



48 N.Y.2d 826, 399 N.E.2d 1203, 424 N.Y.S.2d 183 (Mem)

In the Matter of H. Earl Fullilove et al., as Trustees of the New York Building
and Construction Industry Board of Urban Affairs Fund, Respondents,

v.

Hugh L. Carey, as Governor and Chief Executive Officer of the State of New York, et al., Appellants.

Court of Appeals of New York

Argued September 5, 1979;

decided November 20, 1979

CITE TITLE AS: Matter of Fullilove v Carey

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered July 14, 1978, which, by a divided court, affirmed a judgment of the Supreme Court at Special Term (Roger J. Miner, J.; opn [91 Misc 2d 531](#)), entered in Albany County in a proceeding pursuant to CPLR article 78, (1) converting the proceeding into an action for declaratory judgment, (2) declaring that Executive Order No. 45 (9 NYCRR 3.45)[Executive Order No. 45 \(9 NYCRR 3.45\)](#) as promulgated by Governor Carey was an unauthorized exercise of legislative power, illegal and unconstitutional, (3) enjoining appellants from implementing the provisions of said Executive Order, and (4) directing appellants to refrain from promulgating or enforcing any rules and regulations issued pursuant to said Executive Order. Executive Order No. 45[Executive Order No. 45](#) provided that all State contracts shall include language providing for contractors to undertake affirmative action programs, including goals for minority manpower utilization; that contractors shall submit affirmative action programs before contracts are awarded as required by rules and regulations of the Commissioner of Human Rights, and that the commissioner shall adopt rules and regulations necessary to effectuate the order. The Appellate Division concluded that Executive Order No. 45[Executive Order No. 45](#) was unconstitutional since it went beyond any specific statutory requirement that contractors follow nondiscriminatory hiring practices and beyond the mere requirement that rules and regulations or programs be developed by the Commissioner of Human Rights, and since the order “ ‘assumes the power of the Legislature to set State policy in an area of concededly increasing public concern.’ ” *827

[Matter of Fullilove v Carey, 62 AD2d 798](#), affirmed.

HEADNOTES

[Governor](#)

Imposition of Affirmative Action Programs by Executive Order

(1) An order of the Appellate Division which affirmed a judgment declaring unconstitutional Executive Order No. 45, which provided that all State contracts shall include language providing for the contractor to undertake affirmative action programs, including goals of minority manpower utilization, and for submission of affirmative action programs before contracts are awarded, is affirmed for reasons stated in the opinion at the Appellate Division, which concluded that Executive Order No. 45 went beyond any specific statutory requirement that contractors follow nondiscriminatory hiring practices and beyond the mere

requirement that rules and regulations or programs be developed by the Commissioner of Human Rights, and since the order “ ‘assumes the power of the Legislature to set State policy in an area of concededly increasing public concern.’ ”

APPEARANCES OF COUNSEL

Robert Abrams, Attorney-General (Shirley Adelson Siegel, Dominick J. Tuminaro, Arnold D. Fleischer and Judith T. Kramer of counsel), for Hugh L. Carey, as Governor of the State of New York, appellant.

Ann Thacher Anderson for Office of State Contract Compliance, Division of Human Rights, appellant.

Robert G. Benisch, Robert J. Fink and Richard O'Hara for respondents.

Victor M. Goode, Alton Maddox, Jr., and Howard Lane for National Conference of Black Lawyers and another, *amici curiae*.

M. D. Taracido, Kenneth Kimerling, Peter Bienstock and Idelisse Malave for Puerto Rican Legal Defense & Education Fund, Inc., *amicus curiae*.

OPINION OF THE COURT

Order affirmed, without costs, for the reasons stated in the opinion by Mr. Justice J. Clarence [Herlihy at the Appellate Division \(62 AD2d 798\)](#); see, also, [Matter of Fullilove v Beame, 48 NY2d 376](#), decided herewith).

Concur: Chief Judge Cooke and Judges Jasen, Gabrielli, Jones and Wachtler. Judges Fuchsberg and Meyer dissent *828 and vote to reverse (see dissenting opn by Fuchsberg, J., in [Matter of Fullilove v Beame, 48 NY2d 376](#), decided herewith).

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