No. 83-697

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,
*Petitioners,*

v.

RAYMOND J. DONOVAN, *et al.*,
*Respondents.*

## BRIEF AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ON BEHALF OF PUBLIC SERVICE RESEARCH COUNCIL

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## INTEREST OF THE AMICUS CURIAE

Public Service Research Council[1] is an independent national citizens' organization engaged in nonpartisan research and education concerning public service unionism and its effects upon the nation's governmental institutions and their services to all Americans. It is a voluntary association of private citizens, legislators, scholars, and commentators united by a common concern with the maintenance of limited, constitutional government.

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[1]Public Service Research Council requested and received consent from Petitioners and the Solicitor General to the filing of this brief *amicus curiae.* Counsels' letters have been filed with the Clerk of the Court.

Because of the Council's above stated fundamental concerns, it has been active as a friend of the court at all levels of the legal process to affect evolving concepts of law in connection with various matters in the public interest and has filed briefs *amicus curiae* in numerous cases before this and other courts.[2]

## STATEMENT OF CASE

The Davis-Bacon Act, 40 U.S.C. §276a, was originally enacted in 1931, during the Great Depression, in order to equalize the wages paid to laborers and mechanics working on federal construction with the wages prevailing in the locality where the construction was being undertaken. Although this Act only applies to federal construction work, its terms have been incorporated by reference into more than fifty-eight other federal statutes which provide some form of federal financial assistance. 48 Fed. Reg. 19,532 (April 29, 1983). The Copeland Anti-Kickback Act, 40 U.S.C. §276c, was enacted in 1934, and required *inter alia,* the weekly submission of certain information to the federal government to insure that prevailing rates were paid.

On August 14, 1981, the Secretary of Labor published certain proposed revisions in the regulations which implement these Acts. 46 Fed. Reg. 41,444. Nine months later the Secretary of Labor made certain revisions and issued these as final regulations to become effective on July 27, 1982. 47 Fed. Reg. 23,644-79 (May 28, 1982).

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[2]Public Service Research Council filed a brief with the United States District Court as *amicus curiae* on July 16, 1982 in support of the government, arguing that the Secretary of Labor had discretion to promulgate the regulations in question.

Petitioners Building and Construction Trades Department, AFL-CIO, sixteen AFL-CIO unions or departments and the Teamsters Union ("Unions") sought to enjoin portions of the proposed regulations in five separate areas. The Unions' Motion for Preliminary Injunction was granted by the U.S. District Court for the District of Columbia on December 23, 1982. On July 22, 1982, the District Court granted in part summary judgment to the Unions.

The Government took an appeal to the U.S. Court of Appeals for the D.C. Circuit which affirmed the District Court in part and reversed in part on July 5, 1983. Petitioners filed a Suggestion for Rehearing En Banc in the U.S. Court of Appeals, which was denied on September 16, 1983. Subsequently Petitioners filed a Petition for Writ of Certiorari in this Court on October 26, 1983.[3]

## THE PETITION SHOULD BE DENIED

### I. THE STANDARD OF REVIEW USED BY THE COURT OF APPEALS WAS CORRECT AND IN CONFORMITY WITH DECISIONS OF THIS COURT.

Petitioners incorrectly claim that the approach of the Court of Appeals in its decision below is inconsistent with the approach mandated by this Court in *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual,* ____ U.S. ____, 103 S. Ct. 2856 (1983) and in *BankAmerica Corp. v. United States,* ____ U.S. ____, 103 S.Ct. 2266 (1983); and that the Court of Appeals held the erroneous view that

[3] *Amicus curiae* Public Service Research Council opposes granting this petition for certiorari, but if the petition is to be granted, then review of all regulations should be undertaken by this Court so as not to deny review of those regulations overruled by the Court of Appeals.

> the judiciary is to show extreme deference to administrators who seek to substantially alter settled rules as to what a statute means without explaining why those rules are mistaken and are not to give substantial weight to the prior administrator's understanding of the statute. . . . [Pet. 7.]

In fact, the well reasoned Court of Appeals decision used an "arbitrary and capricious" standard of review as reiterated by this Court in *Motor Vehicle Mfrs.;* and the decision in *BankAmerica Corp.* is inapposite to the questions presented by the petitioners herein. Petitioners have not even made a colorable showing that certiorari should issue as the opinion of the Court of Appeals is well reasoned, consistent with applicable law, and does not require an exercise of this Court's power of supervision. Supreme Court Rule 17.1(a).

### A. Petitioners Erroneously Claim that the Prior Regulations Have Proven Effective in Operation.

In framing the first question presented for review, and in alleging that the Secretary's stated reasons were insufficient to support a change in these regulations, Petitioners simply assume that these regulations have been effective in operation. Pet. 1, 6. This assumption is at odds with governmental findings. The United States General Accounting Office, an arm of the U.S. Congress, has researched the operation of these regulations, issuing eight reports from June 1962 through April 1979. In its most recent report, GAO summarized its findings in bold terms.

> After nearly 50 years of administering the Davis-Bacon Act, the Department of Labor has not

> developed an effective system to plan, control, or manage the data collection, compilation, and wage determination functions. [*The Davis-Bacon Act Should be Repealed,* General Accounting Office (April 27, 1979) ii.]

After reviewing these reports, one can only conclude, rather, that the Secretary of Labor was compelled to revise the antiquated regulations in order to improve their operation and more closely approximate the intent of the Congress in its adoption of the Davis-Bacon Act. 46 Fed. Reg. 41,445-46 (1981).

**B. The Elimination of the Thirty Percent Rule.**

In affirming the District Court's upholding of the Secretary's elimination of the "thirty percent rule" the Court first determined that the

> statute delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing. . . . The legislative history confirms that it was envisioned that the Secretary could establish the method to be used. *See, e.g.,* 74 CONG. REC. 6516 (1931) (remarks of Rep. Kopp) ("A method for determining the prevailing wage rate might have been incorporated in the bill, but the Secretary of Labor can establish the method and make it known to the bidders.") [Pet. App. 9a-10a.]

Having determined that the Secretary's discretion in ascertaining "prevailing wages" was broad, the Court correctly limited its review, "to ensuring that the new definition is not one 'that bears no relationship to any recognized concept of [the statutory term] or that would defeat the purpose of the [statutory] program' . . ." Pet. App. 10a.

As described, this standard of a review is precisely equivalent to that recited by this Court in *Motor Vehicle Mfrs.* In *Motor Vehicle Mfrs.*, this Court dealt with a rescission of a proposed U.S. Department of Transportation regulation which required the installation of passive restraint systems in automobiles. The standard of review was described.

> The agency's action in promulgating such standards therefore may be set aside if found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." (citations omitted). We believe that the rescission or modification of an occupant protection standard is subject to the same test.
>
> . . . Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.
>
> In so holding, we fully recognize that "regulatory agencies do not establish rules of conduct to last forever," . . . and that an agency must be given ample latitude to "adapt their rules and policies to the demands of changing circumstances." [*Motor Vehicles Mfrs.*, 103 S. Ct. at 2865-66.]

Petitioners read *Motor Vehicle Mfrs.* as requiring, in the event an agency attempts to rescind or modify a long-standing rule, that the reviewing Court give "dispositive weight to the prior regulatory record." Pet. 11. *Motor Vehicle Mfrs.* does not require such a burden on the agency; only that the agency examine the relevant data and articulate a satisfactory explanation, which rebuts any presumption that the prior rule was the only rule appropriate under the statute.

In the instant case, Secretary Donovan set out a reasoned analysis in support of his regulations. Thus, *Motor Vehicle Mfrs.* applies to a very different situation and provides no support for the proposition that the standard used in the case below by the Court of Appeals in reviewing the Secretary of Labor's elimination of the thirty percent rule to determine prevailing wages was incorrect.

### C. The Exclusion of Urban Counties from Rural Wage Determinations.

Explicitly and demonstrably the Court of Appeals used the "arbitrary and capricious" standard in reviewing the Secretary's proposed regulation that, where there has not been sufficient similar construction in the county in which a project is located to determine a prevailing wage, he will look at wages paid on similar construction in surrounding counties; except that he will not use projects in metropolitan counties as a source of data for projects in rural counties, and *vice versa.*

First, the Court noted that "[n]either party questions the Secretary's basic claim of authority to look beyond the county line if necessary to determine the prevailing wage in the county in which the project is located." Pet. App. 11a. In analyzing the language of this statute and its legislative history, the Court found the appropriate extent of delegation of authority to the Secretary: "In essence, Congress anticipated that the general authorization to the Secretary to set the prevailing wage would encompass the power to find a way to do so in the interstitial areas not specifically provided for in the statute." Pet. App. 13a.

The standard expressed by the Court is "arbitrary and capricious" and its analysis comports with that standard:

> We review the Secretary's choice of methods only to ensure that he is acting consistently with the purposes of the statute and that his choice is not arbitary. We think it clear that the new regulation is rational and furthers the purposes of the statute. The Secretary's justification for the provision was that, because of the disparity between urban and rural wages, using demographically dissimilar counties for such determinations is unreliable. . . . Furthermore, the Secretary claimed, importation of high urban wages to rural areas has disrupted labor relations in rural areas because employees have been unwilling to return to their usual pay scales after a Davis-Bacon project has been completed. [Pet. App. 14a.]

The Court addresses the fundamental misperception of the Petitioners who seek to give dispositive weight to the fact that a different rule was used for a considerable period, and in support, look to *BankAmerica Corp.* Basically, such weight is given only when an agency has historically *interpreted* a statute in a certain way and then reverses itself to a contrary position; not when an agency within its delegated authority changes its method in order to reasonably achieve a statutory goal. Pet. App. 15a-16a.

It is clear that *BankAmerica Corp.* dealt with the adoption of an interpretation of a statute *directly contrary* to that held for a sixty-year period, in the context of federal criminal prohibitions, and not with a discretionary change designed to more closely achieve the purpose of a statute than regulations out of step with the times.

The central issue in *BankAmerica Corp.* was "a narrow statutory question" and the government's new interpretation was found to be contrary to the plain meaning of the statute. 103 S. Ct. at 2270-71. The Court did not defer to

the historic interpretation; rather it looked first to the statute and determined its meaning; it cited the interpretation history only in support of the conclusion it reached from statutory analysis. The present case does not involve "a crabbed interpretation of the words of a statute which so many in authority have interpreted in accordance with its plain meaning for so long." 103 S. Ct. at 2273.

### D. The Exclusion of Federal Projects From Wage Determinations.

Again, in its review of the Secretary's proposed exclusion of certain categories of federally-assisted projects from consideration in determining prevailing wages, the Court of Appeals adhered to the correct "arbitrary and capricious" standard and correctly concluded that the Secretary has the authority to exclude such data.

The Court's premises were that the Act's central goal is to ensure *equality* of wages paid to federal project workers and private project workers but does not require or suggest that these wages be *greater* than those of their private project counterparts. The Secretary determined that the current system of including federal project data in the "prevailing wage" determination of private sector wages skewed that wage upward, against the intent of Congress. "Neither the District Court opinion nor the unions dispute the factual basis for this conclusion. Rather, the unions argue that the act and its legislative history, including congressional acquiescence to administrative practice, forbid exclusion of federal projects." Pet. App. 17a.

The Court extensively analyzes the legislative history and economic conditions giving rise to the need for Davis-Bacon, finding that because federal projects had to be

awarded to the lowest suitable bidder, contractors were paying wages *less* than those for private projects:

> With this as the Act's premise, it would make no sense to *require* the Secretary, when setting prevailing wages, to include federal projects in his survey. Since the problem to be remedied was the low wages paid on federal projects, to include them would only impede attainment of the ultimate goal of counterbalancing the flaws in the federal bidding system and equalizing federal and private wages. [Pet. App. 19a.]

The Court's analysis of the purposes of the statute demonstrates not only that the proposal to exclude federal projects is within the Secretary's discretion but also that it furthers the statute's primary goal of *equality* of pay better than the prior regulation.

> To continue to include them now that federal wages are far above those paid in the private sector, however, would only exacerbate in the opposite direction the kind of problem – an inequality between federal and private wages – Congress was seeking to avoid. The fact that no Secretary has previously abandoned the practice does not take away from the current Secretary's power to fine tune his exercise of discretion. [Pet. App. 21a.]

**E. The Expanded Definition of Helpers.**

The Court of Appeals upheld two elements of the Secretary's proposal regarding the use of the "helper" class of workers: the conformity of the definition of "helper" with currently existing practice; and the limit of two helpers for every three journeymen employed on a project. Pet. App. 29a-39a.

Petitioners strongly oppose this decision, insisting that it is contrary to the central purpose of the Act and contrary to the prior "interpretation" of the phrase "classes of laborers and mechanics" inserted into the Davis-Bacon Act by the 1935 amendments. They contend that the issue is one of statutory interpretation and that the Court of Appeals mischaracterized the Secretary's decision as an enforcement decision to which it applied the wrong standard of review. Pet. 17.

In fact, the Court of Appeals applied the same standard of review here ("All things considered, the unions have not shown the Secretary's choice of regulatory schemes to be arbitrary or capricious," Pet. App. 39a), and applied it scrupulously, first looking to the intent of the Act through its language and legislative history and then to the articulation by the Secretary of the reasons for the change; it found that the Secretary had met his burden of relating the change in a reasonable way to the goals of the Act and that the central question was not one of statutory interpretation but rather one of the extent of the discretion afforded the Secretary to select methods of achieving equality with private project wages.

The new regulation would define the "helper" essentially as one who works *under the supervision of a journeyman.* Petitioners' view is in effect that a "helper", because by definition he sometimes uses a journeyman's tools and thus overlaps a journeyman's duties, although under supervision, is an outlawed category of worker under the 1935 amendment which requires equality of wages between "classes of laborers and mechanics." Petitioners claim that each such class must be discrete and distinguishable, *based on the type of task the worker is entitled to perform.* Pet. 15-17.

The first question which the Court of Appeals addressed is whether a non-overlapping task-based definition (in accordance with union practice) is required by the Act, or whether the Act permits, indeed requires, categories of federal project workers to mirror real world private project workers.

The Court's decision is informed as it should be by the central purpose of the Act, to provide equality of wages: "At bottom, we are unwilling to read the fairly ambiguous legislative references to a task-based classification system in such a way as to vitiate the clearly expressed congressional purpose to have federal wages mirror those prevailing in the area." Pet. App. 35a.

In examining the language and legislative history of the Act, the Court correctly found that references to non-overlapping classes were the reflection of the practices prevailing in the industry at the time of the Act and its amendments. Thus, the non-use of a helper category during the early years of the Act appropriately re-created in federal projects the situation obtaining in private projects:

> Nevertheless, we do not think Congress intended to bind the Secretary to the job classification existing at that time, but rather merely spoke against a background of the task-based union practice being the prevailing one. [Pet. App. 32a-33a.]

Today, however, the practice in private project construction is to use laborers extensively as helpers in parts of the country. The Secretary so found and the Court analyzed and approved his finding as within his area of special competence. 47 Fed. Reg. 23,647 (May 28, 1982); *See* Pet. App. 38a.

It is clear that the Secretary has the authority to alter regulations to confront changes in the real world, so as to carry out the intent of Congress. *Atchison, T & S.F.R. Co. v. Wichita Bd. of Trade,* 412 U.S. 800, 808 (1972).

The core of Petitioners' concern is enforceability of the new regulations – whether they will provide a means for employers to circumvent the intent of the Act. Pet. 15-16. They argue that the situation which arose under the 1931 language of the statute (". . . shall be not less than the prevailing rate of wages for work of a similar nature. . ."), *i.e.,* the "tendency . . . of wages of the skilled group to descend toward the level of the unskilled group" will reoccur should the regulation be adopted. Pet. 19. This conclusion does not follow necessarily. Contravention of the earlier language was considerably easier, since the lack of *any* reference to classes of laborers was an easier obstacle for contractors to overcome ". . . by hiring mechanics as common laborers, and then assigning them to tasks which fell within the purview of one of the skilled crafts." S. Rep. No. 332, 74th Cong., 1st Sess. 5 (1935).

The Petitioners do not consider that the new regulation will not eliminate the scheme of classification, returning the statute to its 1931 status, since a "helper" falls into a discrete and distinguishable category because he must work under supervision when he does "journeyman's task work"; they do not even address the further guarantee in the regulation that the maximum ratio of helpers to journeymen is two to three, or only 40 percent of the personnel.

Fundamentally, the Petitioners simply disagree with the Secretary's conclusion regarding the degree of enforceability of the new classification. Such a difference of opinion is not ground for invalidating a determination by the

Secretary who has been delegated the appropriate discretion to make such decisions. The Court properly refused to substitute its own or Petitioner's judgment for the articulated, reasonable judgment of the Secretary:

> but we find it difficult to second-guess the Secretary's view that he can catch them. We do not mean that we cannot review the Secretary's decision against a charge that he has effectively abandoned the field. But our deference to his choice is properly near its greatest when his decision turns on the enforceability of various regulatory schemes. He and not the courts can best balance such shifting dynamics as the incentive to violate the rules, the willingness of construction workers and competitors to complain, the ability of his inspection staff to respond and to discover violations, and the effectiveness of sanctions. [Pet. App. 37a.]

## II. THE CONSIDERATION BY THE SECRETARY OF PUBLIC POLICY CONCERNS, SUCH AS COST SAVINGS TO THE TAXPAYERS UNDER THE PROPOSED REGULATIONS, WAS APPROPRIATE.

### A. The Changes Will Save Considerable Unnecesary Costs.

The Petitioners complain that the Secretary's explanations of the reasons for the proposed changes

> focus on the *cost* aspects of the new regulations and the extent to which regulatory changes will succeed in *lowering* wage rates paid on public construction. . . . But the basic purpose of the Davis-Bacon Act and its related statutes is to ensure fair wages and working conditions for laborers and mechanics employed on federally-funded construction, and not to save money for the Government . . . . [Pet. 14.]

To the contrary, the Secretary primarily related his changes to the intent of the Act, as explained above, which is to ensure *equality* of wages, and *not* to provide *higher* wages in federal projects, as implied by Petitioners. Petitioners say that the Secretary should not consider savings to the taxpayers. Such a position is indefensible: it is surely the responsibility of every federal officer to carry out the law in ways that are most cost-effective and unwasteful of the public treasury.

It is clear that the proposed changes will in fact save considerable unnecessary costs, although the precise savings to be realized can only be estimated. *See Oversight on the Davis-Bacon Act: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources,* 97th Cong., 1st Sess. (April 28 and 29, 1981) (hereinafter "Hearings").

With regard to the elimination of the thirty percent rule, Lester A. Fettig, former Administrator of the Office of Federal Procurement Policy, and Staff Director of the Subcommittee on Federal Spending Practices, U.S. Senate Committee on Governmental Affairs, noted:

> Further, where else could you find a regulation like the Department of Labor's "30% Rule" which, by mathematical proof, can be shown to drive wage determinations above average prevailing rates?
>
> We can argue over HOW inflationary the effects may be, quibble over the statistics, but let's not waste any more time with Alice in Wonderland logic which would have us believe these regulations are non-inflationary. [Hearings 42.]

The effect of overpaying workers on federal projects through the inclusion of federal project wages on the data base, has an inflationary effect on all construction wages.

As stated by Michael Callas, on behalf of Associated Builders and Contractors:

> We contest the statements of organized labor that once you pay that individual $6 an hour, you can pay them $4 an hour. When you pay them $13 an hour, they are going to be looking for 13 or more. This is the ratchet effect that does affect private construction, so that on every job bid after that, the authorities and the private agencies in our area have to go look for more money. We are 10 or 15 percent over the budget every time. [Hearings 438.]

In fact, it is the existing regulations, not the proposed Final Regulations, which have questionable validity regardless of their duration. The effect of this is stated by Professor Walter E. Williams. Visiting Professor in Economics, George Mason University: "The Secretary of Labor, contrary to the intent of the law, makes wage determinations based on union wages." Hearings 244.

Robert T. Thompson, Chairman of the Labor Relations Committee of the U.S. Chamber of Commerce points out the same concept as follows:

> By legal and proper administrative interpretation, the Department has the discretion to define "prevailing wage" as the range of wages which contractors in a community are offering. But the current regulations provide that when as little as a 30 percent minority earn a figure, then that is a prevailing rate. This formula practically guarantees that where a union represents 30 percent of a local work force, it will have Federal work available. [Hearings 176-177.]

Additionally, the National Society of Professional Engineers noted that:

> Originally, the Act was to keep Federal construction wages even with those paid in private industry. Now, however, the prices are dictated by the Department of Labor and many contractors contend that the wages are equal to union wages and not the "prevailing" wages in a community. The Department of Labor has ruled that a "prevailing" wage is one paid to the exact penny to 30 percent of those people employed in one work category. "*To the penny" pay rates are usually set by union collective bargaining agreements.* [Hearings 567.] (Emphasis added.)

Further support for the Secretary's cost-savings conclusions are found in *Modifying the Davis-Bacon Act: Implications for the Labor Market and the Federal Budget,* Congressional Budget Office (1983) (hereinafter "CBO Study"):

> *Prevailing Wages and Union Rates.* Because union wages in construction are substantially higher than those paid in the nonunion sector, the current definition of prevailing wages potentially raises wages paid on federal construction projects above competitive levels, especially when non-union rates are prevalent in a locality. . . .
> . . . The GAO estimated that, of 20 craft determinations studied, wages on 14 would have been 4 percent to 50 percent lower if data from federal projects had not been included. Six determinations, however, would have been 3 percent to 23 percent higher.
>
> The costs to the federal government attributable to Davis-Bacon's effects on wages have been estimated to range from $75 million to $1 billion a year. . . . For example, the DoL estimated that, in 1982, the difference between average wages on Davis-Bacon projects and on private projects

> was 5.3 percent in building construction and 5.4 percent in residential construction – implying a cost to the federal government of $568 million in 1982. This estimate – approximately the mid-point of the range of estimates – is used as part of the total cost impact (3.7 percent) given above. [CBO Study 23]

In summary, the CBO Study finds that eliminating the thirty percent rule will save $500 million in federal outlays for fiscal 1984-1988; and allowing expanded use of helpers in a maximum ratio of two for every three journeymen, will save $1.685 billion in the same period.[4] CBO Study 36.

### B. The Redefinition of the "Helper" Category Will Result in Greater Construction Industry Employment Opportunities for Minority and Young Workers.

The refinement of the definition of "helpers" was supported by findings made by the Secretary of Labor after the comment period. Increased recognition of helpers was said to "reflect the wide-spread industry practice of employing semi-skilled workers on construction projects . . . ."[5] 47 Fed. Reg. 23,647 (May 28, 1982). Importantly,

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[4]Due to the dual nature of the proposed regulations regarding helpers, the record does not clearly reflect the cost savings of redefining the term helper, apart from expanding the number of localities in which this definition could be used. Nevertheless the estimated cost savings are substantial. 47 Fed. Reg. 28,649, 23,662 (May 28, 1982).

[5]It is not surprising that in the fifty-two years since the enactment of the Davis-Bacon Act that construction practices would change. What is unusual is that Petitioners would seek to freeze antiquated regulations designed only to perpetuate high construction labor costs for the federal government. The Davis-Bacon Act was passed when the federal government was attempting to counteract depressed employment as a result of the Depression through a substantial construction

the Secretary pointed out that this change would provide more job opportunities for "unskilled and semi-skilled workers (including youth, women and minorities) and encourage their use in a manner which provides training." *Id.* When helpers are used, highly skilled workers can use their skills more effectively, thereby enhancing productivity. Lastly, the changes would allow more contractors to compete for government work. *Id.*

The fundamental problem which the Secretary was trying to correct was the inadvertent effect of existing federal regulations to raise wage levels above those competitive levels prevailing in the community. The social and economic effect of this type of market distortion is multifold. Contractors who are present in the locality who pay lower wage rates prevalent in the community would be precluded from winning federal contracts based on those lower rates. Additionally, since market wage rates convey signals to workers to seek employment where their efforts will be valued most highly, "[l]egislatively imposed minimums interfere with these signals, potentially leading to reduced employment levels, increased unemployment, and shifts in employment in favor of higher-wage workers — such as union labor — who now face artificially slight competition from lower-wage workers." CBO Study 3-4.

The data underlying the Secretary's decision demonstrate that redefining the "helper" category will facilitate job opportunities for those on the entry levels and lower levels of our employment ladder. Informed witnesses with experience with federally-assisted construction agree. Mr. Richard Pepper, a Chicago contractor and vice president

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program. This situation no longer obtains. *See The Davis-Bacon Act Should be Repealed,* General Accounting Office (April 27, 1979) at 1-2.

of the Associated General Contractors of America urged the recognition of "a semiskilled helper classification to be included in the official wage determinations; this would go a long way toward permitting contractors to bid work in accordance with real world employment practices. Recognition of helpers should include the recognition of a training classification for employees not registered in a formal apprenticeship program." Hearings 234.

## CONCLUSION

The Petition for a writ of certiorari should not be granted. The Court of Appeals applied the correct standard of review and correctly determined that the Secretary of Labor's proposed regulations are not arbitrary or capricious and are within the ambit of authority delegated to him by Congress. The new regulations will carry out the intent of the Davis-Bacon Act and further important public policies including cost savings and expanded employment of minority, women and youth workers.

Respectfully submitted,

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