to maintain uniformly free navigation, the Government now must compensate for improvements it might not have undertaken if it were at liberty independently to assess the advisability of opening the pond to navigation.

7 I need not reach the question whether petitioners could have been compensated for the value of the pond as a fishery if the Government had decided, prior to development of Hawaii Kai, either to cut off access to the Bay or to dredge the pond. But cf. *United States v. Commodore Park, Inc.*, 324 U.S. 386, 390, 65 S.Ct. 803, 805, 89 L.Ed. 1017 (1945); *Lewis Blue Point Oyster Co. v. Briggs*, 229 U.S. 82, 33 S.Ct. 679, 57 L.Ed. 1083 (1913).

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EXHIBIT 4

KeyCite Yellow Flag - Negative Treatment

Called into Doubt by Parents Involved in Community Schools v. Seattle School Dist. No. 1, 9th Cir.(Wash.), July 27, 2004

125 F.3d 702
United States Court of Appeals,
Ninth Circuit.

MONTEREY MECHANICAL CO., Plaintiff–Appellant,
v.
Pete WILSON; Gray Davis; Curt Pringle; Delaine Easton; Barry Munitz; Roland E. Arnall; Marian Bagdasarian; William D. Campbell; Ronald L. Cedillos; Jim Considine; Martha C. Fallgatter; Bernard Goldstein, Jr.; James H. Gray; William Hauck; Joan Otomo–Corgel, Dr.; Ralph R. Pesqueira; Ali C. Razi; Ted J. Saenger; Michael D. Stennis; Anthony M. Vitti; Stanley T. Wang; Frank Y. Wada, Individually and as Trustee of the California State University; Swinerton and Walberg Co., a California Corporation, Defendants–Appellees.

No. 96–16729.

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Argued and Submitted Feb. 10, 1997.

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Decided Sept. 3, 1997.

Synopsis

Unsuccessful bidder for construction project at state university brought action against university trustees and successful bidder, alleging that statute which required general contractors to subcontract percentages of work to subcontractors owned by women or minorities, or demonstrate good faith effort to do so, violated equal protection clause. The United States District Court for the Eastern District of California, Edward J. Garcia, J., denied preliminary injunction, and unsuccessful bidder appealed. The Court of Appeals, Kleinfeld, Circuit Judge, held that: (1) unsuccessful bidder had standing to challenge statute; (2) statute created classification subject to equal protection analysis, and (3) statute violated equal protection clause.

Reversed and remanded.

West Headnotes (9)

[1] Federal Courts—Preliminary injunction; temporary restraining order

While Court of Appeals reviews district court's decision not to enter preliminary injunction for abuse of discretion, district court is deemed to abuse its discretion when it bases its decision on erroneous legal standard; thus, abuse of discretion is established if district court applied incorrect substantive law.

16 Cases that cite this headnote

[2] Constitutional Law—Government contracts

Unsuccessful bidder for state construction project had standing to challenge, under equal protection clause, statute which required general contractors to subcontract percentages of work to subcontractors owned by women or minorities, or demonstrate good faith effort to do so, as unsuccessful bidder was prevented by statute from competing on equal footing with general contractors in designated classes, who were excused from statute's requirements. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Pub.Con.Code §§ 10115(c), 10115.2.

11 Cases that cite this headnote

[3] Federal Courts—Standing

Standing is question of law reviewed de novo.

[4] Constitutional Law—Equal Protection

Person required by government to discriminate by ethnicity or sex against others has standing to challenge validity of requirement, under equal protection clause, even though government does not discriminate against that person. U.S.C.A. Const.Amend. 14.

7 Cases that cite this headnote

[5] Constitutional Law—Public contracts
Constitutional Law—Public contracts
Public Contracts—Preferences and set-asides

Statute which required general contractors to subcontract percentages of work to subcontractors owned by women or minorities, or demonstrate good faith effort to do so, created classification, for purpose of equal protection challenge, as statute did not treat all contractors alike, since contractors that were owned by women and minorities were excused from requirements if they proposed to keep specified percentage of work for themselves, and different treatment of businesses owned by women or minorities did not have de minimis effect. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Pub.Con.Code §§ 10115(c), 10115.2(a).

4 Cases that cite this headnote

[6] Constitutional Law—Public contracts
Constitutional Law—Public contracts
Public Contracts—Preferences and set-asides

Fact that statute which required general contractors to subcontract percentages of work to subcontractors owned by women or minorities did not impose rigid quotas but, rather, allowed general contractors to meet requirements by showing good faith effort to comply with set goals, did not preclude finding that statute created classification, for purpose of equal protection challenge to statute. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Pub.Con.Code §§ 10115(c), 10115.2(a).

8 Cases that cite this headnote

[7] Constitutional Law—Equal Protection

There is no de minimis exception to Equal Protection Clause. U.S.C.A. Const.Amend. 14.

7 Cases that cite this headnote

[8] Constitutional Law—Public contracts
Constitutional Law—Public contracts
Public Contracts—Preferences and set-asides

Statute which required general contractors to subcontract percentages of work to subcontractors owned by women or minorities, or demonstrate good faith effort to do so, which provided exception for businesses owned by women or minorities which proposed to keep specified percentage of work for themselves, violated equal protection clause, because there was no evidence that state had discriminated against benefitted groups in the past, and statute was not narrowly tailored to serve government interest. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Pub.Con.Code §§ 10115(c), 10115.2(a).

17 Cases that cite this headnote

[9] Constitutional Law—Race, National Origin, or Ethnicity
Constitutional Law—Sex or Gender

Burden of justifying different treatment by ethnicity or sex, in face of equal protection challenge, is always on government. U.S.C.A. Const.Amend. 14.

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Appeal from the United States District Court for the Eastern District of California; Edward J. Garcia, District Judge, Presiding. D.C. No. CV–96–01279–EJG.

Before: O'SCANNLAIN, LEAVY and KLEINFELD, Circuit Judges.

Opinion

KLEINFELD, Circuit Judge:

We review denial of a preliminary injunction, regarding a state program setting goals for ethnic and sex characteristics of construction subcontractors.

*704 FACTS

California Polytechnic State University, San Luis Obispo (the University) solicited bids for a utilities upgrade. This construction project, expected to take almost two years, will connect all buildings to a central heating and air conditioning plant and install a new electrical distribution system. Monterey Mechanical, the plaintiff-appellant, submitted the low bid, $21,698,000.00, but did not get the job. The second lowest bidder, Swinerton and Walberg, won the contract, with a bid $318,000 higher than Monterey Mechanical's.

Monterey Mechanical's bid was disqualified because the company did not comply with a state statute. The statute requires general contractors to subcontract percentages of the work to minority, women, and disabled veteran owned subcontractors, or demonstrate good faith efforts to do so. The required "goals" are "not less than" 15% for minority business enterprises, 5% women, 3% disabled veteran. Cal. Public Contract Code § 10115(c). To count towards fulfilling the goal, a subcontractor must be at least 51% owned and controlled by members of those classes. Cal. Public Contract Code § 10115.1(e).

There were two ways Monterey Mechanical might have complied with the statute. It could have used minority, women and disabled veteran business enterprises for the designated 23% (15% plus 5% plus 3%) "of the contract dollar amount." Its bid was $21,698,000, so compliance by this means would require subcontracting $4,990,540 to subcontractors of the designated classes.

Alternatively, Monterey Mechanical could comply by demonstrating "good faith effort" to meet the "goals." The statute requires a bidder using "good faith" as its means of qualifying to contact government agencies and organizations to identify potential subcontractors in the designated classes, advertise in papers "focusing on M/W/DVBEs,"[1] and solicit bids from "potential M/W/DVBE subcontractors and suppliers." The contractor must document its efforts within two days following the opening of the bids, so as a practical matter the solicitation must be fully accomplished prior to bidding. Dates, times, organizations contacted, contact names, and phone numbers are "needed to corroborate the information."

Monterey Mechanical did not fully comply with the statute by either method. Its President acknowledges that "Monterey is not eligible for classification as an MBE or a WBE." It did not subcontract out the required 23% of the contract amount.[2] Nor did Monterey Mechanical fully comply with the "good faith" requirement. Monterey Mechanical contacted state and federal agencies and minority and women organizations, advertised to minority and women owned firms, and invited and considered bids from them. But it did not document contact with the University physical planning and development office to identify minority, women, and disabled veteran business enterprises.

Swinerton and Walberg, which won the contract, did not subcontract out at least 23% of the work to firms in the designated classes (and does not claim to be a minority, women, or disabled veteran enterprise). It differed materially from Monterey Mechanical only in that it fully complied with the "good faith" requirement. Unlike Monterey Mechanical, it provided documentation of its contact with the University physical planning and development office to identify minority, women, and disabled veteran business enterprises.

When the University rejected Monterey Mechanical's bid as non-responsive, Monterey Mechanical requested whatever disparity study California State University had used to justify the goals for the designated classes. The University replied that there was no such study. It took the position that because *705 the "goal requirements" of the scheme "do not involve racial or gender quotas, set-asides or preferences," the University needed no such disparity documentation.

Monterey Mechanical protested the contract award, then sued the University's trustees and Swinerton and Walberg for a declaratory judgment, injunction, and damages. The theory of the lawsuit is that the statute that caused Monterey Mechanical to lose the contract violates the Equal Protection Clause of the United States Constitution.

The district judge denied the preliminary injunction. Monterey Mechanical has appealed. The denial was based on a legal conclusion that Monterey Mechanical had a low probability of success on the merits.[3] No findings of fact were made, nor were any necessary, because there was no dispute as to any of the facts. The facts recited above, from the documents submitted by the parties, are uncontested.

ANALYSIS

[1] We have jurisdiction to review "[i]nterlocutory orders ... refusing ... injunctions" under 28 U.S.C. § 1292(a)(1). While we review its decision not to enter a preliminary injunction for an abuse of discretion, the district court is deemed to abuse its discretion when it "bases its decision on an erroneous legal standard." American–Arab Anti–Discrimination Comm. v. Reno, 70 F.3d 1045, 1062 (9th Cir.1995). Thus an abuse of discretion is established if the district court applied the incorrect substantive law. International Molders' and Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 551 (9th Cir.1986).[4]

*706 A. Standing.

[2] [3] The district court concluded that Monterey Mechanical lacked standing. Because Swinerton and Walberg was not a women or minority business enterprise,[5] and all general contractors, not just non-minority non-women contractors, were bound by the same requirements, the district court concluded that unconstitutional discrimination, even if it existed, did not cause Monterey Mechanical to lose the contract. The idea is that if the government does not discriminate against A, but requires that A discriminate against B, B has standing but A does not. Appellees[6] do not argue that Monterey Mechanical lacked standing. We nevertheless consider standing sua sponte, because it goes to jurisdiction. "Standing is a question of law reviewed de novo." Snake River Farmers' Assn. v. Department of Labor, 9 F.3d 792, 795 (9th Cir.1993).

The issue of standing is controlled by Northeastern Florida Contractors v. Jacksonville, 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993). That was another contracting set-aside case. The plaintiff made no showing that it or any of its members would have received particular contracts but for the challenged set-aside ordinance. The Court held that to establish standing in challenges to set-aside laws, a bidder need only demonstrate that a discriminatory policy prevents it from competing on an equal footing, not that the discrimination caused its failure to win a contract:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.... And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract.... To establish standing, therefore, a party

challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.[5]

FN[5] It follows from our definition of "injury in fact" that petitioner has sufficiently alleged both that the city's ordinance is the "cause" of its injury and that a judicial decree directing the city to discontinue its program would "redress" the injury.

Id. at 666, 113 S.Ct. at 2303.

Monterey Mechanical was prevented by the statute from competing on an equal footing with general contractors in the designated classes. Had it been a minority or women business enterprise (or both), and proposed to keep those classes' work rather than subcontract it out, it would have been excused to that extent from both the subcontracting and "good faith" requirements. *See* Cal. Public Contract Code §§ 10115(c), 10115.2.

*707 We construed *Northeastern Florida Contractors* in *Bras v. California Public Utilities Commission,* 59 F.3d 869 (9th Cir.1995). We held that in a challenge to an affirmative action program, "plaintiffs did not have to prove that they would lose any bids or identifiable contracts in order to sustain actual injury." *Id.* at 873. "An injury results not only when [the bidder] actually loses a bid, but every time the company simply places a bid." *Id.* at 873, quoting *Coral Construction Company v. King County,* 941 F.2d 910 (9th Cir.1991). Our analysis of standing in *Coral Construction* was approved of by the Court in *Northeastern Florida Contractors,* 508 U.S. at 660, 113 S.Ct. at 2300. A bidder need not establish that the discriminatory policy caused it to lose the contract. To establish standing bidders "need only show that they are forced to compete on an unequal basis." *Bras,* 59 F.3d at 873. Being forced to compete on an unequal basis because of race (or sex) is an injury under the Equal Protection Clause. *See Northeastern Florida Contractors,* 508 U.S. at 665–67, 113 S.Ct. at 2303.

The Tenth Circuit applied *Northeastern Florida Contractors* to standing under an ordinance substantially similar to the statute before us in *Concrete Works of Colorado, Inc. v. City and County of Denver,* 36 F.3d 1513 (10th Cir.1994). *Concrete Works* held that because minority and women business enterprises could use their own work to satisfy goals for their classes while firms not in these classes would have to subcontract the work out or show "good faith," a non-minority and non-women bidder satisfied all elements of the standing requirement. The injury in fact was that "the extra requirements imposed costs and burdens on non-minority firms that preclude them from competing with MBEs and WBEs on an equal basis." *Id.* at 1518, 1519. The case at bar is indistinguishable from *Concrete Works,* and there is no justification for creating an intercircuit split of authority on this point.

Monterey Mechanical established injury in fact traceable to the challenged statute, and established redressability, for several reasons. One is that a minority-owned or women-owned bidder could keep the work for its class (and a firm owned and controlled by women who were minorities could keep the work for both classes). Keeping the work would avoid the loss of profits to subcontractors, and the time and expense of complying with the "good faith" requirements. Though Swinerton and Walberg subsequently won the contract, Monterey Mechanical did not know that when it submitted its bid. The time of bidding was the relevant time for determining whether Monterey Mechanical was unable "to compete on an equal footing in the bidding process." *Northeastern Florida Contractors,* 508 U.S. at 666, 113 S.Ct. at 2303. When it prepared and submitted its bid, Monterey Mechanical had to do so in the face of a statute conferring advantages on whatever competing bidders might be in groups identified by ethnicity and sex. The burden of bidding in a discriminatory context established by statute is, under *Northeastern Florida Contractors,* injury in fact caused by the challenged statute.

[4] Standing is also established in this case independently of whether minority or female competitors, if there were any, would have competed against Monterey Mechanical on a privileged basis. Standing doctrine "requires us to ask ... 'Was this person hurt by the claimed wrongs?' " *Snake River Farmers' Assn. v. Department of Labor,* 9 F.3d 792, 798 (9th Cir.1993). Even if a general contractor suffers no discrimination itself, it is hurt by a law requiring it to discriminate, or try to discriminate, against others on the basis of their ethnicity or sex. A person required by the government to discriminate by ethnicity or sex against others has standing to challenge the validity of the requirement, even though the government does not discriminate against him.

A person suffers injury in fact if the government requires or encourages as a condition of granting him a benefit that he discriminate against others based on their race or sex. Americans view ethnic or sex discrimination as "odious," *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 214, 115

S.Ct. 2097, 2106, 132 L.Ed.2d 158 (1995). The principle that ethnic discrimination is wrong is what makes discrimination against groups of which we are not members wrong, and by that principle, discrimination is wrong *708 even if the beneficiaries are members of groups whose fortunes we would like to advance. The person required by government to engage in discrimination suffers injury in fact, albeit of a different kind, as does the person suffering the discrimination. A "law compelling persons to discriminate against other persons because of race" is a "palpable violation of the Fourteenth Amendment," regardless of whether the persons required to discriminate would have acted the same way regardless of the law. Peterson v. City of Greenville, 373 U.S. 244, 248, 83 S.Ct. 1119, 1121, 10 L.Ed.2d 323 (1963).

The contractor required to discriminate also suffers injury in fact because the statute exposes him to risk of liability for the discrimination. A private actor may be subject to section 1983 liability for discriminating against persons based on their ethnicity or sex pursuant to a state law requiring it. Adickes v. S.H. Kress and Company, 398 U.S. 144, 148, 152, 90 S.Ct. 1598, 1603, 26 L.Ed.2d 142 (1970). For example, the plaintiff in Bras v. California Public Utilities Commission, 59 F.3d 869 (9th Cir.1995), brought a section 1983 claim for damages against Pacific Bell for discriminating against the plaintiff in the course of complying with a state statutory scheme to increase minority and women owned businesses shares of utility contracting.

The contractor required to discriminate also suffers injury in fact because of the increased expense and difficulty of performing the contract. A construction contract is not completed when the winning bid is announced. The work must be done. A general contractor often uses the same specialty subcontractors on many jobs, because of successful past experience with them, so it would be a waste of time and money to solicit bids from strangers, and risky to accept them. The statute allows a women- and minority-owned contractor to subcontract out a fifth of the work to whomever it chooses, or keep the work itself, but denies this flexibility to contractors not in those groups.

Appellees have not argued absence of redressability. But for the minority and women enterprise goals and "good faith" requirements, Monterey Mechanical would have won the contract. The statute imposed injury in fact on Monterey Mechanical. Monterey Mechanical has standing to challenge the statute pursuant to which its bid was rejected.

B. Classification.

[5] Appellees argue that Monterey Mechanical's equal protection challenge has to fail, because the statute treats all general contractors bidding on state jobs alike. They argue that because general contractors are treated alike, there is no unequal treatment to which any scrutiny need be applied, that is, no classification. There are two aspects to this argument. One is that all general contractors are treated alike. To the extent that minority or women contractors could avoid the subcontracting and good faith requirements for their groups, the argument goes, the difference is de minimis. The second is that the scheme has enough flexibility, because a contractor can avoid the percentages by "good faith" efforts, so that its ethnicity and sex aspects cannot violate the Equal Protection Clause. The district court adopted the first of these arguments. Appellees' argument that the statute does not classify general contractors by ethnicity or sex is in some respects the standing argument in a slightly different form. Because it is made separately, and addresses the Equal Protection Clause rather than the case or controversy requirement in Article III, we discuss classification independently of standing.

1. Different treatment.

The argument that all general contractors are treated alike, regardless of sex or ethnicity, is mistaken. They are not. The statute requires that state contracts have "participation goals" of at least 15% minority, 5% women, and 3% disabled veteran enterprises:

> [C]ontracts awarded by any state agency, department, officer, or other state governmental entity for construction, professional services ..., materials, supplies, equipment, alteration, repair, or improvement shall have statewide participation goals of not less than 15 percent for minority business enterprises, not less than 5 percent for women business enterprises and 3 percent *709 for disabled veteran business enterprises. These goals apply to the overall dollar amount expended each year by the awarding department....

Cal. Public Contract Code § 10115(c). A state agency making a contract award is required to award the contract to the low bidder "meeting or making good faith efforts to meet these goals":

(a) In awarding contracts to the lowest responsible bidder, the awarding department shall consider the efforts of a bidder to meet minority business enterprise, women business enterprise, and disabled veteran business enterprise goals set forth in this article. The awarding department shall award the contract to the lowest responsible bidder meeting or making good faith efforts to meet these goals.

(b) A bidder shall be deemed to have made good faith efforts upon submittal, within time limits specified by the awarding department, of documentary evidence that all of the following actions were taken:

(1) Contact was made with the awarding department to identify minority, women, and disabled veteran business enterprises.

(2) Contact was made with other state and federal agencies, and with local minority, women, and disabled veteran business enterprise organizations to identify minority, women, and disabled veteran business enterprises.

(3) Advertising was published in trade papers and papers focusing on minority, women, and disabled veteran business enterprises, unless time limits imposed by the awarding department do not permit that advertising.

(4) Invitations to bid were submitted to potential minority, women, and disabled veteran business enterprise contractors.

(5) Available minority, women, and disabled veteran business enterprises were considered.

Cal. Public Contract Code § 10115.2(a).

The statute allows a minority or women business enterprise to satisfy the goals by allocating the percentage of work for its group to itself. The statute requires the state to award the contract to the "bidder meeting ... the goals," Cal. Public Contract Code § 10115.2(a). It does not say that the "bidder" should meet the goals by subcontracting the work to someone else instead of keeping it for itself. It would be nonsensical to disqualify, for example, a minority enterprise's bid for not meeting the 15% minority goal, when the minority bidder proposed to do at least 15% of the work itself. The university bid documents accordingly say that one way to meet the goals is that, "[t]he bidder is an MBE and committed to performing not less that 15% of the contract dollar amount *with its own forces* or in combination with those of other MBEs and is committed to using WBEs for not less than five (5) percent of the contract dollar amount, and DVBEs for not less than three (3) percent of the contract dollar amount." Supplementary General Conditions § 1(b) (emphasis added). Likewise for women and disabled veteran bidders.

Under these provisions, a bidder not in any of the designated groups must subcontract out at least 23% of the job, or make good faith efforts to do so, to subcontractors in the designated groups. But a minority or female bidder can avoid that requirement by keeping that group's work for itself. Thus not all general contractors bidding on state projects are treated the same way. An enterprise in all the designated categories can, by keeping at least 23% of the work for itself, avoid any of the requirements of the statute.

The district court considered this difference, but concluded that it was *de minimis*. *De minimis non curat lex* means that the law does not concern itself with trifles. *Black's Law Dictionary* 482 (4th ed.1957); *Ballentine's Law Dict.* 330 (3d ed.1969). On this $21,698,000 job, it would be worth $3,254,700 of the gross to be a minority as compared with a non-minority bidder, if the bidder were to keep as much as possible of the work for itself. A bidder in all three categories could keep $4,990,540 that a bidder in none would have to subcontract out or demonstrate a good faith effort to do so. There is nothing *de minimis* about that kind of money.

*710 2. Good faith efforts.
[6] Appellees argue that the classifications the statute makes are not subject to heightened levels of scrutiny, because they require only good faith attempts to satisfy goals, and do not impose rigid quotas. Thus a bidder may satisfy the goals without being in one of the designated classes, and without subcontracting 23% of the work to businesses in the designated classes, so long as it shows good faith.

Analysis of this argument requires that a distinction be drawn between whether the classifications themselves are permissible, considered in section D, and whether a softer system of discrimination avoids the Equal Protection Clause. For now, we are discussing only the latter proposition, whether there is a classification at all, not the former, whether the classification is permissible.

Appellees are correct in their argument that the statute does not impose rigid quotas. A bidder in none of the designated classes can get a contract even though it subcontracts none of the work whatsoever to anyone in the designated classes. Indeed, the University's analysis says that Swinerton and Walberg's winning bid had this breakdown, well under 23%:

Minority Participation		MWDVBE Breakdown	
African American:	$ 19,980	MBE:	13.92%
Pacific Asian:	$ 3,000,000	WBE:	1.25%
Anglo:	$18,678,000	DVBE:	0.00%

Total Contract Amount: $21,698,000[7]

Minority Participation		MWDVBE Breakdown	
African American	$ 262,000	MBE:	3.49%

Hispanic	$ 306,700	WBE:	1.29%
Native American	$ 15,788	DVBE:	0.0%
Asian Indian	$ 162,000		
"Anglo"	$20,633,512		

Total Contract Amount: $21,380,000

But the statute still has firm requirements, enforced by rejection of low bids like Monterey Mechanical's, unless all the requirements are met. State agencies "shall award the contract to the lowest responsible bidder meeting or making good faith efforts to meet" the percentage "goals." Cal. Public Contract Code § 10115.2(a). That means that the state will not award a contract to a bidder which does neither. The "good faith efforts" have specific content. They require documented efforts to identify, focus advertising on, and solicit and consider bids from, firms in the designated classes:

(b) A bidder shall be deemed to have made good faith efforts upon submittal within time limits specified by the awarding department of documentary evidence that all of the following actions were taken:

(1) Contact was made with the awarding department to identify minority, women, and disabled veteran business enterprises.

(2) Contact was made with other state and federal agencies, and with local minority, women, and disabled veteran business enterprise organizations to identify minority, women, and disabled veteran business enterprises.

(3) Advertising was published in trade papers and papers focusing on minority, women, and disabled veteran business enterprises, unless time limits imposed by the awarding department do not permit that advertising.

(4) Invitations to bid were submitted to potential minority, women, and disabled veteran business enterprise contractors.

(5) Available minority, women, and disabled veteran business enterprises were considered.

Cal. Public Contract Code § 10115.2(b). Adherence is monitored, Calif. Public Contract Code § 10115.3(a). Though the requirements allow for awards to bidders who do not meet the percentage goals, they are rigid in requiring precisely described and monitored efforts to attain those goals.

The question whether a non-rigid system of goals and good faith efforts, as opposed to rigid quotas, is treated as a classification under the Equal Protection Clause, is settled by existing precedent. *Bras v. California Public Utilities Commission*, 59 F.3d 869 (9th Cir.1995), dealt with a similar law, providing for "goals" and "methods for encouraging" minority and women subcontracts, and expressly abjuring "quotas." *711 Cal. Pub. Util.Code § 8283(b). The state argued that a challenger lacked standing because of the absence of rigid requirements. We held that the provisions were not "immunized from scrutiny because they purport to establish goals rather than quotas." Bras, 59 F.3d at 874. We construed *Northeastern Florida Contractors* to mean that "the relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." Bras, 59 F.3d at 875.

Bras controls. In the case at bar, the statute does not require set-asides, but it encourages them. A bidder can avoid disqualification by seeing to it that 23% of the work goes to the designated classes, or showing that it tried to bring about that result. The Tenth Circuit has reached the same conclusion in an indistinguishable case, *Concrete Works of Colorado v. Denver*, 36 F.3d. 1513 (10th Cir.1994). The Denver ordinance at issue in that case was almost identical in material respects to the statute at issue here. It provided only for "goals" and "good faith" efforts to meet them, not quotas or rigid set-asides. Appellees do not cite any cases going the other way. We have no basis for setting up an intercircuit conflict on this settled issue.

It is much easier to imagine that good faith compliance, as opposed to meeting the goals by subcontracting out 23% of the work, might be *de minimis*. Good faith compliance does not cost millions of dollars. It does not seem much to ask of a bidder that it get the names of firms in the designated classes, advertise to them, and consider their bids. There is much appeal to enlarging the participation of minority-owned and women-owned firms by assuring that they as well as others receive full information on opportunities to bid.

But the question we are considering in this section of our opinion is whether the statute classifies, that is, whether it treats people differently by ethnicity or sex, not whether the purpose of the classification is attractive. The statute treats contractors differently according to their ethnicity and sex, with respect to the "good faith" requirement. It does not say that all contractors must assure that the opportunity to bid is advertised to all prospective subcontractors, including minority-owned and women-owned firms. Only those firms not minority or women owned must advertise to those respective groups, and only minority and women owned firms are entitled to receive the bid solicitation. A firm which is both minority and women owned, and keeps at least a fifth of the work, does not have to solicit any bids from firms identified by ethnicity or sex. If a minority and women owned firm does solicit bids from subcontractors, the firm is free under the statute before us to exclude non-minority, non-women owned firms from the solicitation.

We are not faced with a non-discriminatory outreach program, requiring that advertisements for bids be distributed in such a manner as to assure that all persons, including women-owned and minority-owned firms, have a fair opportunity to bid. The Equal Protection Clause as construed in *Adarand* applies only when the government subjects a "person to unequal treatment." There might be a non-discriminatory outreach program which did not subject anyone to unequal treatment. But this statute is not of that type.

Though worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness. The scheme requires the bid solicitation in the context of requiring "good faith efforts to meet [percentage] goals." Cal. Public Contract Code § 10115.2(a). It requires distribution of information only to members of designated groups, without any requirement or condition that persons in other groups receive the same information. Thus the statute may be satisfied by distribution of information exclusively to persons in the designated groups. Bidders in the designated groups are relieved, to the extent they keep the required percentages of work, of the obligation to advertise to people in their groups. The outreach the statute requires is not from all equally, or to all equally.

It is heuristically useful, in sorting out the question of whether a classification is made from the question whether the classification is permissible, to hypothesize the same provision in favor of white male firms. That way we can separate the question of whether the *712 discrimination is permissible, which it would not be for white male firms, from the question whether there is discrimination at all. If the statute required solicitation of subcontract bids only to white male-owned firms, and did not require that white-male-owned firms make any solicitation if they kept the work, a court might well find that the scheme "discriminate[d] against MBEs and WBEs and continued to operate under 'the old boy network' in awarding contracts." *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1414 (9th Cir.1991). We would certainly conclude that the statute classified by ethnicity and sex.

The statutory classification also imposes higher compliance expenses on some firms than others, according to ethnicity and sex. To demonstrate "good faith," the bidder must contact the awarding department, state agencies, federal agencies, and minority and women organizations, to identify prospective subcontractors, locate and prepare advertisements for advertisements in papers focusing on those groups, and distribute invitations to bid to potential minority and women subcontractors. Cal. Public Contract Code § 10115.2(b). These efforts require time, which must be paid for, effort, and expense—they do not happen by themselves. The expenses—perhaps a few hundred or a few thousand dollars for wages and salaries, communications, and advertisements—are avoidable for firms in the designated classes to the extent they keep the required percentages of work for themselves.

[7] More important, we can find no authority, and appellees have cited none, for a *de minimis* exception to the Equal Protection Clause. The Supreme Court has held that, "*any* person, of whatever race, has the right to demand that *any* governmental actor subject to the Constitution justify *any* racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." Adarand, 515 U.S. at 224, 115 S.Ct. at 2111 (emphasis added). We conclude that there is no *de minimis* exception to the Equal Protection Clause. Race discrimination is never a "trifle."

C. Heightened Scrutiny.

[8] We have concluded so far that Monterey Mechanical had standing to challenge the constitutionality of the statute, and that the statute makes a classification subject to Equal Protection analysis. That does not end the inquiry into probability of success on the merits. The next question is whether the classification is permissible.

The Equal Protection Clause protects "persons, not groups, so group classifications are in most circumstances prohibited, and are subjected to detailed judicial inquiry to insure that the *personal* right to equal protection of the laws has not been infringed." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 115 S.Ct. 2097, 2112–13, 132 L.Ed.2d 158 (1995). Likewise, "parties who seek to defend gender based government action must demonstrate an exceedingly persuasive justification for that action." United States v. Virginia, 518 U.S. 515, ——, 116 S.Ct. 2264, 2274, 135 L.Ed.2d 735 (1996).

The Constitution entitles "any person" to equal protection of the laws. U.S. Const. Amend. 14, § 1. It draws no distinction by ethnicity or sex. The scrutiny applied to racial classifications "is not dependent on the race of those burdened or benefitted." Adarand, 515 U.S. at 222, 115 S.Ct. at 2110. An "exceedingly persuasive justification" must be presented for a sex classification, even if it "discriminates against males rather than against females." Mississippi University for Women v. Hogan, 458 U.S. 718, 723–24, 102 S.Ct. 3331, 3335, 73 L.Ed.2d 1090 (1982).

Racial classifications are subject to "strict scrutiny," and "are Constitutional only if they are narrowly tailored measures that further compelling governmental interests." Adarand, 515 U.S. at 226, 115 S.Ct. at 2113. Classifications based on sex must be justified by an "exceedingly persuasive justification," serve "important governmental objectives" and the means must be "substantially related to the achievement of those objectives." United States v. Virginia, 518 U.S. 515, ——, ——, 116 S.Ct. 2264, 2274, 2275, 135 L.Ed.2d 735 (1996).

The statute benefits bidders and subcontractors who fit the classification "minority *713 business enterprise" and "women business enterprise." Cal. Public Contract Code § 10115.2(a). A "women business enterprise" must be "at least 51% owned by one or more women," "whose management and daily operations are controlled by one or more women who own the business." Cal. Public Contract Code § 10115.1(f). A "minority business enterprise" must meet the same criteria with respect to the designated minorities. Cal. Public Contract Code § 10115.1(e).

For a racial classification to survive strict scrutiny in the context before us, it must be a narrowly tailored remedy for past discrimination, active or passive, by the governmental entity making the classification. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 482–84, 490–91, 109 S.Ct. 706, 716, 720, 102 L.Ed.2d 854 (1989). "Findings of societal discrimination will not suffice; the findings must concern prior discrimination by the government unit involved." *Id.* at 485, 109 S.Ct. at 716–17; *and see* Associated General Contractors v. City and County of San Francisco, 813 F.2d 922, 930 (9th Cir.1987).

[9] The burden of justifying different treatment by ethnicity or sex is always on the government. "[A]ny person of whatever race has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." Adarand, 515 U.S. at 224, 115 S.Ct. at 2111. For laws that classify by sex, "The burden of justification is demanding and it rests entirely on the State." United States v. Virginia, 518 U.S. at ——, 116 S.Ct. at 2275.

In the case before us, the University offered no evidence whatsoever to justify the race and sex discrimination. When asked by Monterey Mechanical for statistics, the University said there were none. In their opposition papers to Monterey Mechanical's motion for preliminary injunction, the University and Swinerton & Walberg offered no evidence whatsoever that the University or the state had previously discriminated, actively or passively, against the groups benefitted by the statute. They never proposed to offer evidence of past discrimination in any form at any time. There are legislative findings, but they do not say that California State University, or the California state government, has in the past actively or passively discriminated against the benefitted groups. Cal. Public Contract Code § 10115(a). There are no legislative findings, and no fact findings by the district court, of past discrimination against the benefitted groups by the state or the University.

Instead, the legislative findings say that markets, prices and personal opportunities will be advanced by "the policy of the state to aid the interests of minority, women and disabled veteran business enterprises." *Id.* Phrases in the legislative findings say and imply that these enterprises have an "economically disadvantaged position." Cal. Public Contract Code § 10115(a)(4). But the legislative findings do not say whether the "economically disadvantaged position" has to do with past active or passive discrimination by the State, other entities, general societal discrimination, or factors other than discrimination.

Because the state made absolutely no attempt to justify the ethnic and sex discrimination it imposed, we do not reach the questions of how much proof, or what kinds of legislative findings, suffice. Unlike *Associated General Contractors v. Coalition for Economic Equity,* 950 F.2d 1401, 1414 (9th Cir.1991), there were no "detailed findings of prior discrimination" and no extensive evidence of discrimination submitted. Because appellees offered no evidence or argument justifying discrimination, we do not reach the question whether a more tolerant constitutional regime for sex discrimination would permit the part of the statute favoring women owned businesses to survive constitutional analysis if the part favoring minority businesses does not. *See United States v. Virginia,* 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735; *Associated General Contractors v. City and County of San Francisco,* 813 F.2d 922, 940–41 (9th Cir.1987). Even sex discrimination against males requires the state to bear the burden of justification. Likewise, because no justification has been offered for the group classifications at issue, *714 we do not reach the question whether group discrimination *ipso facto* violates individuals' rights to equal protection of the laws. *See Adarand,* 515 U.S. at 239, 240, 115 S.Ct. at 2118, 2119 (Scalia, concurring, and Thomas, concurring).

Even if the purpose of a discriminatory scheme is legitimate, the scheme can survive strict scrutiny only if it is "narrowly tailored" to serve a compelling governmental interest. *Wygant v. Jackson Board of Education,* 476 U.S. 267, 283, 106 S.Ct. 1842, 1852, 90 L.Ed.2d 260 (1986); *Adarand,* 515 U.S. at 235–37, 115 S.Ct. at 2117. The statute at issue is not "narrowly tailored." That it is not is shown by the same overbreadth in its definition of "minority" that the Supreme Court has noted for years in similar statutes. *Wygant,* 476 U.S. at 284 n. 13, 106 S.Ct. at 1852 n. 13; *City of Richmond v. J.A. Croson, Co.,* 488 U.S. at 505–06, 109 S.Ct. at 728:

> (d) "Minority," for purposes of this section, means a citizen or lawful permanent resident of the United States is an ethnic person of color and who is: Black (a person having origins in any of the Black racial groups of Africa); Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race); Native American (an American Indian, Eskimo, Aleut, or Native Hawaiian); Pacific–Asian (a person whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, or the United States Trust Territories of the Pacific including the Northern Marianas); Asian–Indian (a person whose origins are from India, Pakistan, or Bangladesh); or any other group of natural persons identified as minorities in the respective project specifications of an awarding department or participating local agency.

Cal. Public Contract Code § 10115.1(d).

In *Croson,* 488 U.S. at 505–06, 109 S.Ct. at 728, the Court was struck by the inclusion of Aleuts and Eskimos in a Richmond, Virginia, ordinance. Likewise, in *Wygant* the court said that the inclusion of groups highly unlikely to have been the victims of past discrimination by the school board "illustrate[ ] the undifferentiated nature of the plan." *Wygant,* 476 U.S. at 284 n. 13, 106 S.Ct. at 1852 n. 13. The statute before us also lists groups highly unlikely to have been discriminated against in the California construction industry. The Aleuts, for example, a distinct people native to the western part of the Alaska peninsula and the Aleutian Islands, have suffered brutal oppression repeatedly in their history. But it would be frivolous to suggest that California State Polytechnic University at San Luis Obispo, or the State of California, have actively or passively discriminated against Aleuts in the award of construction contracts. In *Croson,* the Court observed in reference to Aleuts and Eskimos that "the gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation." Id. at 506, 109 S.Ct. at 728. Likewise here, some of the groups designated are, in the context of a California construction industry statute, red flags signalling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.

The list in the statute before us might be explained by a laudable desire to improve the social position of various groups perceived to be less well off. Or conceivably those who drafted the statute for the legislature copied from a model form and neglected to strike its inapplicable portions. One explanation which is not plausible is the one needed as a justification, that the list is narrowly tailored to remedy past discrimination, active or passive, by the State of California. Appellees submitted no evidence and offer no argument to the contrary. "A broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny." *Hopwood v. State of Texas,* 78 F.3d 932, 951 (5th Cir.1996).

We are compelled by firmly established law to conclude that the statute violates the Equal Protection Clause. The state has not even attempted to show that the statute is narrowly tailored to remedy past discrimination. The laudable legislative goal, that "the actual and potential capacity of minority, women, and disabled veteran business enterprises [be] encouraged and developed," Calif. Public Contract Code § 10115(a)(1), cannot *715 be achieved by ethnic and sex discrimination against individuals excluded by ethnicity or sex from these groups, in the absence of Constitutionally required justification.

D. Irreparable Harm.

The district court concluded that Monterey Mechanical's probable success on the merits was low, so gave very limited consideration to whether it would suffer irreparable harm if interlocutory equitable relief were denied, and whether granting a preliminary injunction would impose hardship on the University and Swinerton and Walberg. *See Stanley v. University of Southern California,* 13 F.3d 1313 (9th Cir.1994); *Martin v. International Olympic Committee,* 740 F.2d 670, 674–75 (9th Cir.1984). The district court found that the balance of hardships did not tip "sufficiently" in favor of Monterey Mechanical, "especially in view of the possibility of loss of funding if the construction contract is not completed speedily."

The University argues that Monterey Mechanical was properly denied a preliminary injunction, even if its probability of success on the merits was high, because Monterey Mechanical demonstrated no irreparable harm, and the balance of hardships tipped in the University's favor. The University's evidence of hardship was that if a preliminary injunction stopped the project from proceeding while the litigation was pending, completion would probably be delayed until past the date when unencumbered funding would revert to a state bond reserve. Further, the University filed evidence that faculty and staff would be delayed in obtaining the benefits of the project, and the University would be delayed in enjoying the benefits of saving money on electricity because of the project. Monterey Mechanical showed two kinds of harm: (1) loss of the contract, and (2) unconstitutional discrimination in the bidding process based on race and sex. While money damages might remedy the first harm, it is not apparent to us how they would remedy the second.

"We have stated that an alleged constitutional infringement will often alone constitute irreparable harm." *Associated General Contractors v. Coalition For Economic Equity,* 950 F.2d 1401, 1412 (9th Cir.1991). We have been compelled to conclude that the statute, insofar as it classifies by ethnicity and sex, is unconstitutional. That makes Monterey's probability of success much higher than it was when preliminary injunctive relief was considered in district court. We therefore remand so that the district court may reconsider preliminary equitable relief in light of our determination of unconstitutionality.

CONCLUSION

All persons, of either sex and any ethnicity, are entitled to equal protection of the law. That principle, and only that principle, guarantees individuals that their ethnicity or sex will not turn into legal disadvantages as the political power of one or another group waxes or wanes. The statute at issue in this case violates the Equal Protection Clause, so the plaintiff's probability of success on the merits in their challenge to the ethnic and sex provisions of the statute is high. The district court must therefore reconsider the motion for preliminary injunction in light of the unconstitutionality of the statute.

REVERSED AND REMANDED.

All Citations

125 F.3d 702, 97 Cal. Daily Op. Serv. 7099, 97 Daily Journal D.A.R. 11,464

Footnotes

1 "M/W/DVBEs" is the designation on the University's forms for "Minority/Woman/Disabled Veteran Business Enterprises."

2 Monterey Mechanical put in 13 times as much money for black subcontractors as Swinerton and Walberg, and a slightly higher amount for women subcontractors, though the total percentages were not very high for either of them. Neither company proposed to subcontract anything to disabled veteran subcontractors. Swinerton and Walberg had a higher total for total minority participation because of a $3,000,000 item for "Pacific Asian" minority participation.

3 Here is the relevant portion of the district court decision:
The motion for preliminary injunction will be denied. I find that plaintiff has little likelihood of success on the merits on the equal protection claim as pled. The Fourteenth Amendment's equal protection clause requires the State to justify the differential treatment of similarly situated individuals.

. . . . .
On its motion plaintiff argues that California has not made sufficient findings of past discrimination to support Minority Women Enterprise participation goal requirements. In so arguing plaintiff immediately focuses on strict scrutiny analysis without considering what I believe a necessary first step.
By that I mean that plaintiff apparently assume without analysis that California's Minority and Women Enterprise participation goals treat general contractors differently on the basis of race and gender. I'm not satisfied that this is the case. In fact, it's plain that the participation goals require all general contractors, regardless of race or gender, to either submit bids with a set percentage of Minority Women Enterprise participation or to actively seek out and solicit bids from Minority Women Enterprise subcontractors.

Thus the statute does not appear to treat general contractors differently. It might be argued that the statute does treat non-minority women enterprise general contractors differently in one respect. A minority business enterprises that will perform 15% of the contract with its own labor and equipment is under no obligation to seek out minority business enterprises subcontractors since it already meets the minority business participation goal.

The same is true of women business enterprises general contractors who intend to perform five percent of the contract themselves. However, this possible difference in treatment appears to me to be de minimis. In fact, the extra step of soliciting bids from minority business enterprises where a minority business enterprise general contractor might not have to seems hardly worth mentioning.

This is especially so, given that the minority business enterprise would still be required to solicit bids from women business enterprises, nor is there any showing that this possible extra step which might have to be performed by non-minority women enterprises makes it more likely that a minority women business enterprise will be awarded a contract over a non-minority women business enterprise. More importantly, however, even if it is conceded that this possible difference in treatment among general contractors is sufficient to confer standing upon plaintiff to challenge the constitutionality of California's minority women business enterprise participation goal requirements, that possible difference in treatment would not entitle plaintiff to the relief he seeks here.

. . . . .
The record shows that the state let the contract to a non-minority women business enterprise general contractor who solicited bids from minority women business enterprise contractors, but did not meet the participation goals. Accordingly, there is no causal relationship between the manner in which the statute might treat general contractors differently and plaintiff's failure to win the contract. Here in fact, the statute treated plaintiff and defendant Swinerton exactly the same.

4 California's Proposition 209, *see Coalition for Economic Equity v. Wilson,* 110 F.3d 1431, 1997 WL 160667 (9th Cir. April 8, 1997), was passed after Monterey Mechanical was disqualified and the contract was awarded to Swinerton and Walberg, and after the district court denied Monterey Mechanical a preliminary injunction. The parties have not argued that the subsequent change in state law affects this case. They have not made any arguments regarding Proposition 209. We therefore do not consider what effect if any Proposition 209 or *Coalition for Economic Equity* might have on this case.

5 None of the parties have presented any arguments regarding the statutory provision relating to disabled veterans, Cal. Public Contract Code § 10115 et. seq., so we disregard it in our discussion. Monterey Mechanical does not challenge its constitutionality, and the University does not make any arguments relating to it. Accordingly, we do not consider the disabled veterans provisions of the statute, and our decision has no bearing on the provisions of the statute regarding disabled veterans.

6 Governor Pete Wilson was nominally a defendant in the case, and as such prevailed in district court. He has accordingly filed an appellee's brief rather than an appellant's brief. But his position is the same as appellant's, that the statute is unconstitutional. Though nominally an appellee, Governor Wilson is in substance an appellant. Our references to appellees arguments do not include the arguments made by Governor Wilson.

7 Here are the University's categories and numbers for Monterey Mechanical:

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EXHIBIT 5

KeyCite Yellow Flag - Negative Treatment

Abrogation Recognized by Orr v. United States, Fed.Cl., August 30, 2019

121 S.Ct. 2448
Supreme Court of the United States

Anthony PALAZZOLO, Petitioner,
v.
RHODE ISLAND et al.
No. 99-2047.

|
Argued Feb. 26, 2001.
|
Decided June 28, 2001.

Synopsis
Landowner brought inverse condemnation action against the Rhode Island Coastal Resources Management Council (CRMC), alleging that the CRMC's denial of his application to fill 18 acres of coastal wetlands and construct beach club constituted a taking for which he was entitled to compensation. After bench trial, the Rhode Island Superior Court, Washington County, entered judgment for CRMC. The Rhode Island Supreme Court, 746 A.2d 707, affirmed, and landowner petitioned for certiorari. The United States Supreme Court, Justice Kennedy, held that: (1) claims were ripe for adjudication; (2) acquisition of title after the effective date of the regulations did not bar regulatory takings claims; and (3) *Lucas* claim for deprivation of all economic use was precluded by undisputed value of portion of tract for construction of residence.

Affirmed in part, reversed in part and remanded.

Justices O'Connor and Scalia filed concurring opinions.

Justice Stevens filed opinion concurring in part and dissenting in part.

Justice Ginsburg filed dissenting opinion, in which Justices Souter and Breyer joined.

Justice Breyer filed dissenting opinion.

West Headnotes (22)

[1] Constitutional Law—Fifth Amendment

The Takings Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment. U.S.C.A. Const.Amends. 5, 14.

104 Cases that cite this headnote

[2] Eminent Domain—What Constitutes a Taking; Police and Other Powers Distinguished

Taking occurs when the government encroaches upon or occupies private land for its own proposed use. U.S.C.A. Const.Amend. 5.

59 Cases that cite this headnote

[3] Eminent Domain—What Constitutes a Taking; Police and Other Powers Distinguished

Even a minimal permanent physical occupation of real property by government requires compensation under the Takings Clause. U.S.C.A. Const.Amend. 5.

59 Cases that cite this headnote

[4] Eminent Domain—Zoning, Planning, or Land Use; Building Codes