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No. 78-3053

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OHIO CONTRACTORS ASSOCIATION, et al.,

Plaintiffs-Appellants

v.

THE ECONOMIC DEVELOPMENT ADMINISTRATION, et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF FOR THE FEDERAL APPELLEES

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QUESTION PRESENTED

Did the district court abuse its discretion in denying a preliminary injunction against enforcement of Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. 6705(f)(2).

STATEMENT

1. Procedural History

On October 31, 1977, this suit was instituted against the Economic Development Administration of the United States Department of Commerce,[1] and the City of Cincinnati. The plaintiffs, contractors and associations representing contractors and subcontractors in the Ohio construction industry (hereinafter "the Contractors"), claimed (1) that Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. 6705(f)(2),[2] violated the Fifth and Fourteenth Amendments and (2) that the actions taken by the City of Cincinnati to assure compliance with Section 103(f)(2) denied the Contractors their right to equal protection of the law and to make and enforce contracts (App. 8-9). The complaint sought a judgment

1/ On November 3, 1977, plaintiffs amended their complaint by adding Juanita Kreps, the Secretary of Commerce, as a party-defendant (App. 20-21). This Brief will utilize the following citation form: (a) references to the Volume denominated Joint Appendix will be cited "App."; (b) references to the Appendix of Exhibits Volumes will be cited "Vol. I" or "Vol. II".

2/ 42 U.S.C. 6705(f)(2) provides:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts.

declaring Section 103(f)(2) unconstitutional, and a temporary and a permanent injunction against the enforcement of Section 103(f)(2) in public works projects in Cincinnati (App. 10-12). On October 31, 1977, the court denied the Contractors' request for a temporary restraining order (App. 24). On November 9, 1977, the district court held an evidentiary hearing on the Contractors' motion for a preliminary injunction and on November 23, 1977, the court entered its opinion and order denying a preliminary injunction (App. 22-45).

On December 21, 1977, the Contractors filed a notice of appeal from the district court's order. On February 16, 1978, this Court granted the Contractors' motion to advance the hearing and expedite the appeal, setting this case for argument at "the earliest practicable date, but not earlier than the June, 1978 session."

2. Statute Involved

The Local Public Works Capital Development and Investment Act of 1976 [hereinafter "the LPW"], 42 U.S.C. 6701-6710, became law on July 22, 1976. The LPW established a program administered by the Secretary of Commerce (through the Economic Development Administration) to distri-

bute two billion dollars to state and local governments for public works projects. Sections 102-106 of the LPW, 42 U.S.C. 6701-6705.

The Report of the Committee on Public Works and Transportation of the House of Representatives (Report No. 94-1077, 94th Cong., 2d Sess., 2) states that the LPW had "* * * a two-fold purpose: (1) to alleviate the problem of national unemployment, and (2) to stimulate the national economy by assisting State and local governments build badly needed public facilities." Congress intended to have the public facilities projects funded and commenced quickly (id. at 3):

> The bill is carefully and expressly designed to avoid the long lag time sometimes associated with public works programs * * *. To be eligible for a grant, a project must be started within 90 days of its approval if Federal funds are available. The bill also provides that applications must be acted upon by the administrative agency within 60 days of the date of receipt.

Congress ensured prompt final determinations upon applications for grants by providing in Section 107, 42 U.S.C. 6706:

> Failure to make such final determination within such period [60 days] shall be deemed to be an approval by the Secretary of the grant requested.

Section 107 required in addition that regulations to implement the LPW be issued within 30 days of its enactment.

From October 26, 1976 to February 9, 1977, the Economic Development Administration [hereinafter "EDA"] processed over 25,000 applications for grants under the LPW. By the conclusion of this period, referred to as Round I, approximately 2000 applications for public works projects grants had been approved and 23,500 applications for 21.8 billion dollars in grants had been refused (App. 26).

In January, 1977, while the EDA was processing applications under Round I, legislation was introduced in the House (H.R. 11, January 11, 1977) and the Senate (S. 427, January 25, 1977) to provide additional funding for a Round II under the LPW (App. 25) and on May 13, 1977, the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116 [hereinafter "the PWE"], extending and amending the LPW, became law. This legislation was designed both to extend the LPW and to ameliorate problems encountered in Round I (App. 26-27).[3/]

3/ See Report of the Committee on Public Works and Transportation, U.S. House of Representatives, "Local Public Works Capital Development and Investment Act Amendments", House Report 95-20, 95th Cong., 1st Sess., at 3 (1977), published at U.S. Code Cong. and Admin. News, 95th Cong., 1st Sess., 716, 718 [hereinafter "House Report"]; and Report of the Committee on Environment and Public Works, U.S. Senate, "Public Works Employment Act of 1977", Sen. Rep. No. 95-38, 95th Cong., 1st Sess., at 2-3 (1977) [hereinafter "Senate Report"]. The House Report is also reproduced at 441 F. Supp. 1007-1025 as an Appendix to the district court's opinion in Associated General Contractors of California v. Secretary of Commerce, 441 F. Supp. 955 (C.D. Cal. 1977), appeals pending, S. Ct. Nos. 77-1067, 77-1078, 77-1271.

The House Report on the PWE stated that changes were required "in order to target the Federal assistance more accurately into the areas of greatest need" and that the program would be a significant factor in reducing unemployment. House Report at 2. U.S. Code Cong. and Admin. News. 95th Cong., 1st Sess., at 716. The Senate Report justified continuing the LPW program because "[u]nemployment levels, particularly in the construction industry, remain at unacceptable levels," and "[c]ontinuation of the public works employment program will provide additional stimulus to the sluggish economy." Senate Report, at 1-2.

Congress again ensured that funds under the LPW would be expended on an expedited basis by requiring the EDA to approve or deny the thousands of applications for grants between May 13, 1977, the day the PWE was enacted, and September 30, 1977, the deadline for the obligation of grant funds under Round II.[4/] In addition, to further ensure a prompt implementation of Round II, Congress required that with certain limited exceptions, only applications submitted before December 23, 1976, could be

4/ When Congress enacted the PWE, it amended the authorized appropriation in the LPW by raising it to six billion dollars, an additional four billion dollars over the two billion dollars which had originally been authorized, appropriated and spent on Round I. 42 U.S.C. 6710. Congress then appropriated the four billion dollars and required that all but fifteen million dollars be spent by September 30, 1977. Pub. L. 95-29, 91 Stat. 122-124.

considered or approved, Section 108(h)(1), 42 U.S.C. 6707(h)(1), and retained the requirement of Section 106(d) of the LPW, 42 U.S.C. 6705(d), that applicants be required to assure that on-site construction could begin within 90 days of project approval (App. 28-29). Finally, Congress insured that the funds would reach the private sector by requiring the state and local grantees to contract the public works construction to private contractors through competitive bidding. Section 106(e)(1) of the LPW, 42 U.S.C. 6705(e)(1).

The Contractors challenge Section 103(f)(2) of the PWE, 42 U.S.C. 6705(f)(2) [hereinafter, "the MBE provision"],[5/] which requires that 10 percent of the amount of each grant be expended for minority businesses unless the Secretary of Commerce waives the requirement. See n. 2, supra.

3. Regulations and Guidelines Involved

In accordance with the authority granted by 42 U.S.C. 6706, as amended, the Secretary of Commerce has promulgated regulations and guidelines for carrying out Round II. 13 C.F.R. Part 317, published at 42 Fed. Reg. 27432-27440 (May 27, 1977). The regulations, insofar as they relate to the MBE provision, provide (13 C.F.R. 317.19(b), 42 Fed. Reg. 27434-27435; App. 30):

> (b) * * * (1) No grant shall be made under this part for any project unless at least ten percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.

5/ Section 103(f)(2) of the PWE added Section 106(f)(2) to the LPW.

> (2) The restriction contained in paragraph (1) of this subsection will not apply to any grant for which the Assistant Secretary makes a determination that the ten percent set-aside cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured. 6/

EDA has issued Guidelines for 10% Minority Business Participation in LPW Grants (Vol. II, 46-54) [hereinafter "MBE Guidelines"], and a Technical Bulletin (Govm't Ex. E, Nov. 9,1977 Hearing) setting forth detailed instructions regarding implementation of the provision. The MBE Guidelines and the Technical Bulletin contemplate that, while grantees are primarily responsible for assuring compliance with the provision, they should work in cooperation with prime contractors in attempting to locate and involve minority enterprises in the various grant projects.

The MBE provision requirements may be satisfied in a number of ways, depending on whether the particular project will be administered through a single prime contract involving subcontracts and/or substantial supply contracts, more than one prime contract, simple contracts, or a combination of prime and simple contracts (Vol. II, 40-50).7/ The guiding principle is

6/ See also the Guidelines for Round II of the Local Public Works Program (June 6, 1977), Section VIII, B. 1, p. 30. (Govm't Ex. B, Nov. 9, 1977, Hearing; App. 31-32).

7/ For example, "[i]n the case of projects to be administered through one prime contract, the 10% MBE requirement would be met if the prime contractor is an MBE or if at least 10% of the grant funds are expended for MBE subcontractors or suppliers" (Vol. II, 49). In the case of multiple contract projects "[s]ome of the contractors may themselves be MBE's--for example, contracts for

(continued)

that "it is the grantee's obligation to make sure that at least 10% of the grant funds as a whole will be expended for MBE's through its own simple or prime contracts or through the subcontracts or supply contracts of its prime contractors" (Vol. II, 50).

In the event there are not a sufficient number of qualified[8] minority enterprises in the relevant market area,[9] the grantee may apply to an EDA regional director for a waiver (Vol. II, 52-54). The waiver request must list "the efforts the Grantee and potential contractors have exerted to locate and enlist MBE's," and "the specific MBE's which were contacted and the reason each MBE was not used" (Vol. II, 53).

7/ engineering or other professional or supervisory services, or for landscaping, accounting or guard services. Some prime contracts may be with MBE's or may contain assurances for 10% MBE participation or for more than 10% MBE participation, with appropriate supporting names and addresses of MBE subcontractors or suppliers. Other prime contracts may provide for less than 10% MBE participation" (Vol. II, 50).

8/ "Qualified" is defined in the Guidelines (Vol. II, 47) as able to "perform the services or supply the materials that are needed."

9/ The MBE Guidelines provide that (Vol. II, 47):

> The relevant market area depends on the kind of services or supplies which are needed. For example, a supplier of a heavy material such as concrete pipe would have to be located relatively close to the project because of high transportation costs, while a supplier of relatively expensive, light material could be located far from the project. The market area for any kind of services or supplies depends, therefore, on trade practices; but EDA will require that Grantees and prime contractors engage MBEs from as wide a market area as is economically feasible.

4. Facts

By September 30, 1977, EDA had completed approval of all Round II grants. The City of Cincinnati received grant approval for twelve projects totaling almost $11,000,000 (Vol. II, 45). In order to insure that its projects would be in compliance with the MBE provision, the City of Cincinnati required that prime contractors make a twelve percent minority business utilization commitment (Vol. II, 85).[10/]

On October 31, 1977, the Contractors initiated this action in order to prevent the EDA and the other defendants from enforcing the MBE provision with regard to the projects approved for Cincinnati (App. 10-12). Plaintiff Pickney P. Brewer & Sons Co. (hereinafter, the "Brewer Company") and its President William A. Brewer alleged that the enforcement of the MBE provision would cause the Brewer Company to be injured because (a) it would not be afforded an equal opportunity to bid on projects and (b) it would be required to subcontract work it "otherwise would probably perform" (App. 7). The plaintiff

10/ This figure was chosen because approximately 2% of the EDA project grants were allocated to defray the City's nonconstruction, nonsubcontractable line expenses such as administration, engineering, project inspection and contingency reserves. Thus, it was necessary for the prime contractors to meet a slightly higher MBE commitment in order to assure that 10% of the grant would be expended on MBE firms after the 2% was deducted from the total grant (App. 35-36; Vol. II, 103).

associations alleged that their contractor members would be injured because (a) they would not be afforded fair opportunity to bid on the Cincinnati projects and (b) the costs of the projects would be increased, thus decreasing available projects to bid on (App. 6-7).

At the time of the district court hearing, the Brewer Company was low bidder on seven Cincinnati street repair projects. These projects were funded by one EDA grant, No. 06-51-26527, in the amount of $3,284,796 (Vol. II, 55-56, 105, 120). Although at the time of the hearing the Brewer Company alleged that it was having difficulty locating minority businesses to fulfill the MBE provision and that it ordinarily did not subcontract more than 5% of its work (Vol. II, 57), it subsequently did both these things, and was awarded the seven street repair contracts. Contractors' Brief, p. 40. The second lowest bidder on each of these projects, the John R. Jurgensen Company, also complied with the MBE provision in each of its bids (Vol. II, 88).[11/]

11/ The evidence also showed that a non-plaintiff, the Dugan & Myer Company, apparently had difficulty locating minority businesses (Vol. II, 97) and that a non-plaintiff, the Hug Concrete Paving, Inc., a subcontractor, was not hired to perform work on two other projects not the subject of this lawsuit because the prime contractor desired to hire a minority firm (Vol. II, 94-95).

5. The District Court Opinion

On November 22, 1977, the district court issued its opinion and order (App. 22-45). The court examined the evidence in accordance with this Circuit's requirements for ruling on requests for preliminary injunctions, see Mason County Medical Ass'n v. Knebel, 563 F.2d 256 (6th Cir. 1977), and denied the Contractors' motion, ruling that they were not likely to succeed on the merits of their challenge to the MBE provision and that the equities favored a denial of a preliminary injunction (App. 45). The court held that the MBE provision must be subjected to strict scrutiny, and that the burden of proof was upon the government to show that "(1) the challenged legislation embodies a compelling state interest, and, if so, whether the means of accomplishing the objective are (2) necessary and (3) the least restrictive means available * * *" (App. 37). Analyzing the statute in this light the court held:

> [1] The interest of Congress in eradicating the effects of discrimination on minority construction contractors falls within the well-established general state interest in promoting racial equality of opportunity, and the Act is found to satisfy the requirement that a compelling state interest be involved (App. 39).
>
> [2] [T]he necessity for additional measures to combat the effects of prior discrimination upon minority contractors * * * [is] adequately supported (App. 41).

> [3] [The MBE provision] is a reasonable alternative that is as non-restrictive as possible under the circumstances (App. 42).

The court also found "that the public generally and [Cincinnati's] residents generally * * * [would] be harmed by any injunction which would, in effect, arrest the implementation of the funds appropriated by the Act" (App. 43) and that although some non-minority contractors and subcontractors would suffer irreparable injury during the pendency of this litigation "[t]he damaging effect [of an injunction] upon the City and the public is by far the more serious, and weighs heavily against an injunction" (App. 44).

INTRODUCTION AND SUMMARY OF ARGUMENT

This is an appeal from the denial of a preliminary injunction against the application of an act of Congress. "It is well settled that the scope of review on appeal from the denial or granting of a preliminary injunction is limited to a determination of whether the District Court abused its discretion." Mason County Medical Ass'n v. Knebel, 563 F.2d at 260-261. This Court has articulated four standards which it considers in determining whether the district court absued its discretion in granting or denying a preliminary injunction (id. at 261):

1) Whether the plaintiffs have shown a strong or substantial likelihood of success on the merits;

2) Whether the plaintiffs have shown irreparable injury;

3) Whether the issuance of a preliminary injunction would cause substantial harm to others; 12/

4) Whether the public interest would be served by issuing a preliminary injunction.

In the matter sub judice, the district court concluded that the plaintiffs were not likely to succeed on the merits of their challenge to the MBE provision and that the public injury which an injunction would cause outweighed the potential injury plaintiffs might suffer pendente lite. In this Brief, we contend that the court's opinion and the record in this case fully support these conclusions and establish that the district court did not abuse its discretion in denying preliminary relief.

In Constructors Association of Western Pennsylvania v. Kreps, 3d Cir., No. 77-2335 (March 7, 1978),[13/] the Third Circuit applied the same four-part standard of review applied by this

12/ Under this standard, the plaintiff has the burden of showing that "the balance of injury favored the granting of the injunction." Garlock, Inc. v. United Seal Inc., 404 F.2d 256, 257 (6th Cir. 1968).

13/ The slip opinion in the Constructors case is set forth as an Addendum to this brief.

Circuit in ruling that the district court had not abused its discretion in denying a preliminary injunction against the MBE provision under factual circumstances quite similar to the ones before this Court.[14/] The Third Circuit ruled that the lower court, like the district court herein, "properly undertook a careful examination of the purposes and effects of the MBE program," id., slip op. at 10, and had not erred in concluding that the plaintiffs were not likely to succeed on the merits. The Circuit Court reached this conclusion because it recognized that the MBE provision "was designed to 'begin to redress' what Congress perceived to be the continuing economic impact of racial discrimination," ibid., and because the record supported the conclusion "that the challenged provision was necessary to accomplish Congress' remedial objectives." Id., slip op. at 11. Additionally, the Court found that the denial of a preliminary injunction was appropriate because (1) the plaintiffs failed to establish that they were suffering irreparable injury from the MBE provision, id., slip op. at 15, (2) "to the extent that [plaintiffs] * * * would be 'injured' by the statute, minority businessmen would be equally injured by an injunction," id., slip op. at 14, and (3) "a post-ponement of the benefits of the Act would clearly have been against the public interest." Id., slip op. at 16.

14/ The district court opinion is reported at 441 F. Supp. 936 (W.D. Pa. 1977).

The reasoning of the Third Circuit is sound and supports the district court's denial of a preliminary injunction in this case.[15/] The district court, like the Third Circuit, found

15/ The constitutionality of the MBE provision has been challenged in a number of other suits across the country. Three district courts have rendered final decisions holding the statute constitutional. See Fullilove v. Kreps, 443 F. Supp. 253 (S.D. N.Y. 1977), appeal pending, 2d Cir. No. 78-6011; Rhode Island Chapter, Associated General Contractors of America v. Kreps, No. C.A. 77-0676 (D. R.I., Feb. 6, 1978), appeal pending, 1st Cir. (hereinafter, "Rhode Island Chapter v. Kreps"); Associated General Contractors of Kansas v. Secretary of Commerce, No. C.A. 77-4218 (D. Kan., Feb. 10, 1978), appeal pending, 10th Cir., No. 78-1176. One district court has found the statute unconstitutional as applied to the narrow set of facts before it, see Wright Farms Construction Inc. v. Kreps, 444 F. Supp. 1023 (D. Vt. 1977) and one district court has found the statute unconstitutional on its face and granted prospective relief only. See Associated General Contractors of California v. Secretary of Commerce, 441 F. Supp. 955 (C.D. Cal. 1977), appeals pending, S. Ct. Nos. 77-1067, 1078, 1271.

Several other district courts have denied preliminary injunctions and held that the plaintiffs had failed to show that they were likely to succeed on the merits of their claims against the MBE provision. A.J. Raisch Paving Co. v. Kreps, No. C.A. 77-2497 (N.D. Cal., Dec. 15, 1977), appeal pending, 9th Cir., No. 77-3977; Florida East Coast Chapter of the Associated General Contractors of America, Inc. v. Secretary of Commerce of the United States Department of Commerce, No. C.A. 77-8351 (S.D. Fla., Nov. 3, 1977); General Building Contractors Ass'n v. Kreps, No. C.A. 77-3682 (E.D. Pa., Dec. 9, 1977). A number of other courts have denied preliminary injunctions on other grounds. See Carolinas Branch, Associated General Contractors of America, Inc. v. Kreps, 442 F. Supp. 392 (D. S.C. 1977); Montana Contractors Association v. The Secretary of Commerce of the United States, 439 F. Supp. 1331 (D. Mont. 1977); Michigan Chapter, Associated General Contractors of America Inc. v. Kreps, No. C.A. M-77-165 (W.D. Mich., Jan. 4, 1978).

For the convenience of the Court, we have lodged 4 copies of the unreported decisions listed above with the Clerk of the Court. We have also provided copies for the parties.

that Congress adopted the MBE provision to achieve the compelling national interest in remedying the effects of discrimination against minority-owned businesses (App. 39), that in designing a measure to serve that purpose it was necessary to provide for consideration of race (App. 41), and that Congress chose reasonable means for accomplishing its purposes that are "as nonrestrictive as possible under the circumstances" (App. 42). On the basis of these findings, the district court, like the Constructors court, concluded that the plaintiffs were not likely to succeed on the merits of their challenge to the MBE provision (App. 45).

The Contractors argue (Contractors' Brief at 15) and the district court held (App. 37) that the use by government of minority-sensitive measures in distributing benefits must be shown to serve a compelling national interest. Regardless of how this interest is described, it is clear, that where the consideration of race is not directly related to achieving an important governmental objective it should not be employed. At the same time it is clear, as the district court held, that remedying the effects of past discrimination is a compelling national interest. Both the Supreme Court and this Court have approved the use of race-consciousness as a necessary means of remedying the effects of past discrimination. See, e.g.,

Swann v. Board of Education, 402 U.S. 1 (1971); Board of Education v. Swann, 402 U.S. 43 (1971); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); United Jewish Organizations v. Carey, 430 U.S. 144 (1977); United States v. Local Union No. 212, IBEW, 472 F.2d 634 (6th Cir. 1973); United States v. Masonry Contractors Association of Memphis, Inc., 497 F.2d 871, 877 (6th Cir. 1974); EEOC v. Detroit Edison Co., 515 F.2d 301, 317 (6th Cir. 1975), vacated on other grounds, 431 U.S. 951 (1977); Arnold v. Ballard, 12 FEP Cases 1613 (6th Cir. 1976), vacated on other gounds, 16 FEP Cases 396 (6th Cir. 1976). See also Sims v. Sheet Metal Workers, Local 65, 489 F.2d 1023, 1027 (6th Cir. 1973).

The Contractors do not challenge the constitutional standard which the district court applied in reviewing the MBE provision, rather they challenge the manner in which the district court applied the compelling interest standard (Contractors' Brief at 14). While the Contractors recognize that race may be taken into account in remedying racial discrimination (Contractors' Brief at 11, 35-36), they argue that the race-conscious MBE provision is unconstitutional because (1) it was not designed to serve a compelling national interest in remedying discrimination (Contractors' Brief at 22-25); (2) Congress has not shown that there are residual effects of discrimination which warrant remedial legislation (Contractors' Brief at 25-34); and (3) assuming the MBE provision was directed

toward remedying discrimination, Congress could have selected alternative means for accomplishing that end (Contractors' Brief at 35-38). These arguments are meritless.

In Part I, Section A of this Brief, we respond to the Contractors' first two arguments. We demonstrate that in enacting the MBE provision, Congress exercised its authority to adopt minority-sensitive legislation to overcome the effects of past governmental and private discrimination and to prevent their perpetuation in a Federally-funded program. Congress recognized that economic conditions and contracting practices have operated to deny minority businesses an equal opportunity to obtain Federally-funded contracts and sought to ensure that the effects of those conditions and practices would not preclude participation in the current Federally-funded construction program. Congress had a substantial basis for concluding - in light of the failure of alternative programs and the short-term emergency nature of the PWE program - that there were no alternatives available to effectively counteract the effects of discrimination.

In Part I, Section B, we respond to the Contractors' third contention. Where, as here, Congress concludes that a minority-sensitive measure is necessary to the effective

operation of a remedial scheme, judicial review should be addressed to determining whether the legislation is tailored in design and application to achieve that end. The program should be upheld if it is properly designed as a remedy rather than for the purpose of distributing governmental benefits on a racial basis. It should be tailored to moderate the adverse effects on others to the extent consistent with achievement of its remedial goal. In making such an evaluation, a court should be guided by consideration of a number of factors, including: (1) whether the minority-sensitive provision is designed to benefit those who suffer the effects of past discrimination, (2) the relationship between the benefits derived under the provision and overcoming the effects of past discrimination, (3) whether the provision fits the general purposes of the legislative program, and (4) whether the provision is drawn to moderate the adverse impact on others. We believe that evaluation of the MBE provision under this standard demonstrates its constitutionality.

In Parts II and III of this Brief, we also demonstrate that the district court's order should be upheld because (1) the Contractors failed to establish that they would suffer irreparable injury during the pendency of this case which would warrant the the issuance of a preliminary injunction, and (2) the district court's determination that the issuance of a preliminary injunction would cause substantial harm to others and was not in the public interest is correct.

ARGUMENT

THE DISTRICT COURT PROPERLY DENIED THE CONTRACTORS' MOTION FOR A PRELIMINARY INJUNCTION

I

THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE CONTRACTORS WERE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR CHALLENGE TO THE CONSTITUTIONALITY OF THE MBE PROVISION

A. Congress Properly Concluded That Legislative Action was Necessary to Eliminate the Effects of Discrimination Against Minorities in the Construction Industry

1. There Is a Substantial Factual Basis Supporting The Conclusion That Minority-Sensitive Remedial Legislation Was Necessary.

a. Minority-owned businesses account for an extremely small portion of construction business.

There is no question that minorities[16/] are represented in disproportionately low numbers in ownership of businesses in

16/ As used hereinafter, the term "minority" generally refers to Black Americans, Spanish-speaking Americans, American-Orientals, American-Indians, American-Eskimos, and American Aleuts. This definition of minority, used in the MBE provision, has been adopted for use in Federal minority business affirmative action efforts. See, e.g., 41 C.F.R. 1-1.1303, 1.1310-2.

this country. As Senator Javits stated on the floor of the Senate:

> [w]hile minority persons comprise over 15 percent of the Nation's population only 3 percent of the 13 million businesses in the United States are owned by minority persons. 17/

122 Cong. Rec. S. 7147 (daily ed. May 13, 1976). Moreover, when viewed in terms of gross receipts, those few minority-owned businesses account for a miniscule share of American business. As Senator Muskie has noted: "Of $2.54 trillion in gross business receipts for the nation, about $16.6 billion, or 0.65 percent of that total was realized by the minorities." 122 Cong. Rec. S. 17907 (daily ed. October 1, 1976) (quoting a statement by Senator Glenn). See also 124 Cong. Rec. E. 985 (remarks of Representative Hamilton) (daily ed. March 2, 1978).[18/] The statistics concerning the amount of government contracts going to minority businesses are similar. Less than one percent of the federal contract dollar goes to minority enterprises. See 123 Cong. Rec. S. 3910 (Remarks of Senator Brooke) (daily ed. March 10, 1977); 123 Cong. Rec. H. 1440 (Remarks of Representative Biaggi, citing 1976 data) (daily ed. February 24, 1977).

17/ According to the 1970 Census, minorities represent approximately 15.7 percent of the population: blacks and other racial minorities, 11.1 percent; persons of Spanish heritage, 4.6 percent. For purposes of computing an approximate total, all Spanish heritage persons are treated as white. 1970 Census of the Population, Vol. 1, Characteristics of the Population, Pt. 1: United States Summary, Sec. 1, table 85, General Characteristics by Race for Urban and Rural Residence: 1970.

18/ In this Brief we at times reference comments made during the months immediately following enactment of the MBE provision. It is true that the views of members of a later Congress might not be instructive as to the meaning of an Act. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 354 n. 39. However, here we rely on the views and statements of members of the same Congress made less than a year after the MBE provision's enactment, in order to demonstrate not the meaning of the Act but rather the types of considerations of which Congress was aware when it enacted the MBE provision.

In 1972, according to Census statistics, minority-owned firms represented only 4.3 percent of the total number of establishments in the construction industry; gross receipts for these minority-owned firms constituted approximately one percent of the gross receipts for all firms. While nearly 95 percent of the gross receipts for all construction firms are taken in by those with payrolled employees, only 22.8 percent of the minority firms have payrolled employees, against 47.6 percent for all construction firms. 1972 Census of Construction Industries, United States Summary -- Statistics for Construction Establishments With and Without Payrolls, Table A1 (August 1975); 1972 Survey of Minority-Owned Business Enterprises, Minority-Owned Businesses, Table 1 (May 1975) [hereinafter "Summary Volume"]. 19/

The record is the same in relevant sub-industry classifications. Only 2.3 percent of the heavy construction industry consists of minority-owned firms, receiving only 0.3 percent of the total receipts. 1972 Census of Construction Industries,

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19/ In those industries which provide supplies and equipment for construction, minority-owned firms are even less represented. Minority-owned firms in the wholesale trade industry constitute only 1.9 percent of the total number of establishments, and approximately 0.3 percent of the gross receipts. 1972 Census of Wholesale Trade, Volume I, Summary and Subject Statistics, Table 1 (August 1976); 1972 Survey of Minority-Owned Business Enterprises, supra, Summary Volume, Table I. In the manufacturing industry, only 2.9 percent of the total number of establishments are minority-owned. 1972 Census of Manufactures, Volume I, Subject and Special Statistics, Table 3 (August 1976); 1972 Survey of Minority-Owned Business Enterprises, supra, Summary Volume, Table 1.

United States Summary -- Statistics for Construction Establishments With and Without Payroll, Table A1 (August, 1975); 1972 Survey of Minority-Owned Business Enterprises, supra, Summary Volume, Table 1. Within the wholesale trade industry, 0.6 percent of the firms involved in construction, mining, logging, and road maintenance equipment were minority-owned, drawing only 0.1 percent of the total subindustry receipts. 1972 Census of Wholesale Trade, Volume I, Summary and Subject Statistics, Table 1; 1972 Survey of Minority-Owned Business Enterprises, supra, Summary Volume, Table 1. In the manufacturing industry, only 0.4 percent of all firms producing construction, mining, and materials-handling machinery and equipment were minority-owned firms. 1972 Census of Manufactures, Volume I, Subject and Special Statistics, General Summary, Table 3; 1972 Survey of Minority-Owned Business Enterprises, supra, Summary Volume, Table 1.

Absent explanation it is ordinarily to be expected that nondiscriminatory practices would result in a business community more or less representative of the racial and ethnic composition of the country. The statistical evidence alone is sufficient to support the inference that minorities have encountered discriminatory treatment blocking their access to economic success in this country and in the construction industry. See, Hazelwood School Dist. v. United States, 433 U.S. 299, 307 (1977);

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 340 n. 20 (1977); Fullilove v. Kreps, 443 F. Supp. at 258-259. The history of discrimination against minority groups in this country and the evidence of its continuation in, and impact upon the construction industry, however, obviate any need for one to rely solely on such inferences.[20/]

b. Congress was aware of the barriers to minority participation in the construction industry.

The low level of minority firm participation in industry and in the construction industry in particular has been attributed to a number of sources,[21/] not the least of which is overt racial bias.

20/ The Contractors have criticized the methodology of some of the national studies concerning minority enterprises (Contractors' Brief at 26-30), but the Contractors offered no contrary national studies below and their criticisms in no way refute the validity of the conclusions reached in these studies. Moreover, as we develop herein, there is ample information from which Congress could ascertain that minorities have been excluded from participation in the economy. In any event, as one district court has held, "even if the statistics for minority businesses were to be doubled, there would still be an ample basis for Congress to have concluded that 'the severe shortage of potential minority entrepeneurs with general business skills is a result of their historic exclusion from the mainstream economy'". Fullilove v. Kreps, supra, 443 F. Supp. at 258-259.

21/ See generally Interagency Report on the Federal Minority Business Development Programs, prepared by the Office of Management and Budget, Exhibit N, November 9, 1977 Hearing; Office of Minority Business Enterprises, Department of Commerce, Minority Business Opportunity Committee Handbook, Exhibit O, November 9, 1977 Hearing.

Representative Addabbo has recognized that "* * * there is good reason why minority enterprise has not kept pace with the growth of the national minority population, and that reason - plain and simple - is discrimination." Hearings on H.R. 567, 5960, and 2379 before the Subcommittee on Minority Enterprise and General Oversight of the Committee on Small Business, 95th Cong., 1st Sess., p. 3 (1977) (hereinafter, Hearings on H.R. 567). Lenders, insurers, nonminority contractors and purchasers have traditionally sought out nonminority-owned firms with which to do business.[22] Senator Bayh emphasized that while the construction industry has long served as a vehicle for upward mobility, the industry "unfortunately has not generally welcomed the participation of non-white workers[23] and contractors."[24] 116 Cong. Rec. 18886 (1970).

22/ Representative Mitchell has observed: "As you well know, there are some minority companies which sort of folded overnight. They were doing business for the entire community and then suddenly the word got out that this is a minority-owned firm; it is owned by a black guy, and purchasing just stopped, which means that that man's business had to be confined only to the minority community itself." Hearings on H.R. 567, p. 42.

23/ This court is well aware of the pervasive racial discrimination in the construction industry. See cases cited, supra, p. 18 and United States v. Local No. 38, IBEW, 428 F.2d 144 (6th Cir. 1970), certiorari denied, 400 U.S. 943 (1970). Moreover, according to unpublished data from the current population survey of the Bureau of Labor Statistics, in 1976, 11.9 percent of white construction workers were unemployed, while the figures for blacks and other racial minorities and for Hispanics were 20.3 percent and 17.2 percent respectively. Employment discrimination cuts off one avenue to becoming a contractor. Rhode Island Chapter v. Kreps, slip op. at 29.

24/ A 1970 survey of minority construction contractors, published by the Department of Housing and Urban Development, indicated that 14 percent of the firms interviewed considered overt racial prejudice to be one of the three principal obstacles to obtaining business opportunities. A Survey of Minority Construction Contractors, published by the Office of the Assistant Secretary for Equal Opportunity, U.S. Department of Housing and Urban Development at 20 [hereinafter "HUD Survey"].

Nor are minority-owned businesses free from the effects of attitudinal bias when seeking Federal contracts. Of the minority entrepreneurs interviewed by the Civil Rights Commission, 44.8 percent felt that "more stringent criteria" are imposed "on minority and female businesses during the bidding and selection process." Exhibit Volume I, Minority And Women As Government Contractors 21-22 (May, 1975). A Report of the United States Commission on Civil Rights[25/] [hereinafter "Commission Report"]. The Civil Rights Commission reports of one procurement officer who remarked that "[a] lot of minority firms are like leeches. They don't want to go out on their own and do a little hard work." Commission Report, supra, at 21.

The exclusion of minority-owned businesses from opportunities in the construction industry often results from the operation of subtle forces. Perhaps the most critical determinant in establishing and sustaining a small business is the ability to secure initial and continuing financing. Minority business enterprises have had to rely in most cases on personal savings as the source of their original

25/ The report was transmitted to Congress and to the President in May, 1975. See 42 U.S.C. 1975c(b), Pub. L. 92-496, 86 Stat. 813, 814.

capital investment. HUD Survey, supra n. 20, at 14-15.[26/] The problem of lack of equity capital is compounded by the reluctance of financial institutions to extend credit and capital to minority enterprises without sufficient equity. Minority Enterprise and Public Policy, 24-25 (June, 1977), a publication of the Library of Congress Congressional Research Service [hereinafter "CRS Report"]. "Many lending institutions are simply reluctant - often for the wrong reasons - to extend a line of credit to a minority businessman. Others have restrictive lending policies that demand a credit rating before credit can be made available." 124 Cong. Rec. E. 985 (remarks of Representative Hamilton) (daily ed. March 2, 1978). See also 124 Cong. Rec. S. 226 (remarks of Senator Brooke) (daily ed. January 23, 1978). In addition many minority businesses have been unable to establish credit with their suppliers and wholesalers. CRS Report at 25. As a result, many of the minority enterprises that do survive remain small, undercapitalized, and, therefore, unable to compete for their share of the market.

The unavailability of financing for minority-owned businesses was recognized by Congress in passing the Small Business Investment Act Amendments of 1972, P.L. 92-595, 86 Stat. 1314. In debate, Senator Tower explained:

26/ The HUD Survey reported that about 75 percent of the respondents indicated that savings constituted their original capital investment. As the survey reports, "individuals and institutions with equity money to invest have not been induced to invest in minority contractor enterprises." Id. at 14-15.

> Our goal* **is to give the capital push needed to get business formations and successes going in minority communities, so that they can have the chance to become self-sufficient and to develop the capital within the minority communities to develop their own financing resources in the future.

118 Cong. Rec. 35378 (1972).

Another major obstacle confronting minority contractors is the inability to obtain bonding[27/] to insure their clients against default. As Senator Bayh has pointed out (115 Cong. Rec. 19383 (1969)) (quoting from a report by the National Business League):

> Only one-third of all Negro contractors were successful in securing performance bonds at any time and all of these had experienced 'undue difficulty' in securing them. Seventy percent reported they had lost contracts because of inability to secure bonding.

Most often required for large contracts and particularly government projects, construction bonds frequently have been awarded by surety and bonding companies on a subjective basis, with a consequent adverse impact on minority-owned businesses. Stuart, "Black Contractors' Dilemma" 10-11 (August 1971), a special report published by Race Relations Information Center [hereinafter "Stuart"]; see also remarks of Senator Bayh, 116 Cong. Rec. 18886 (1970). The extent of the problem was recognized in information made available in remarks by Senator Bayh:

27/ There are three principal types of bonds in the construction industry: (1) bid bonds which guarantee the contractor's intention to honor a bid; (2) performance bonds which insure against failure to complete work under the terms of the contract; and (3) payment bonds which guarantee payment to suppliers. Stuart, supra, at 10.

> The inability of minority contractors to obtain bid, performance and payment bonds is one of the most crucial of his problems. Surety companies require the minority contractor to have a capital liquidity of 30-100%, whereas his white counterpart is only required to produce 10-20%. The annals of history are filled with the cases of inequities on the part of surety companies who have historically refused to bond minorities in the construction industry on a parity with whites.

116 Cong. Rec. 18888-18889 (1970) (quoting from October 27, 1969, letter of James A.H. Byrd, Program Officer for the Department of Commerce Office of Minority Business Enterprise, and Executive Secretary to the Government Task Force on Construction Contracting). The problem of bonding is particularly acute for those seeking Federal contracts. 123 Cong. Rec. S. 4987 (remarks of Senator Bentsen) (daily ed. March 28, 1977).[28/]

The lack of adequate management and operational skills constitutes a third major factor limiting the ability of many minority firms to compete successfully. Commission Report, supra, at 24.[29/] The connection between this problem and the effects of prior discrimination was noted by Senator Bayh (again quoting James A.H. Byrd):

> [T]he minority contractor is severely hampered by the general lack of management and technical expertise. Because of the years of discrimination, minority contractors have not been able to develop those skills required in the industry to be a successful entrepreneur. Therefore some vehicle must be perfected which will provide these individuals with the assistance needed * * *.

28/ See also Report to the Congress by the Comptroller General of the United States "Ways to Increase The Number, Type and Timeliness of 8(a) Procurement Contracts," pp. 8, 24-26 (1978).

29/ The problems include overbidding, lack of proposals and lack of familiarity with government contracting regulations. Commission Report, supra, at 24. See 124 Cong. Rec. E. 985 (remarks of Representative Hamilton) (daily ed. March 2, 1978).

116 Cong. Rec. 18888-18889 (1970). See also 124 Cong. Rec. E. 985 (remarks of Representative Hamilton) (daily ed. March 2, 1978); HUD Survey, supra, at 11; Office of Minority Business Enterprise, Department of Commerce, Report of the Task Force on Education and Training for Minority Business Enterprise 4-5 (1974).

Finally, the state of the economy seriously impedes the ability of any small business to acquire contracts, and particularly affects minority businesses. Undercapitalized minority firms are hardest hit during recessionary periods, losing substantial access to financing and credit, while higher supply costs, interest rates and wages impact on the ability of minority firms to compete during inflationary economic periods. CRS Report, supra, at 29.

These problems manifest themselves in the inability of minority contractors to obtain government contracts, a major source of contract work for construction firms. HUD Survey, supra, at 8. Information before Congress at the time of the enactment of the MBE provision indicates that minority businesses receive less than one percent of the federal contract dollars. See 123 Cong. Rec. S. 3910 (Remarks of Senator Brooke) (daily ed. March 10, 1977); 123 Cong. Rec. H. 1440 (Remarks of Representative Biaggi, citing 1976 data) (daily ed. February 24, 1977).[30/]

30/ In addition, minority firms are handicapped by the failure of government agencies to advertise bidding opportunities adequately and by their own difficulty in understanding and meeting strict government contracting standards. Commission Report, supra, at 10, 24, table 7.

c. Congress has enacted measures to deal with these problems.

Recognizing these problems, Congress has, in recent years, stepped up its efforts to aid minority contractors and subcontractors, in order to insure that federal programs do not have the effect of excluding minorities. The Small Business Administration administers a procurement program, authorized by Section 8(a) of the Small Business Act of 1953, 72 Stat. 389, as amended, 15 U.S.C. 637(a), which empowers the SBA to serve as a prime contractor to Federal agencies, and to subcontract to socially and economically disadvantaged businesses.[31/] Since 1968 the SBA has used this authority largely to assist minority-owned enterprises. CRS Report, supra, at 52. According to a 1975 report published by the General Accounting Office,[32/] however, "SBA's success in helping disadvantaged firms to become self-sufficient and competitive has been minimal." CRS Report, supra, at 53.

The Small Business Administration also administers the "301(d)" investment program, which was enacted in 1972 (Small Business Investment Act Amendments of 1972, 86 Stat. 1314, Section 2(b)) in an amendment to the Small Business Investment Act of 1958, 72 Stat. 691,

31/ The Small Business Administration's 8(a) program has been upheld in the face of numerous attacks on its validity. See, e.g., Valley Forge Flag Company, Inc. v. Kleppe, 506 F.2d 243 (D.C. Cir. 1974); Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696 (5th Cir. 1973), certiorari denied, 415 U.S. 914 (1974); Eastern Canvas Products, Inc. v. Brown, 432 F. Supp. 568 (D. D.C. 1977); Massey Services, Inc. v. Fletcher, 348 F. Supp. 171 (N.D. Cal. 1972); Fortec Constructors v. Kleppe, 350 F. Supp. 171 (D. D.C. 1972). None of these cases addressed the constitutionality of the program.

32/ Report to the Congress on Questionable Effectiveness of the 8(a) Procurement Program. Comptroller General of the United States (April 1975).

codified at 15 U.S.C. 681(d). From 1969 to 1972, this program had been operated as a minority enterprise small business investment company program ("MESBIC"), whose purpose was to assist small minority business investment companies technically and financially, thereby providing increased financing opportunities to small minority businesses. CRS Report, supra, at 51. Although, in 1972, the scope of the program was expanded to aid all disadvantaged businesses,[33/] a separate MESBIC program was retained as part of the expanded program.

In order to facilitate the ability of small businesses, including those owned by minorities, to obtain surety bonds, the Small Business Administration was authorized by the Housing and Urban Development Act of 1970, P.L. 91-609, 84 Stat. 1813, 15 U.S.C. 694a and b, to establish a Surety Bond Guarantee Program which would cover surety companies for up to 90 percent of their losses on bonds.[34/] In addition, the last four Congresses have considered at least 12 bills dealing with the difficulties encountered by minority-owned and other small businesses in obtaining bonding,[35/] including

33/ Its effectiveness has been criticized by the General Accounting Office. Report to the Congress by the Comptroller General of the United States. A Look at How the Small Business Administration's Investment Company Program for Assisting Disadvantaged Businessmen is Working, pp. i, ii (October 8, 1975), as cited in CRS report, supra, at 51-52.

34/ In 1970 the program covered contracts not to exceed $500,000. In 1974, the ceiling was doubled.

35/ In the 91st Congress, the bills included S. 2609, 2611, H.R. 15470, 17717, 17991, 17992, 17993, and 19819; in the 93rd Congress, H.R. 7829; in the 94th Congress, S. 3370; and in the 95th Congress-to date, H.R. 692 and S. 1442.

Pub. L. 95-89, 91 Stat. 553, enacted August 4, 1977, which increased the loan and surety bond guarantee authorities under the legislation administered by SBA.[36/] These bills have been introduced in recognition of the fact that "[t]he Federal Government has a duty to not only remove the barriers that restrict minority business development, but also provide a little added help - a few additional opportunities - to encourage minority business expansion." 124 Cong. Rec. S. 4168 (remarks of Senator Dole) (daily ed. March 20, 1978).

d. The Executive Branch has initiated affirmative action efforts to correct the problems

The Executive Branch has also initiated efforts to aid minority-owned businesses pursuant to a national policy of "[eliminating] the barriers which now prevent many who are members of minority groups from controlling their fair share of American business." Statement of President Nixon, accompanying issuance of Executive Order 11625, 7 Pres. Doc. 1404 (October 13, 1971). In 1969, Executive Order 11458, 3 C.F.R. 779, 34 Fed. Reg. 4937, established the Office of Minority Business Enterprise (OMBE) within the Department of Commerce. OMBE was charged with developing programs and coordinating interagency activities to encourage development of minority enterprises, and

36/ During the same period there were at least 28 bills designed to aid economically and socially disadvantaged small businesses: S. 3337, 3891, H.R. 13805, 14240, and 16732 (92nd Congress); S. 1415 and 1941 (93rd Congress); S. 2617, 3427, H.R. 12741, 12826, 13591, 13784, 13785, 14483, 14624, and 14924 (94th Congress); and S. 607, 927, 1228, 1264, H.R. 567, 4362, 4363, 4961, 6153, 7115, and 8912 (95th Congress - to date).

serving as a national clearinghouse of information. The OMBE program was strengthened and expanded by Executive Order 11625, 3 C.F.R. 616, 36 Fed. Reg. 19967, issued in 1971.[37/] However, a November 10, 1977, Comptroller General Report to the Congress concludes that "OMBE's assistance program does not appear to appreciably affect OMBE's program objective of closing the gap between the minority population business/ownership ratio."[38/]

Under Small Business Administration regulations, a minority procurement program is required of all Federal agencies to ensure that efforts are undertaken to extend subcontracting opportunities to minority business enterprises. 41 C.F.R. 1-1.1300-1.1303. The effectiveness of the program was attacked in testimony before the House Subcommittee on SBA Oversight and Minority Enterprise (94th Cong., 1st Sess. 34 (1975)).

> We find that in title 41, where you talk about the utilization of minority businesses in procuring contracts either in prime contractors or through the 8(a) program, [a contractor] has to use his best efforts. Well, that is a lot of baloney. Best efforts usually amount to looking at a directory of minority businesses that is usually out of date and they tried one or two or three and if they are unsuccessful then they say, we have made a best effort and they go on and get a majority guy to do the work.

37/ That order authorized the expansion of the development and coordination functions of the Office of Minority Business Enterprise with respect to federal agencies, state and local governments, and private and public technical and management assistance organizations. It also required all federal agencies to step up their efforts to promote minority business enterprise.

38/ Report to the Congress by the Comptroller General of the United States, "The Office of the Minority Business Enterprise Could Do More To Start And Maintain Minority Businesses," p. 7 (November 10, 1977).

(Testimony of George Pattison, President of the Brooklyn Local Economic Development Organization).

Despite all of these efforts by the Federal government,[39] through statutes, Executive Orders, and regulations, the House Committee on Small Business, in November 1976, described the problems still encountered by minority enterprises in the following way:

> The very basic problem * * * is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently have not participated to any measurable extent, in our total business system generally, or in the construction industry, in particular. However, inroads are now being made and minority contractors are attempting to break into a mode of doing things, a system with which they are empirically unfamiliar and which is historically unfamiliar with them.

Summary of Activities of the Committee on Small Business, House of Representatives, 94th Cong., 2d Sess., H. Rep. 94-1791, 182-183 (1977).

39/ For a list of the over 100 Federal agency programs providing financial, marketing and management assistance to minority and other small businesses, see Office of Minority Business Enterprise, Federal Assistance Programs for Minority Business Enterprises (U.S. Department of Commerce, 1977).

e. The MBE provision was considered against the background of prior efforts to increase minority opportunities in Federal contracting programs

By 1977, when the MBE requirement was enacted, it had been clear to Congress that the foregoing methods of aiding minority businesses had not succeeded and that more concrete measures were required.[40/] During consideration of the Senate version of the PWE, Senator Brooke moved to amend the bill with a provision establishing a set-aside for minority business suppliers.[41/] In

40/ This view is shared by the Executive Branch. President Carter has directed that increased efforts be made by all Federal agencies to strengthen minority business development, through greater participation of minority enterprises in procurement and banking activities. 13 Pres. Doc. 1333 (September 12, 1977); 13 Pres. Doc. 511 (April 8, 1977).

41/ Senator Brooke's Amendment to S. 427, Amendment No. 66, provided (123 Cong. Rec. S. 3910 (daily ed. March 10, 1977)):

> * * * Notwithstanding any other provisions of law, no grant shall be made under this Act for any local public works project unless at least 10 per centum of the articles, materials, and supplies which will be used in such project are procured from minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 percent of which is owned by minority group members or, in case of publicly owned businesses, at least 51 percent of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.
>
> This section shall not be interpreted to defund projects with less than 10 percent minority participation in areas with minority population of less than 5 percent. In that event, the correct level of minority participation will be predetermined by the Secretary in consultation with EDA and based upon its lists of qualified minority contractors and its solicitation of competitive bids from all minority firms on those lists.

support of his amendment he stated that a minority business provision was "a legitimate tool to insure a participation by hitherto excluded or unrepresented groups," and was necessary:

> because minority businesses have received only 1 percent of the Federal contract dollar despite repeated legislation, Executive orders and regulations mandating affirmative efforts to include minority contractors in the Federal contracts pool.

123 Cong. Rec. S. 3910 (daily ed. March 10, 1977); see also remarks of Representative Biaggi, citing 1976 data, 123 Cong. Rec. H. 1440 (daily ed. February 24, 1977) (Vol. II, 137). Senator Brooke's amendment was adopted, 123 Cong. Rec. S. 3910, and included in S. 427 as it passed the Senate. Id. at S. 3929. When the Congress enacted the PWE it adopted the MBE provision originally introduced in the House by Representative Mitchell, 123 Cong. Rec. H. 1436 (daily ed. February 24, 1977), which, like Senator Brooke's amendment, contained a requirement that minority enterprises receive a certain percentage of funds made available under the LPW.[42/]

42/ On February 24, 1977, the House agreed to Representative Mitchell's amendment after amending it to give the Secretary of Commerce discretion to grant waivers. 123 Cong. Rec. H. 1441 (daily ed.) The House then passed H.R. 11 containing Representative Mitchell's amendment establishing the MBE requirement. 123 Cong. Rec. H. 1462 (daily ed. Feb. 24, 1977). On March 10, 1977, the Senate passed H.R. 11 after amending it by inserting in lieu thereof S. 427 containing Senator Brooke's amendment. 123 Cong. Rec. S. 3927-3929. On April 5, 1977, the House insisted upon its version of H.R. 11 and again passed H.R. 11 after amending the Senate's amendment to make it reflect the original H.R. 11. 123 Cong. Rec. H. 3063-3070. The bill was referred to conference where the Conference Committee agreed upon the Mitchell Amendment. The Senate (123 Cong. Rec. S. 6755-6757 (daily ed. April 29, 1977)) and the House (123 Cong. Rec. H. 3920-3935 (daily ed. May 3, 1977)) agreed to the bill as reported by the Conference Committee. On May 13, 1977, the Public Works Employment Act of 1977 (Pub. L. 95-28) containing the MBE provision, as introduced by Representative Mitchell, was signed into law.

Representative Mitchell supported his amendment as an essential means of making the Federal efforts to aid minority enterprises more rational, more effective, and more responsive to the problems which have encumbered minority enterprises. He echoed Senator Brooke's assessment of the failure of programs to aid minority businesses and noted that a minority business requirement is "the only way we are going to get the minority enterprises into our system." He urged that "to the extent we are willing to let minorities do business with the government, we will be able to reduce survival support programs now paid for by the Federal Government." 123 Cong. Rec. H. 1437 (daily ed. February 24, 1977) (Vol. II, 133-134).

Emphasizing the depressed state of the minority construction industry and related minority industries, Representative Stokes stated that an MBE provision was essential to address the problem of

> unemployment in the minority construction sector. In this sector there is currently an unemployment rate of 35 percent. In addition 20 percent of the complementary construction industries, which are owned by blacks, have failed for want of work.

123 Cong. Rec. H. 1423 (daily ed. February 24, 1977).

In recognition of the need for the provision because of the inability of minority-owned businesses to compete effectively "through no fault of their own," 123 Cong. Rec. H. 1440 (remarks of Representative Conyers) (daily ed. February 24, 1977) (Vol. II, 137); 123 Cong. Rec. H. 1436 (remarks of Representative Mitchell) (daily ed. February 24, 1977) (Vol. II, 134), the measure was also supported as a necessary means of (1) building "a viable economic system for minorities in this country," id. at H. 1437 (Vol. II, 134) and (2) insuring that the PWE would not be inequitable to minority businesses. Id. at H. 1440 (Vol. II, 137) (remarks of Representative Biaggi).

2. Congress Concluded that the MBE Provision was Necessary to Counteract the Effects of Past Discrimination

The Contractors would dismiss all of the evidence of minority exclusion from Federal contracting programs because Congress did not specifically state that the MBE provision was intended to remedy past discrimination. (Contractors' Brief at 22-24).[43/] In Constructors Association of Western Pennsylvania v. Kreps, supra, the Third Circuit rejected this argument, holding that the legislative history shows that the MBE provision (id., slip op. at 10-11; footnote omitted):

> * * * was designed to "begin to redress" what Congress perceived to be the continuing economic impact of racial discrimination. Such a purpose might well be sufficient to allow the legislature to take notice of findings by the government in other aspects of the national anti-discrimination effort to the effect that minority contractors labor under handicaps requiring remedial action. Moreover, the debates in connection with the MBE set-aside evidence a Congressional determination that other attempts to encourage minority businesses have not proved successful.

In any event, the validity of legislation is not affected by the absence of a Congressional articulation of purpose. In Katzenbach v. Morgan, 384 U.S. 641 (1966), the Supreme Court upheld Section 4(e) of the Voting Rights Act of 1965[44/]

43/ This appears also to be the reasoning of the district court in Associated General Contractors of California v. Secretary of Commerce, 441 F. Supp. at 965, upon whom the Contractors rely (Contractors' Brief at 24).

44/ Section 4(e), like the MBE provision at issue here, was originally proposed as an amendment during floor debate, Katzenbach v. Morgan, 384 U.S. at 669 n. 9 (Harlan, J. dissenting), and, as a result, there was virtually no attention to the issue in hearings or reports. Ibid.

despite Congress' failure to state its view of the need for the legislation or its purpose. Instead, the Court looked to the information before Congress to determine whether there was any basis for the exercise of Congressional power. See also Usery v. Allegheny County Institution Dist., supra, n. 14; Heart of Atlanta Motel v. United States, 379 U.S. at 252; Katzenbach v. McClung, 379 U.S. 294, 299 (1964). Cf. Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976).

Where there is reason to believe that Congress acted on the basis of facts, the Supreme Court will weigh those facts although they do not appear in the history of the legislation itself. See Katzenbach v. Morgan, supra; Oregon v. Mitchell, supra; United States v. Carolene Products Co., 304 U.S. 144, 152-153 (1938). The Contractors would have this Court conclude that Congress had not acted to deal with these problems because the legislative history of the PWE does not include the word "discrimination." But there is no basis for concluding that Congress was not aware of the long history of discrimination suffered by minorities in this country, or that Congress is not familiar with the pervasive nature of racial prejudice. Indeed in the past two decades Congress

has enacted legislation designed to end overt discrimination in the market place.[45/] Moreover, as the foregoing discussion makes clear, Congress was aware both of the problems faced by minority-owned businesses because of previous discrimination and of the repeated actions that had been taken to deal with them without substantial success. See Constructors Association of Western Pennsylvania v. Kreps, slip op. at 11.

Congress' awareness of overt discrimination is exhibited in the comments of Senator Bayh and Representatives Mitchell, Addabbo, and Hamilton (pp. 26-30 supra), in the House Small Business Committee report (p. 36 supra) and in the Civil Rights Commission report (p. 27 supra). At least one Congressional committee has recognized that, in addition to overt racial bias past discrimination has operated in conjunction with economic forces and contracting standards to exclude minority participation in contracting programs. (See p. 36 supra). The decision by Congress to rectify the existing exclusion further reflects its belief that minorities have suffered a wrong due to factors beyond their control.

45/ See e.g., Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. 2000a, et seq.; Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, et seq.; Title VIII of the Civil Rights Act of 1968, 82 Stat. 81, 42 U.S.C. 3601, et seq.; Equal Credit Opportunity Act Amendments of 1976, Pub. L. 94-239, 90 Stat. 251, 15 U.S.C. 1691, et seq., as amended.

3. The Congressional Determination That the MBE Provision was Necessary to Remedy the Effects of Discrimination Should Not be Disturbed

The Contractors argue that even if the MBE provision was enacted by Congress to remedy discrimination, the provision is nevertheless impermissible because Congress failed to establish that the minority sensitive legislation which Congress chose - the MBE provision - was required to remediate the residual effects of discrimination (Contractors' Brief at 35-38). The Contractors would require that Congress act only upon "hard evidence" of the sort on which a court would rely in requiring race-sensitive relief. This argument misconstrues the role which Congress plays in exercising its constitutional powers and which a court must play in reviewing the actions of Congress.

Congress has been entrusted with the authority and the obligation to enact legislation to enforce the vital national interest in remedying discrimination.[46/] In so doing, it must ensure that federal funds are not spent in a discriminatory manner.[47/]

46/ Under Section 2 of the Thirteenth Amendment Congress may enact legislation to insure that "the badges and the incidents of slavery" are not fostered by the LPW. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968). See also Rhode Island Chapter v. Kreps, supra, slip op. at 38-51. Under Section 5 of the Fourteenth Amendment, Congress may reach the actions of state and local governments in administering the LPW grant program. Congress has like powers to enforce the equal protection guarantees of the Fifth Amendment in a Federal program and to act affirmatively to ensure that in exercising other powers it does not violate these powers. Cf. Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

47/ Congress has broad authority to fix the terms by which it distributes Federal funds, Oklahoma v. Civil Service Commission, 330 U.S. 127, 142-143 (1947), and may utilize that authority to remedy racial discrimination. Lau v. Nichols, 414 U.S. 563 (1974). See also Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (racial discrimination prohibited through power to regulate commerce).

Such action serves a compelling governmental interest:

> "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."

Lau v. Nichols, 414 U.S. at 569 (quoting Senator Humphrey during debate on the Civil Rights Act of 1964).

In exercising this responsibility, Congress has independent authority to interpret the guarantees of equal protection.[48/] The determination that there is a danger of discrimination and that the danger should be eliminated is committed to Congress. Katzenbach v. Morgan, 384 U.S. 641, 651 (1966); Oregon v. Mitchell, supra;[49/] Heart of Atlanta Motel v. United States, 379 U.S. at 262.

48/ In contrast to the limitations which the Fourteenth Amendment places on actions of the States, Section Five of that Amendment establishes a positive grant of power in the Congress to ensure that the guarantees of the Amendment are achieved. Cf. Hampton v. Mow Sun Wong, 426 U.S. at 100.

49/ In exercising its authority to remedy racial discrimination, Congress is governed by the Necessary and Proper Clause, Art I, sec. 8, cl. 18. See McCulloch v. Maryland, 4 Wheat. 316, 421 (1819). The Supreme Court has recognized that Congress' authority to enact appropriate legislation under the enforcement clauses of the Civil War Amendments must be considered to be coextensive with its expansive powers under the Necessary and Proper Clause. Katzenbach v. Morgan, 384 U.S. 641, 650-651 (1966).

Once Congress determines that there is a danger of discrimination it may require that affirmative measures be undertaken to prevent the discriminatory result.[50/] It may prohibit "practices, procedures, or tests neutral on their face, and even neutral in terms of intent * * * if they operate to 'freeze' the status quo of prior discriminatory * * * practices." Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971); accord, Lau v. Nichols, supra; Oregon v. Mitchell, 400 U.S. 112 (1970) (ban on literacy tests). Moreover, Congress may act to prevent perpetuation in a Federal program of the consequences of discrimination elsewhere in society. Califano v. Webster, 430 U.S. 313, 317 (1977); Griggs v. Duke Power Co., 401 U.S. at 430; Oregon v. Mitchell, supra. Cf. Contractors

50/ Both Title VII of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 require affirmative minority-sensitive action to avoid a racially-biased result. Title VII requires the consideration of race in employment decisions in order to avoid a racially disparate effect. Griggs v. Duke Power Co., 401 U.S. 424 (1971). In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Supreme Court concluded that employers could be required to avoid racially disparate effects of employment tests by using racial criteria (i.e., one passing score for blacks and another for whites) so that the test would predict success on the job equally well for each racial group. Id. at 425.

Section 5 of the Voting Rights Act of 1965 is a prophylactic provision "concerned with * * * the reality of changed [voting] practices as they affect Negro voters." Georgia v. United States, 411 U.S. 526, 531 (1973). In United Jewish Organizations v. Carey, 430 U.S. 144 (1977), the Supreme Court held that Section 5 properly required the consideration of the race of those who would be affected by legislative reapportionments. Thus, race was to be taken into account to avoid a result which would disadvantage black voters.

Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), certiorari denied, 404 U.S. 854 (1971) (requirement imposed upon contractors to eliminate affects of discrimination by unions).

In pursuing its responsibility to enforce the equal protection guarantees, Congress is not required to make a case-by-case determination that exclusion of minorities results from past discrimination. It may act generally on the basis of evidence that certain practices lend themselves to furthering discrimination where it has existed. Oregon v. Mitchell, supra, 400 U.S. at 216 and n. 94 (Harlan, J. concurring in part) and 400 U.S. at 284 (Stewart, J. concurring in part).

The judgment which Congress makes in these circumstances is not subject to the type of proof which the Contractors would require.[51/] Congress cannot conduct a judicial trial to determine with precision the extent of the residual effects of discrimination. Cf. Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977).

Both the determination whether other alternatives should continue to be pursued and the task of weighing the relative

51/ This is not a situation like Craig v. Boren, 429 U.S. 190, 198 (1976), where a classification is being used as a proxy for other more precise categories which a legislature might employ to achieve a legitimate goal. Under such circumstances the legislature must justify the use of the challenged proxy with mathematical precision to establish that the use of the proxy does in fact serve the legitimate goal. Here race must be used as the classification and is not a proxy, since the legitimate goal sought to be met by the statute is the remedying of racial discrimination. Cf. Kahn v. Shevin, 416 U.S. 351 (1974), Califano v. Webster, 430 U.S. 313 (1977) (gender-based classifications upheld where utilized to remedy the effects of gender-based discrimination).

degree of effectiveness of the different methods of remedying discrimination in light of (1) the time frame of the LPW program, (2) the goals sought to be achieved, and (3) the previous Congressional and Executive efforts to remedy discrimination are policy questions which the legislative body is equipped to resolve. In Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court upheld Section 4(e) of the Voting Rights Act of 1965 which struck down voting laws requiring literacy in English as they applied to those who received a sixth grade education in Puerto Rico. The Court ruled (id. at 653):

> It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations - the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school.

Where, as here, Congress exercises its plenary powers to enforce the "overriding national interest" in enforcing the guarantees of the Civil War Amendments, its decision to do so, as well as the means employed, should not be lightly interfered with. Cf. Hampton v. Mow Sun Wong, 426 U.S. 88, 101 (1976).

The issue which this Court must resolve in reviewing Congress' exercise of this responsibility is whether Congress has sufficient basis for its judgment that this remedial legislation was necessary. It is not for courts "to review the congressional resolution of these [competing] factors. It is enough

that * * * [they] be able to perceive a basis upon which the Congress might resolve the conflict as it did." Katzenbach v. Morgan, 384 U.S. at 653.[52/] As we have demonstrated above, Congress had an ample basis for resolving the conflict as it did.

The Contractors do not appear to challenge Congress' decision to employ minority-sensitive means of dealing with the perceived problem. Indeed, the alternatives approved in their brief include minority-sensitive measures. (Contractors' Brief at 33-37.) Instead, the Contractors fault Congress for not considering alternative programs before enacting the MBE provision. (Ibid.)

It cannot be said that Congress did not consider alternative measures. As we have noted above (pp. 32-36), a number of programs to strengthen minority and other small businesses have been instituted and none has yet succeeded in eliminating the barriers which have prevented minorities from competing on an equal basis for government-funded contracts.

Congress, in reviewing the LPW, sought to prevent the exclusion of minorities from participation in the benefits of that legislation. (See pp. 37-42, supra.) In view of the short-term time frame of the LPW, no long-term tax or training program would accomplish that result. The need was for a provision which could be enforced immediately, in conjunction with the immediate distribution of funds.

52/ This Court is not limited to evaluating an asserted justification for Congressional legislation, but must uphold the statute if it is within the power of Congress to enact. Usery v. Allegheny County Institution Dist., 544 F.2d 148, 155-156 (3d Cir. 1976), certiorari denied, 430 U.S. 946 (1977); see Heart of Atlanta Motel v. United States, 379 U.S. at 284-285 (Douglas, J. concurring).

Of course, Congress also anticipated that the MBE provision will operate to strengthen minority businesses so that they can compete more effectively in the future, in hopes of eliminating the need to enact further remedial legislation. See p. 39 supra. To that extent the program is intended to operate as a training program to provide experience to minority businesses. While these long-range goals might not alone justify use of the MBE provision, when combined with the goal of eliminating minority exclusion from the current expedited public works program, the need for the provision becomes clear.

Where as here, Congress exercises its expertise and makes a judgment, shared by the Executive, which is well founded in light of its knowledge of the problem and of available alternatives, this judgment should not be set aside merely because other judgments are possible. United States Civil Service Commission v. Letter Carriers, 413 U.S. 548, 564, 566-567 (1973). Under the circumstances, it is clear that the district court's conclusion that the MBE provision "is a reasonable alternative that is as non-restrictive as possible under the circumstances" (App. 42) is entirely correct. See Rhode Island Chapter v. Kreps, slip op. at 36-37; Fullilove v. Kreps, 443 F. Supp. at 262.

B. The MBE Provision is Tailored to Remedying the Effects of Past Discrimination in the Context of the Public Works Grant Program.

1. The MBE Provision Will Benefit Those Who Suffer The Effects Of Past Discrimination

Although the Contractors recognize that a numerical quota may be an appropriate remedy for discrimination (Contractors' Brief at 37),[53/] they urge that the MBE provision is impermissible because "there was no evidence on the crucial issue of whether employment opportunity had been denied minorities so as to preclude them entry into the industry as contractor" (Contractors' Brief at 34). This contention is based on the erroneous assumption that Congress must act as a court does, on a case-by-case basis. The Contractors would apparently permit the provision to be directed at only proven victims of discrimination and only after all other alternatives had been applied in each case. As we have argued above, Congressional power is not so confined. See pp. 43-49 supra.

The beneficiaries of the MBE provision are members of groups which have long suffered the effects of racial discrimination. See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954); Hernandez v. Texas, 347 U.S. 475 (1954); Morton v. Mancari, 417 U.S. 535 (1974); Ex parte Endo, 323 U.S. 283 (1944); Yick Wo v. Hopkins, 118 U.S. 356

53/ Indeed, this Court, see cases cited at p. 18 supra, and every other court of appeals which has considered the issue, has approved the use of numerical standards in remedying past discrimination. See, e.g., Boston Chapter NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), certiorari denied, 421 U.S. 910 (1975); Bridgeport Guardians, Inc. v. Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973), certiorari denied, 421 U.S. 991 (1975); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (en banc), certiorari denied, 406 U.S. 950 (1972); United States v. Elevator Constructors, Local 5, 538 F.2d 1012 (3d Cir. 1976); Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), certiorari denied, 404 U.S. 854 (1971).

(1886). Moreover, minorities are not represented in the business community in proportion to their percentage in the population. See pp. 21-25, supra.

Thus, Congress has acted in response to a broad societal problem stemming from both official and private action. Racial discrimination has been widespread in this country and its effects are not amenable to precise measurement. While it is reasonable for Congress to conclude that the exclusion of minority businesses from construction programs results, in part, from that discrimination, the extent and nature of the relationship is too complex to dissect. It is impossible to identify all those whose disadvantage is a direct result of that discrimination or to calibrate the relationship between the past discrimination and the present disadvantage. When measurement of effects on an individual basis is impractical, Congress may generalize in identifying the victims of discrimination. See Gaston County v. United States, 395 U.S. 285, 295-96 (1969); Califano v. Webster, supra; Oregon v. Mitchell, 400 U.S. at 216 (Harlan, J. concurring in part).

2. The MBE Provision Will Provide Qualified Minority-Owned Businesses a Realistic Chance To Participate In The LPW Program

The MBE provision benefits only qualified minority-owned businesses. Where there are not sufficient businesses in the relevant area that possess the necessary qualifications, a waiver will be granted. There is no allegation in this case that a non-minority contractor lost a contract to an unqualified minority contractor.

The MBE provision is designed to enable minority contractors to compete on an equal basis with non-minorities in spite of the lack of financing and bonding and the resultant lack of experience

and expertise. Congress has made a judgment that minorities need assistance in overcoming these problems through the MBE provision in conjunction with other assistance programs. Bonding and financing are available through the Small Business Administration. Congress has determined that so long as a contractor is qualified, other criteria for choosing among contractors which have had an adverse impact on minorities in the past, will not have that effect here.

In addition, by de-emphasizing certain criteria in this program Congress has not established a different industry standard for minorities. The minority-owned businesses which participate will attain valuable experience and expertise which will make it easier for them to obtain bonding and financing in the future. The long-range effect of the MBE provision will be to enable minorities to better compete with non-minorities toward the end of rendering future remedial measures unnecessary.

3. The MBE Provision Is Consistent With The Design And Purposes Of The Public Works Construction Program

The design of Section 103(f)(2) was necessitated in substantial part by the rapid time-frame established by Congress for implementation of the Public Works Employment Act as a whole. Only a set-aside could provide Congress with the means of insuring that the program would not continue the effects of discrimination

against minorities because the speed in which funds were required to be allocated, contracts let, and construction commenced (see pp. 6-7, supra), prevented effective Congressional oversight. Similarly, the short duration of this public works program insures that Congress will have an opportunity to determine whether the MBE provision effectively remedies discrimination and whether it is still required if Congress again authorizes and appropriates funding to extend the LPW.[54/]

The PWE was enacted to stimulate the economy. (See pp. 4, 6, supra). Consistent with that purpose, it provided for geographic allocation of funds on the basis of a formula keyed to need. 42 U.S.C. 6707(a)(3). More assistance is given to areas of greater need, as measured by unemployment, regardless of the relative need of the individual contractors in each area. The MBE provision is similarly targeted to serve a felt economic need. As the legislative history indicates, Congress was aware of the economic state of the minority community and chose, through the MBE provision, to assure the expenditure of funds where most needed. (See p. 39, supra.)

4. The MBE Provision Has Been Drawn To Moderate The Adverse Impact On Non-Minority-Owned Businesses

The consideration of race in formulating a remedy is not barred because that consideration has a direct adverse impact upon others.

54/ In those instances where Congress envisions a long-term program subject to continuing oversight, the adoption of more flexible targets may be more appropriate. See S. Rep. No. 95-715, Report of the Committee on Governmental Affairs to Accompany S. 1264 (The Federal Acquisition Act of 1977), 95th Cong., 1st Sess. at 59 (1978).

Any race-conscious remedy will in some sense have an adverse impact on some group, if only in that it alters the effected groups expectations of their place of schooling or employment. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Board of Education v. Swann, 402 U.S. 43 (1971); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). It is in the nature of a remedy that there must be some "sharing of the burden of the past discrimination." Franks v. Bowman Transportation Co., 424 U.S. at 777. Where, as here, race is taken into acccount in order to assure minorities an opportunity to take part in a program for the distribution of governmental benefits, the extent of adverse effect of that race-consciousness on non-minorities must be weighed against the need for the remedial minority-sensitive provision. In making such an evaluation in this case, it should be remembered that the MBE provision applies to one set of grants distributed in a single year. Future programs must be evaluated on the basis of justification existing at that time.[55/]

55/ The anticipated effects of the MBE provision will be cumulative. Once minority-owned businesses are strengthened enough to enable them to compete effectively, programs of this nature should become unnecessary. See Associated General Contractors of Mass., Inc. v. Altschuler, 490 F.2d 9, 18 n. 16 (1st Cir. 1973), certiorari denied, 416 U.S. 957 (1974). See Fullilove v. Kreps, 443 F. Supp. at 262.

The MBE provision is an integral part of the PWE. In appropriating funds authorized for expenditure under that Act Congress implicitly determined that ten percent of the funds should be expended to help remedy the prior discrimination against minority-owned businesses. Had Congress failed to enact the PWE or enacted it without the MBE provision and appropriated ten percent less moneys, non-minority contractors would not have been in an improved situation. The MBE provision applies only to funds provided by the Federal government and does not extend to all funds expended on a given project. It is unclear precisely what injury the Contractors claim, but it is clear that the Contractors have lost no right or legitimate expectation by inclusion of the provision.[56/] Cf. Katzenbach v. Morgan, 384 U.S. 641, 657 (1966). Although a non-minority contractor may not have engaged in discrimination, he may benefit indirectly from the exclusion of minority contractors from business opportunities. Cf. Clark v. Universal Builders, Inc., 401 F.2d 324 (7th Cir. 1974), certiorari denied, 419 U.S. 1070 (1975). A provision which assures minority participation in one, temporary, Federally-financed program affecting only one sector of the construction industry, does not unduly disadvantage non-minority contractors.

56/ The requirement that construction be performed by private contractors (rather than government agencies) was enacted contemporaneously with the MBE provision in the PWE. See p. 7, supra.

While qualification has been retained as a requirement of obtaining work under the LPW, Congress has chosen to shift the burden to grantees and prime contractors to seek out and help qualified minority-owned businesses secure contracts.[57/] Such an approach requires that some numerical standard be imposed to guide affirmative action efforts and to measure their success. The requirement must be imposed contemporaneously with distribution of the funds to ensure that the money is distributed expeditiously and in a manner which effectively provides opportunities to minority-owned businesses. Without a numerical guidepost grantees and prime contractors would have no way of determining whether they were complying with the Congressional mandate, nor would it be possible to correct non-compliance without upsetting the program.

57/ The United States has found such an approach useful in enforcing equal employment opportunity requirements. A policy statement issued on March 23, 1973, by the Department of Justice, the Department of Labor, the Civil Service Commission, and the Equal Employment Opportunity Commission - known as the Four Agency Agreement - endorses the use of flexible goals that "help measure progress in remedying discrimination." CCH Employment Practices ¶3775. The policy statement provides that an employer should not be "required to hire a less qualified person in preference to a better qualified person, provided that the qualifications used to make such relative judgments realistically measure the person's ability to do the job." Ibid. (emphasis added). The statement recognizes that the use of qualifications that themselves exclude substantial numbers of minority applicants makes the usefulness of those qualifications suspect and calls for reassessment. Ibid. As we have noted above, only qualified minority-owned businesses will be considered in meeting the requirements of the MBE provision. Congress has concluded that the neutral application of currently used criteria for choosing subcontractors and suppliers operates to exclude substantial numbers of minority-owned businesses from obtaining contracts.

The Contractors also object to the choice of twelve percent as the numerical standard.[58/] Eighty-eight percent of each PWE grant may go to non-minority-owned businesses.[59/] Any adverse effect is evenly distributed throughout the construction industry and not concentrated on individual competitors. Moreover, the Contractors' argument that the MBE provision has an exclusionary effect because some of its members do not ordinarily subcontract twelve percent of their work ignores the fact the MBE provision applies both to subcontracting and to the provision of supplies. The Contractors could comply with the MBE provision by the purchase of their supplies and equipment from MBE suppliers and thus neither the individual nor the associational plaintiffs need be injured by the application of the MBE provision.[60/]

The MBE provision is flexible. The availability of a waiver is based upon three factors: (1) number of qualified minority-owned businesses in the relevant area which are available to perform the work or provide supplies, (2) efforts to find such businesses and (3) minority population of the area (Vol. II, 52-54). These criteria are similar to those employed in setting goals for enforcement of the affirmative action requirements of Executive

58/ The City of Cincinnati adopted a twelve percent requirement to insure that the ten percent MBE provision could be met, since a portion of each grant to the City was necessarily spent on noncontractable costs. See p. 10, supra. The Contractors do not allege that the City's use of a twelve percent figure has caused any plaintiff any injury greater than the injury allegedly caused by the MBE provision.

59/ It is not accurate to say that twelve percent of the funds are required to go to minority individuals since the MBE provision defines a minority business enterprise as one 50 percent (or 51 percent of the stock) of which is owned by minority group members.

60/ The Contractors do not allege that they represent suppliers.

Order 11246.[61/] The record shows that the EDA was not requested to waive the requirement for any contracts in this case (Vol II, 111). Although the Contractors claim that the Brewer Company was unable to obtain minority subcontractors in preparing its bid on a PWE project (Contractors' Brief at 40), apparently the Brewer Company eventually did comply with the MBE provision for it was awarded the contracts in question. Ibid.

In choosing a numerical remedial standard a court will, as much as possible, fine tune the numbers so that they are closely adapted to the facts of the case before it. Since the MBE provision will apply nationally, however, Congress is forced to generalize to a greater extent. That is especially true here since the PWE was enacted as an emergency measure to go into effect immediately. Detailed comparative statistics regarding ownership of businesses are not available on a local basis. As a result, Congress has, of necessity, left to the Secretary of Commerce the task of adapting the requirement to specific situations by granting waivers.

While the Contractors object to the ten percent required by the MBE provision, they do not indicate what number might be more appropriate. The ten percent applies on a grant-by-grant basis. Some grants are as low as $132,500 (Vol. II, 120). To provide for less than ten percent participation would provide little of the

61/ Under the Executive Order, consideration is given to the minority percentage of the labor force in the area from which the contractor can recruit, the percentage of minorities with the requisite skills or the potential to develop such skills in the recruitment area, the internal minority workforce and the number of minority workers who can be promoted or transferred, and the amount of training the contractor is reasonably able to undertake to make all jobs available to minorities. 41 C.F.R. 60-2.11(b)(1).

intended economic support for minority-owned businesses. Even with a ten percent requirement, not all minority-owned businesses will participate.

The provision is intended, in part, to encourage the development of new minority-owned businesses. Since minorities comprise over 15 percent of the national population, it might be expected that, absent any lingering effects of discrimination, minority participation in business would be higher than it is at present. Cf. International Brotherhood of Teamsters v. United States, 431 U.S. at 339 n. 20.

Congress has chosen a figure which is reasonable in light of the national percentage of minority-owned businesses, the minority population, the one-time-only nature of the legislation, and the desire to afford minority-owned businesses more than token participation in order to encourage development of such businesses. Such a choice is largely a factual matter, and when within reasonable limits, is best left to the fact-finding body.

The balancing of the various interests at stake is a task particularly within the province of Congress.[62/] Katzenbach v. Morgan, 384 U.S. at 653. The MBE provision is a legislative effort to counteract discrimination which is tailored, as much as

62/ The MBE provision, by its application in a single short-lived grant program, is experimental. Experience under the provision will provide helpful data to guide Congress in adopting more precisely defined programs in the future. See n. 54, supra.

possible in the context of this temporary, emergency legislation, to serve that end. As such, it was properly upheld by the district court.

C. The MBE Provision is not Inconsistent with Other Civil Rights Legislation

The Contractors argue that the MBE provision imposes a duty which conflicts with their obligations under various other anti-discrimination statutes and that therefore the provision should be declared unlawful on statutory grounds. The Contractors have not, however, demonstrated that any of the cited statutes (42 U.S.C. 1981, 2000d-1, 2000e-1) are inconsistent with the MBE provision.[63/] Indeed, they could make no such showing, for as one district court faced with this argument has held, "it defies credulity to argue that measures intended to correct the invidious effects of racial discrimination must be limited to remedies which are not race sensitive, for minority groups would forever be frozen into the status quo if that were the intent of the Civil Rights Acts." Fullilove v. Kreps,

63/ The Contractors' contention that the MBE provision is prohibited by state law is irrelevant. "There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid." King v. Smith, 392 U.S. 309, 333 n. 34 (1968).

443 F. Supp. at 262. See Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d at 173-174.[64/]

Moreover, it is axiomatic that "a specific statute [the MBE provision] will not be controlled or nullified by a general one [42 U.S.C. 1981, 2000d-1 or 2000e-1]", Morton v. Mancari, 417 U.S. 535, 550-551 (1974), and that if there is "an irreconcilable conflict between successive statutory enactments, the later enactment [the MBE provision] should be given primary consideration." Araya v. McLelland, 525 F.2d 1194, 1196 (5th Cir. 1976). The district court in Associated General Contractors of California v. Secretary of Commerce, supra, relied on by the Contractors, recognized these principles but it refused to apply them. Id., 441 F. Supp. at 967-968. In so doing, it committed error, for "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."

64/ The Contractors appear to recognize this (Contractors' Brief at 49) but seek to argue that the MBE provision must fall because there has been no Congressional finding of discrimination. This, of course, is not the question for as we have argued supra, pp. 43-49, the relevant standard is not what Congress found but whether there was any basis for the exercise of Congressional power. Katzenbach v. Mc Clung, 379 U.S. 294, 299 (1964); Katzenbach v. Morgan, 384 U.S. 641 (1966); Heart of Atlanta Motel v. United States, 379 U.S. 241, 252 (1964). For the same reason, the Contractors reliance on Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216, 224 (5th Cir. 1977) is misplaced. Regardless of the merits of the Weber panel's holding concerning voluntary affirmative action plans adopted by private parties, it is clear that this holding is not relevant to a consideration of an Act of Congress.

Morton v. Mancari, 417 U.S. at 551.[65/]

II

THE CONTRACTORS FAILED TO ESTABLISH THAT THEY WOULD BE IRREPARABLY INJURED BY THE DENIAL OF A PRELIMINARY INJUNCTION

The Contractors failed to introduce any evidence to support their claim (Contractors' Brief at 39-40) that the enforcement of the MBE provision in the Cincinnati projects is causing them irreparable injury during the pendency of this litigation. There are five named plaintiffs, Pickney P. Brewer and Sons Co. (the Brewer Company), William A. Brewer, Daniel R. Dugan, the Ohio Contractors Association and Associated Contractors of Ohio, Inc. Neither associational plaintiff alleged or proved that the enforcement of the MBE provision during the pendency of this litigation would cause any irreparable injury to the association itself. Under such

65/ Congress has included in the Local Public Works Capital Development and Investment Act of 1976, Section 110, 90 Stat. 1002, a provision that bars discrimination on the grounds of sex and provides that compliance with the non-discrimination provision shall be enforced through the administrative machinery established "with respect to racial and other discrimination under Title VI of the Civil Rights Act of 1964," 42 U.S.C. 2000d, et seq. The passage of the MBE provision in light of Congressional recognition of the applicability of Title VI to projects funded under the PWE, indicates that in the view of Congress, minority-sensitive remedial statues are consistent with the prohibition against discrimination in Title VI. See also Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973).

circumstances, an association has standing to seek a preliminary injunction on behalf of its members (1) only insofar as it alleges and establishes "that its members, or any one of them, are suffering immediate or threatened injury as a result of the [MBE requirement]", Warth v. Seldin, 422 U.S. 490, 511 (1975); and (2) only so long as the nature of this claim "and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution" of the propriety of a preliminary injunction. Ibid. Moreover, an association like any other party, is entitled to the drastic relief of a preliminary injunction against the enforcement of an act of Congress only if it demonstrates that its members would be irreparably injured by the enforcement of the MBE provision during the pendency of this litigation. Id. at 515.

The only legally relevant injury demonstrated by the Contractors concerned the Brewer Company's allegation that it would be required to subcontract 12% of the work on which it was low bidder when it ordinarily subcontracts only 5% of the project work (Vol. II, 57).[66/] This possibility did not warrant the issuance of a preliminary injunction in this case. The injury potentially being suffered by the Brewer Company during the pendency of this litigation amounts to no

66/ Although the Contractors appear to claim that the Brewer Company was somehow injured because it had difficulty obtaining minority enterprises to comply with the MBE requirement in preparing its bid (Contractors' Brief at 40), this is irrelevant in light of the fact that the Brewer Company eventually did comply with the requirement and receive the contracts in question. Ibid.

more than that it is being deprived of the opportunity to earn whatever profits might accrue from performing an additional seven percent of the work. "Any time a corporation complies with a government regulation that requires corporation action, it spends money and loses profits; yet it could hardly be contended that proof of such injury alone, would satisfy the requisite for a preliminary injunction." A.O. Smith v. F.T.C., 530 F.2d 515, 527 (3d Cir., 1976). See Constructors Association of Western Pennsylvania v. Kreps, slip op. at 13-14. It would appear that here, where the question of lost profits is at best speculative and the amount of profits lost would be minimal, irreparable injury warranting the entry of a preliminary injunction has not been established. Ibid.

The Contractors also introduced evidence that the John R. Jurgensen Company had complied with the MBE provision and had been the second lowest bidder on the Cincinnati street projects awarded to the Brewer Company. Although the Contractors maintain that the Brewer Company's bids were lower than the Jurgensen Company's because the Brewer Company did not obtain minority subcontractors in preparing its bid (Contractors' Brief at 40), the record does not support this assertion or this conclusion. The record shows only that the Brewer Company based its bids in part upon "prices from minority contractors" (Vol. II, 56), and in no way supports the inference that the Jurgensen Company's bids would have been lower had it not utilized minority subcontractors. Compare Affidavit of William A. Brewer, Vol. II, 55-57 with Affidavit of John C. Jurgensen, Vol. II, 87-89.

Finally, the Contractors argue that the evidence that the Hug Paving Company was denied two subcontracts because of prime contractors' asserted desire to comply with the MBE provision establishes that the plaintiffs "have and continue to be, irreparably injured by [the MBE provision] * * *" because of the MBE competition. (Contractors' Brief at 40) The evidence introduced concerning the Hug Paving Co. [67/] related to two projects not the subject of this lawsuit and thus does not aid the Contractors in carrying their burden of showing that they are suffering irreparable injury in Cincinnati during the pendency of this lawsuit. See Mason County Medical Ass'n v. Knebel, 563 F.2d at 261. Cf. Cincinnati Electronics Corp. v. Kleppe, 509 F.2d 1080, 1089 (6th Cir. 1975). Moreover, this argument ignores the fact that the MBE requirement could be met by the purchase of materials and supplies from minority enterprises and that it is entirely possible that none of the named plaintiffs

67/ Neither the Hug Paving Company, its President Thomas J. Hug, nor its employee Mason Oglesby are named plaintiffs and the record does not establish that they are members of the plaintiff associations. See Vol. II, 93-96. Thus, it is unclear that the Contractors have any standing to claim that they are being injured pendente lite based upon the treatment accorded the Hug Paving Co. See Warth v. Seldin, supra.

and none of the plaintiff associations' members will be adversely affected in any way by the MBE requirement. As the Third Circuit held in Constructors Association of Western Pennsylvania v. Kreps, slip op. at 14, under similar facts:

> Insofar as it is the applicant for a preliminary injunction who bears the burden of establishing irreparable injury, neither this Court nor the trial judge would be warranted in assuming that * * * [the plaintiffs] rather than other contractors [and suppliers] bore the brunt of the enhanced competition provided by the MBEs. There is thus no evidence of the magnitude of the injury caused by such competition, if any.

III

THE GRANTING OF A PRELIMINARY INJUNCTION IN THIS CASE WOULD SERIOUSLY HARM OTHER INTERESTED PARTIES AND WOULD NOT BE IN THE PUBLIC INTEREST

The district court correctly found (App. 26-30) that the PWE was enacted for the two-fold purpose of promptly reducing unemployment and remedying the problem whereby "minority business received only 1 percent of the Federal contract dollar, despite repeated legislation, Executive orders and regulations mandating afirmative efforts to include minority contractors in the Federal contracts pool". 123 Cong. Rec. S. 3910 (daily ed. March 10, 1977) (remarks of Senator Brooke). Both of these Congressional determinations would have been nullified if the district court had granted an injunction in this case - to the detriment of other interested parties and the public interest. Under such

circumstances, the denial of a preliminary injunction was entirely appropriate. See Yakus v. United States, 321 U.S. 414, 440-441 (1944); M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1301-1303 (D.C. Cir. 1971). Cf. Garlock, Inc. v. United Seal Inc., 404 F.2d 256, 257 (6th Cir. 1968).

As we have developed supra, the PWE requires that all contracts be let and all construction begun within 90 days of grant-approval in order to achieve the act's purpose of spurring a sluggish economy and promptly reducing unemployment. If the district court had entered a preliminary injunction, the Congressional determination of the public interest as defined by the MBE provision would have been frustrated and a unique opportunity to rectify past discriminatory practices would be lost, since all contracts would likely have been let and construction begun on all projects before this case is concluded (Vol. II, 45). See 42 U.S.C. 6705(d). This de facto repeal of the MBE requirement by a preliminary injunction would have adversely affected the minority business enterprises by preventing them from acquiring the contracts and the experience which the PWE made available to them.

A preliminary injunction would also have frustrated the PWE's other important purpose - the prompt disbursement of public funds to spur the economy and reduce unemployment by building needed public worksprojects. An injunction against

the MBE provision would have necessitated at the least that the defendant grantees reopen bidding on any contracts not yet let and re-advertise the bid requirements for those contracts to reflect that the MBE provision was no longer in force (Vol. II, 83).[68/]

The district court found that the Cincinnati EDA projects would create 2400-2600 person years of employment, including the equivalent of a year of employment for 656 construction workers (App. 44). These projects involved the construction of essential facilities, the performance of needed services, the renovation of a seriously antiquated hospital tunnel, and the performance of badly needed street repairs (App. 43; Vol. II, 108-110). It was essential that these projects be begun immediately and the City of Cincinnati was not able to carry out the projects without the EDA funds in question (App. 43; Vol. II, 110). Any delay in building these projects would have adversely affected the public interest by slowing economic recovery (and the concomitant reduction in unemployment), as well as the meeting of the publics' needs for essential services.[69/] Moreover, delay would also directly affect

68/ On November 9, the date of the hearing on the motion for a preliminary injunction, bids for over seven million of the eleven million dollars involved had already been or were shortly to be opened (App. 43).

69/ Because of inflationary trends in the economy, any delay in implementing the PWE would also have increased the costs of construction, thus requiring that more state and local money be expended. The record shows that a delay of even one year would increase the Cincinnati project construction costs an additional two million dollars (Vol. II, 115).

the many unemployed construction workers who benefitted from prompt and expeditious action under Round II and who would have remained unemployed during the period caused by an injunction against the MBE provision. Thus, in light of the minimal showing of injury made by the contractors (see pp. 62-66, supra), the court's conclusion that "[t]he damaging effect upon the City and the public is by far the more serious, and weighs heavily against an injunction" (App. 44) is entirely correct.[70/]

70/ Courts faced with suits seeking preliminary injunctions against projects funded under Round I almost uniformly refused to delay the beginning of projects in light of the adverse impact which such an action would have had on the public interest. See, e.g., Lewis v. Richardson, 428 F. Supp. 1164, 1170 (D. Mass. 1977); Clark v. Richardson, 431 F. Supp. 105, 118-119 (D. N.J. 1977); City of Benton Harbor v. Richardson, 429 F. Supp. 1096 (W.D. Mich. 1977); City of Grand Rapids v. Richardson, 429 F. Supp 1087, 1095-1096 (W.D. Mich. 1977). Similarly, courts considering challenges to the MBE provision under Round II have refused to take any action which would adversely affect the public interest by interfering with projects funded under the Act. See, e.g., Montana Contractors Association v. Secretary of Commerce, 439 F. Supp. at 1335; Associated General Contractors of California v. Secretary of Commerce, 441 F. Supp. at 970-971; Carolinas Branch Associated General Contractors of America v. Kreps, 442 F. Supp. at 400; Florida East Coast Chapter of the Associated General Contractors of America v. Secretary of Commerce, supra. But cf. Wright Farms Construction Inc. v. Kreps, supra.

CONCLUSION

For the foregoing reasons the order of the district court denying a preliminary injunction should be affirmed.

Respectfully submitted,

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BRIEF ADDENDUM

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2335

CONSTRUCTORS ASSOCIATION OF WESTERN PENNSYLVANIA,

Appellant

v.

JUANITA KREPS, Secretary of Commerce of the United States of America,

MILTON J. SHAPP, Governor of the Commonwealth of Pennsylvania; and

RICHARD CALIGUIRI, Mayor of the City of Pittsburgh

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
C.A. No. 77-1035

Argued January 3, 1978

Before: ADAMS, GIBBONS and GARTH, *Circuit Judges*

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OPINION OF THE COURT

(Filed March 7, 1978)

ADAMS, *Circuit Judge*

The question in this case is whether the district court abused its discretion in declining to issue a preliminary injunction enjoining the United States Department of Commerce, the Commonwealth of Pennsylvania and the City of Pittsburgh from complying with a federal statute which requires 10% of all federal funds in specified public works projects to be allocated to "minority business enterprises."

A. FACTS

In July of 1976, Congress enacted the Local Public Works Capital Development and Investment Act (LPW).[1] The LPW established a program to distribute two billion dollars to state and local governments for public works projects in order to stimulate the national economy. In January of 1977, legislation was introduced to provide additional funding of the LPW, denominated "Round II." Because under "Round I" only 1% of the funds allocated to state and local governments had reached minority contractors, the LPW was amended in mid-1977 to require that

1. 42 U.S.C. § 6701-6710.

10% of the amount of each LPW grant be expended in connection with contracts with "minority business enterprises" (MBEs), unless the Secretary of Commerce waives the requirement.[2]

Under the LPW program, the City of Pittsburgh requested grants totaling $11,000,000, and the Department of Transportation, of the Commonwealth of Pennsylvania, applied for a similar amount of funds. By September 30, 1977, Pittsburgh had received approval for approximately $9,000,000 worth of projects, and the Department of Transportation had received approval of seven projects costing over $11,000,000. Since the LPW required that construction on any project begin within 90 days of the allocation of a grant, bidding for the Pittsburgh and the Department of Transportation projects proceeded on accelerated schedules.

On September 8, 1977, the Constructors Association of Western Pennsylvania, a 95-member non-profit associa-

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2. That amendment, 42 U.S.C. 6705(f)(2), provides as follows:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term minority business enterprises means a business at least 50 per centum of which is owned by minority group members or, in case of publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts.

The MBE set-aside has been the subject of considerable litigation. *See Associated General Constructors of California v. Secretary of Commerce,* 46 U.S.L.W. 2242 (November 1977, C.D. Cal.) (holding the provision unconstitutional and enjoining future enforcement); *Florida East Coast Chapter of Associated General Contractors of America v. Secretary of Commerce,* No. 77-8351 Civ. J.W. (S.D. Fla. November 1977) (refusing to grant preliminary injunction against enforcement of the provision); *Carolinas Branch, Associated General Contractors v. Kreps,* No. 77-2326 (Columbia Div. Dec. 1977) (denying preliminary injunction); *Fullilove v. Kreps,* 46 U.S.L.W. 2371 (S.D. N.Y. December 1977) (upholding constitutionality of MBE provision); *Montana Contractors Assn. v. Kreps,* No. C.A. 77-62-M (D. Mont. November 1977); *Wright Farms Construction Inc. v. Kreps,* 46 U.S.L.W. 2372 (D. Vt. December 1977) (holding MBE provision unconstitutional as applied to Vermont).

Although counsel did not mention the fact at oral argument, *Associated General Contractors of California v. Secretary of Commerce* is currently being appealed directly to the Supreme Court under 28 U.S.C. 1252. *See Associated General Contractors of California v. Secretary of Commerce,* No. 77-3737 AAH (C.D. Cal. slip op. of December 15, 1977).

tion of heavy construction contractors, filed a complaint in the District Court for the Western District of Pennsylvania attacking the legislation on the ground that the MBE requirement discriminated against its members, who were all white, in violation of the equal protection components of the Fifth and Fourteenth Amendments. The Association sought a temporary restraining order to prohibit Pittsburgh, the Transportation Department of the Commonwealth of Pennsylvania, and the Secretary of Commerce from enforcing or taking action to solicit or to accept bids based on the MBE requirement. The Association also requested injunctive and declaratory relief.

After notice and hearing, Judge Daniel J. Snyder on September 12, 1977, denied the request for a temporary restraining order. He held a hearing on September 30, 1977, regarding the plaintiff's request for a preliminary injunction. In an opinion dated October 13, 1977, Judge Snyder denied the request for a preliminary injunction. This appeal from that denial followed.[3]

B. The Standards

The narrow issue before us is whether the district court abused its discretion in refusing to grant the preliminary injunction sought by the plaintiff.[4] Our analysis

3. On October 17, 1977, the plaintiff filed a notice of appeal from the district court's order. Plaintiff also filed a motion for injunction pending appeal, which the district court denied. On October 19, 1977, this Court declined to grant the plaintiff's motion for an injunction pending appeal, referred the plaintiff's motion for summary reversal to a merits panel, and established an expedited briefing and argument schedule.

4. At oral argument, the Contractors asserted that the ruling below was a declaratory judgment as well as a denial of a preliminary injunction. The defendants disputed that contention. While the matter is not entirely free from doubt, *cf. Montana Contractors Assn. v. Secretary of Commerce*, Civ. No. 77-62 (D. Mont. Missoula Div. Nov. 7, 1977) slip op. (interpreting the decision by the trial court as "declaring the MBE provision constitutional"), it appears from the record before us that Judge Snyder intended to deal only with the propriety of issuing of a preliminary injunction.

In his order of September 13, 1977, Judge Snyder described the hearing which he set for September 30, as a "Hearing on Preliminary Injunction". Similarly, the order entered on October 13, 1977 made no mention of a declaratory judgment, but simply denied the request for preliminary injunction. In its "Motion for Injunction Pending Appeal" the plaintiff, on page 2, describes

of the plaintiff's contention that such an abuse did, in fact, occur is framed initially by the factors which the district court was required to take into account in evaluating an application for a preliminary injunction. "The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance, he will suffer irreparable injury and also that he is likely to prevail on the merits."[5] More specifically, this Court has consistently identified four factors which must be examined in ascertaining the propriety of a preliminary injunction:

> . . . the moving party must generally show (1) a reasonable probability of eventual success in the litigation and (2) that the movant will be irreparably injured *pendente lite* if relief is not granted. *Delaware River Port Auth. v. Transamerican Trailer Transp. Inc., supra* at 919-20; *see A. L. K. Corp. v. Columbia Pictures, Inc.*, 440 F.2d 761, 763 (3d Cir. 1971). Moreover, while the burden rests upon the moving party to make these two requisite showings, the district court "should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest." *Delaware River Auth. v. Transamerican Trailer Transp., Inc., supra* at 920.[6]

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4. (Cont'd.)
the October 13 order as denying the request for preliminary injunction, and in its notice of appeal plaintiff appealed from an order "denying plaintiffs request for a Preliminary Injunction."

We therefore interpret Judge Snyder's discussion of the constitutionality of the MBE provision as an evaluation of the plaintiff's "likelihood of success on the merits" in the context of a denial of preliminary injunctive relief, rather than in the context of a declaratory judgment.

5. *Doran v. Salem Inn*, 422 U.S. 922, 931 (1975); *see Sampson v. Murray*, 415 U.S. 61, 88-92 (1974); *Brown v. Chote*, 411 U.S. 452, 456 (1973); *Granny Goose Foods Inc. v. Teamsters*, 415 U.S. 423, 441 (1974).

6. *Oburn v. Shapp*, 521 F.2d 142, 147 (3d Cir. 1975); *A. O. Smith Corp. v. FTC*, 530 F.2d 515, 525 (3d Cir. 1976); *Ammond v. McGahn*, 532 F.2d 325, 329 (3d Cir. 1976); *Systems Operations, Inc. v. Scientific Games Development Corp.*, 555 F.2d 1131, 1141 (3d Cir. 1977); *Glasco v. Hills*, 558 F.2d 179, 180 (3d Cir. 1977). *See Sampson v. Murray*, 415 U.S. 61, 84 n.53 (1974).

While these factors structure the inquiry, however, no one aspect will necessarily determine its outcome. Rather, proper judgment entails a "delicate balancing" of all elements.[7] On the basis of the data before it, the district court must attempt to minimize the probable harm to legally protected interests between the time that the motion for a preliminary injunction is filed and the time of the final hearing.[8]

Thus, for example, in a situation where factors of irreparable harm, interests of third parties and public considerations strongly favor the moving party, an injunction might be appropriate "even though plaintiffs did not demonstrate as strong a likelihood of ultimate success as would generally be required."[9] In contrast, where the threatened irreparable injury is limited or is balanced to a substantial degree by countervailing injuries which would result to third parties, or to the public interest from the issuance of an injunction, "greater significance must be placed upon the likelihood that the party will ultimately succeed on the merits of the litigation."[10]

This Court's analysis is further constrained by the standard of review appropriate to appellate examination of a decision to deny a preliminary injunction. Absent an

7. *Delaware River Port Authority v. Transamerican Trailer Transport Inc.*, 501 F.2d 917, 920, 923-24 (3d Cir. 1974); *see Brown v. Chote*, 411 U.S. 452, 456 (1973) ("issuance of the injunction reflected the balance which that court reached in weighing those two factors"); *Oburn v. Shapp*, 521 F.2d 142 (3d Cir. 1975) (requiring "balancing of interests"); *A. O. Smith Corp. v. FTC*, 530 F.2d 515, 525 (3d Cir. 1976) *quoting United States Steel Corp. v. Fraternal Assn. of Steelhaulers*, 431 F.2d 1046, 1048 (3d Cir. 1963) ("a delicate balancing of the probabilities of ultimate success at final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief").

8. *See* Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525, 540-49 (1978) (suggesting that attempt to minimize probable harm to protected interests *pendente lite* synthesizes previous doctrine).

9. *Delaware River Port Auth. v. Transamerican Trailer Transport Inc.*, 501 F.2d 917 (1974). *See Atch. Top. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 822 n.15 (1973) (Plurality opinion of Marshall, Burger, Stewart and Blackmun, JJ.); *Semmes Motors Inc. v. Ford Mtr. Co.*, 4299-7 F.2d 1197, 1205-06 (2d Cir. 1970) (per Friendly, J.).

10. *Delaware River Port Auth. v. Transamerican Trailer Transport Inc.*, 501 F.2d 917 (3d Cir. 1974). *See Oburn v. Shapp*, 521 F.2d 142, 152 (3d Cir. 1975).

obvious error of law or a serious mistake in the consideration of proof, the trial court's decision will be reversed only for an abuse of discretion.[11]

In view of this test, we turn to an examination of the four components which guide judgment regarding the issuance of a preliminary injunction.

C. Likelihood of Success on the Merits

We accept, as did Judge Snyder, the plaintiff's contention that racial classifications by government are not to be taken lightly. Such governmental actions are in tension with fundamental ideals of our society, and run the risk of both devisiveness and oppression. Racial classifications may be upheld only in limited circumstances, and are subject, in constitutional parlance, to "strict scrutiny."[12]

The fact that the MBE provision embodies a racial classification, however, is not sufficient to guarantee the plaintiff in this case a likelihood of success, for the courts

11. *Glasco v. Hills,* 558 F.2d 179, 180 (3d Cir. 1977); *see Doran v. Salem Inn,* 422 U.S. 922, 932 (1975); *Brown v. Chote,* 411 U.S. 452, 457 (1973); *A. O. Smith Corp. v. FTC,* 530 F.2d 515, 525 (3d Cir. 1976); *Oburn v. Shapp,* 521 F.2d 142, 147 (3d Cir. 1975); *Scooper Dooper Inc. v. Kraftco,* 460 F.2d 1203 (3d Cir. 1972); *Delaware River Port Auth. v. Transamerican Trailer Transport, Inc.,* 501 F.2d 917, 920 (3d Cir. 1974).

12. Governmental actions which classify individuals according to race have, for the past two decades, been constitutionally suspect under the Fourteenth Amendment. *See Loving v. Virginia,* 388 U.S. 1, 11 (1967); *McLaughlin v. Florida,* 379 U.S. 184 (1964). The Supreme Court has stated that such actions can be justified only when they are necessary to vindicate "compelling state interests." *Id.*

The Supreme Court has also held that the due process clause of the Fifth Amendment embodies the equal protection principles of the Fourteenth. *E.g. Buckley v. Valeo,* 424 U.S. 1, 3 (1976); *Hampton v. Mow Sun Wong,* 426 U.S. 88, 99-100 (1976); *Washington v. Davis,* 426 U.S. 229, 239 (1976); *See Bolling v. Sharpe,* 347 U.S. 497 (1954); *Korematsu v. United States,* 323 U.S. 214 (1944).

We note, however, that both the Thirteenth and Fourteenth Amendments empower Congress to enact legislation to remedy racial discrimination, U.S. Const. Amendment XIII Sec. 2; Amendment XIV Sec. 5; *cf. Jones v. Alfred A. Mayer Co.,* 392 U.S. 409, 437-44 (1968); *Runyon v. McCrary,* 427 U.S. 160, 168-72 (1976), and the Supreme Court has held that such authorization may supersede the limitations of previous amendments. *Fitzpatrick v. Bitzer,* 427 U.S. 445, 451-56 (1976) (legislation adopted to remedy employment discrimination supersedes Eleventh Amendment). *Cf. Hampton v. Mow Sun Wong,* 426 U.S. 88, 100 (1976) (protection of Fifth Amendment is not coextensive with Fourteenth; overriding national interests may justify federal legislation unacceptable for state).

have upheld the use of racial classification by government in attempts to remedy the effects of past discrimination. Thus, for example, in *E.E.O.C. v. American Telephone and Telegraph Co.*,[13] this Court rejected a constitutional challenge to the propriety of a consent decree which provided for the overriding of a seniority system when hiring failed to meet specified racial, sexual and ethnic "targets." We noted that the federal interest in "remedying the effect of a particular pattern of employment discrimination" and in "having all groups fairly represented in employment" was sufficient to justify the use of quotas to accomplish those goals.[14]

Likewise, in *Contractors Assn. of Erie, Pa. v. Secretary of Labor,* 442 F.2d 159, 176-77 (3d Cir. 1971), we upheld the remedial use of racial employment "goals" by the executive without a prior adjudication that discrimination existed.[15] Most recently, in *United Jewish Organizations v. Carey,*[16] the Supreme Court sustained a deliberate use of race by government officials in drawing voting districts so as to achieve 65% majorities of nonwhite voters in such districts. Three Justices held that even aside from the commands of the Voting Rights Act, such a use of racial criteria was permissible where it produced no stigma, and "did not minimize or unfairly cancel out white voting strength."[17] Two other Justices held the

13. 556 F.2d 167 (3d Cir. 1977).

14. 556 F.2d at 179-180. Similar use of racial criteria in attempts to remedy judicially identified discrimination have been approved in other situations. *See e.g. Franks v. Bowman Transportation Co.,* 424 U.S. 747, 778 (1976); *Swann v. Bd. of Education,* 402 U.S. 1 (1971); *United States v. Int. Union of Elevator Const.,* 538 F.2d 1012, 1018-20 (3d Cir. 1976); *Erie Human Relations Commn. v. Tullio,* 493 F.2d 371 (3d Cir. 1974); *id.* at 375 (Adams, J. concurring), *cf. Oburn v. Shapp,* 521 F.2d 142, 149 (3d Cir. 1975).

15. *Cf. Kahn v. Shevin,* 416 U.S. 351 (1974) (special tax exemption for widows permissible to remedy general discrimination against women in economic system); *Califano v. Webster,* 45 U.S.L.W. 3630 (1977) (preferential social security provisions upheld as remedy for general economic discrimination against women); *Morton v. Mancari,* 417 U.S. 535 (1974) (preferential hiring of American Indians upheld).

16. 430 U.S. 144 (1977).

17. 430 U.S. at 165 (opinion of White, J., joined by Rehnquist, and Stevens, JJ. on this point).

action to be congruent with the Fourteenth Amendment because there was neither evidence of "purposeful discrimination against white voters" nor evidence that the plan "undervalued the political power of white voters"—a predicate from which such a discriminatory purpose might be inferred.[18] Finally, Justice Brennan expressed the opinion that "if and when a decision-maker embarks on a policy of benign racial sorting, he must weigh the concerns [of the negative aspects of quotas] against the need for effective social policies promoting racial justice in a society beset by deep-rooted racial inequities." 430 U.S. 144 at 175.

From such decisions, which provide our guidance at least until the *Bakke* case is decided,[19] it is clear that Judge Snyder properly undertook a careful examination of the purposes and effects of the MBE program. Equally evident, however, is the conclusion that under such investigation, the plaintiff has not presented a strong likelihood of success on the merits. The legislative history of the MBE provision gives no indication that the drafters contemplated "purposeful discrimination" against white contractors.[20] Rather, the set-aside was designed to "begin to redress" what Congress perceived to be the continuing economic impact of racial discrimination.[21] Such a purpose might

18. *Id.* at 179-80 (Stewart, J. and Powell, J.).

19. *Bakke v. Regents of University of California,* 18 Cal. 3d 34, 533 F.2d 1152 (1976) *cert. granted* 429 U.S. 1090 *argued* October 17, 1977, 46 U.S.L.W. 3249 (1977).

20. The goals professed in debate included "building a viable minority business system," Remarks of Rep. Mitchell, 123 Cong. Rec. H. 1437 (daily ed. Feb. 24, 1977); "an equitable relationship for minority contractors and suppliers to be able to participate," Remarks of Rep. Roe, *id.* at H. 1437; and "promoting a sense of economic equality in this nation," Remarks of Rep. Biaggi, *id.* at H. 1440.

The concern voiced by Rep. Harsha that the set-aside might discriminate against non-minorities, *id.* at H. 1439, was assuaged by an amendment intended to assure that the MBE provision applied only to areas in which qualified MBEs were available.

21. Remarks of Rep. Mitchell *id.* at H. 1440. *See* Remarks of Rep. Mitchell *id.* at H. 1437 (under current program, minorities are "cut off from contracts" because they are "new on the scene"); at H. 1440 ("minority contractors and businessmen who are trying to enter into the bidding process . . . get the 'works' almost every time"); Remarks of Rep. Harsha ("We are

well be sufficient to allow the legislature to take notice of findings by the government in other aspects of the national anti-discrimination effort to the effect that minority contractors labor under handicaps requiring remedial action.[22] Moreover, the debates in connection with the MBE set-aside evidence a Congressional determination that other attempts to encourage minority businesses have not proved successful.[23] We therefore do not consider it error for Judge Snyder to have ascertained—at least on the basis of the material submitted to him—that the challenged provision was necessary to accomplish Congress' remedial objectives.[24]

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21. (Cont'd.)
talking about people in the minorities and deprived") *id.* at H. 1440; Remarks of Rep. Biaggi ("This nation's record with respect to providing opportunities for minority business is a sorry one"), *id.* at H. 1441.

22. *See e.g.* Summary of Activities of the Committee on Small Business, House of Representatives, 94th Cong. 2d Sess., H. Rep. 94-1791, 182-83 (1977); U.S. Commn. on Civil Rights, Minorities and Women as Government Contractors (1977); *cf. Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976) (". . . if the rule were expressly mandated by the Congress or the President we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption.").

23. *E.g.* Remarks of Rep. Mitchell, 123 Cong. Rec. H. 1437 (daily ed. Feb. 24, 1977).

It should be noted that the suggestions by the plaintiffs in this case of "less intrusive" alternatives which are available, such as government bonding of minority contractors, would appear to involve no less governmental allocation on the basis of race than the statutes to which they object in the first instance. Such "alternatives" also distribute scarce federal funds on the basis of racial classifications, but merely do not allocate such money out of public works projects.

24. Judge Snyder stated:

> . . . capital and technical assistance programs do nothing to overcome barriers existing due to lack of confidence in minority business ability or racial prejudice and misconceptions.
>
> Some other mechanism is therefore needed to guarantee participation by available and qualified minority businesses to give them a foothold in the competitive market. The 1% level which alternative programs have been unable to increase, at least in the short run, will not afford the opportunities to develop the experience, skills and reputation looked for in a competitive market. A percentage set-aside is the only effective way to crack the competitive barriers and end the cycle which continually excludes minority businesses from proportionate participation. This MBE provision will afford minority businesses this heretofore lacking opportunity to acquire experience, establish a reputation and rebut misconceptions about minority business capability.

Slip op. at 23-25, 376a-378a.

Thus, at the level of analysis appropriate for a preliminary injunction, we cannot say that Judge Snyder erred in holding that the plaintiff failed to demonstrate a significant likelihood of succeeding on the merits.

D. Irreparable Injury

Nor is the modest probability of plaintiff's success outweighed by a greater potential for irreparable injury to the Association and its members. At the hearing the plaintiff alleged three sources of irreparable injury to its member contractors. On examination none of these claims requires reversal of the district court's order.

First, the plaintiff asserted that its members, who are white, were deprived of the profits to be garnered from LPW construction contracts when they were forced to subcontract to meet the MBE requirements. The only example in support of this contention which was adduced at trial was the Brayman Construction Company, the recipient of a $165,000 contract to build a bridge in Mercer County. The Vice President of Brayman testified that in order to meet the minority set-aside requirement, Brayman subcontracted $15,600 of work which Brayman otherwise would have done itself to R. L. Johnson Co., a minority contractor. Since, however, Brayman owned 49% of Johnson, in effect the contract represented only $8,000 of lost business. Further, as to that $8,000, the Vice President of Brayman testified that he could make no estimate whether a profit could be anticipated.[25] It was not an abuse of discretion for Judge Snyder to determine that such a limited or conjectural "injury" was not sufficient to support issuance of a preliminary injunction.[26]

Second, the plaintiff asserted that its members would be damaged by being forced to seek out and deal with minority contractors with whom they would ordinarily not

25. 231a.

26. *See Glasco v. Hills,* 558 F.2d 179, 181-82 (3d Cir. 1977); *A. O. Smith v. FTC,* 530 F.2d 515, 527-28 (3d Cir. 1976); *cf. Doran v. Salem Inn,* 422 U.S. 922, 932 (1975) (probable bankruptcy was irreparable injury).

do business, thereby disrupting their commercial relationships.[27] There is no evidence in the record that such a change in operating procedures would significantly burden the business enterprises of the Association's members. Indeed, the only "injury" alleged is precisely the result which the MBE provision seeks to accomplish: established contractors are required to admit minorities into their circle of business dealings. While such compliance with the statutory provision represents an alteration in past practices, it does not rise to the level of irreparable injury. In this connection, we note the comments in *A. O. Smith Corp. v. FTC:*

> Any time a corporation complies with a government regulation which requires corporate action, it spends money and loses profits; yet it would hardly be contended that proof of such an injury alone would satisfy the requisite for a preliminary injunction. Rather, in cases like these, courts ought to harken to the basic principle of equity that the threatened injury must be, in some way, peculiar.[28]

No such "peculiar" injury appears in the record here.

Finally, the plaintiff argued before Judge Snyder that inasmuch as its members would normally obtain subcontracts from LPW-type projects, such members would be irreparably damaged by being placed at a competitive disadvantage *vis-à-vis* minority contractors. Since the general contractors would be forced to give priority to minority contractors in order to meet the MBE set-aside, it was maintained that Association members would be unable to obtain contracts.

This contention suffers from a number of defects. While the plaintiff's scenario has some plausibility, it is

27. *See* Judge Snyder's opinion, p. 12, 362a (contractors "are forced . . . to add race as at least one if not the primary factor in the complexity of considerations involved in the business judgment, thus disturbing the balance of other factors contractors normally weigh"); Plaintiff's Brief p. 12 ("the survival of businesses which enter such contracts is in serious jeopardy").

28. 530 F.2d 515, 527 (3d Cir. 1976).

without substantial support in the record that was before Judge Snyder. The only instance adduced of an MBE who obtained a subcontract as a result of the set-aside was the case of the Brayman-Johnson contract discussed above. And while there was testimony that the members of the Association had in the past obtained between 40% and 80% of the heavy and highway construction contracts let by the Commonwealth and Pittsburgh in any given year, the testimony did not indicate which of these percentages represented *subcontracts* for which Association members would compete with MBEs. Insofar as it is the applicant for a preliminary injunction who bears the burden of establishing irreparable injury,[29] neither this Court nor the trial judge would be warranted in assuming that members of the Association, rather than other contractors, bore the brunt of the enhanced competition provided by the MBEs. There is thus no evidence of the magnitude of the injury caused by such competition, if any.

Moreover, to the extent that such subcontractors would be "injured" by the statute, minority businessmen would be equally injured by an injunction against the MBE set-aside. For every contract that the Association members lose to an MBE, under the statute, MBEs would presumably lose a contract to Association members under the injunction. Thus, in view of the lack of a strong showing of probability of success on the merits, any irreparable injury that has been demonstrated is offset by the countervailing possibility of improper harm to the beneficiaries of the Act.[30]

Finally, since under the LPW, construction of the projects was to have commenced by no later than December 29, 1977,[31] any additional injury that could occur prior to

29. *A. O. Smith Corp. v. FTC*, 530 F.2d 515, 525 (3d Cir. 1976).

30. *Cf. Oburn v. Shapp*, 521 F.2d 142, 152 (3d Cir. 1976) (minorities given preference in admission to state trooper training program would be harmed to the extent that white applicants would be helped by preliminary injunction); *Delaware River Port Auth. v. Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 924 (3d Cir. 1974) (Competitive ports would be injured to the extent that plaintiffs would be aided by preliminary injunction).

31. *See* 42 U.S.C. 6705(d).

the federal hearing would, at least as the controversy was presented to us, be minimal.[32]

Thus, when considered in light of the marginal showing of probable success on the merits which the plaintiff tendered, we cannot say it was an abuse of discretion for the district court to determine that plaintiff had shown no irreparable injury sufficient to justify granting a preliminary injunction.[33]

E. The Public Interest

An examination of the public interest consideration in the situation before us also supports the trial judge's exercise of discretion. The purpose of the LPW is to furnish prompt economic stimulation to a flagging economy, as well as to provide needed public works. Indeed, the Act itself stipulated that construction was to begin on funded projects no later than 90 days after a grant had been made. Delay in providing such stimulation would defeat a major purpose of the Act by depriving of their jobs individuals who might otherwise be employed, and by slowing the recovery of the economy in general.

The federal defendants argue that if the MBE provision falls, so must the entire Act, and a preliminary injunction against the MBE set-aside would deprive citizens of the economic benefits which Congress wished to confer. This is so, they maintain, because a prime purpose of the PWE was to afford relief from the unemployment which particularly afflicts minority communities.

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32. *Cf. Meccano Ltd. v. John Wanamaker,* 253 U.S. 136, 141-42 (1920). We were informed at oral argument that in Pittsburgh, all 18 of the projects at issue had been advertised, 16 had already been awarded, and the award of the remaining two bids was then imminent.

33. Plaintiff also contends that its members are irreparably injured as a result of being denied their equal protection rights under the Fifth Amendment. This argument is undercut by the weakness of the showing of probable success on the merits. *See Oburn v. Shapp,* 521 F.2d 142, 151 (3d Cir. 1975). It should be noted that, unlike First Amendment rights whose deprivation even for minimal periods of time constitutes irreparable injury, *see Elrod v. Burns,* 427 U.S. 347, 372-73 (1976), a denial of equal protection rights may be more or less serious depending on the other injuries which accompany such deprivation.

Even if the MBE provision is severable, however, an injunction against its enforcement, at a time when projects had already been advertised, would have resulted in administrative confusion, and hence, inexorably, in delay. Such a postponement of the benefits of the Act would clearly have been against the public interest.

These considerations buttress our conclusion that Judge Snyder's determination was not an abuse of discretion.[34]

F. Conclusion

Since we find no abuse of discretion, no error in applying the law, and no clear mistake in the consideration of the proof, the order of the district court will be affirmed.

34. *See Yakus v. United States,* 321 U.S. 414, 440-41 (1944); *Oburn v. Shapp,* 521 F.2d 142, 151-52 (3d Cir. 1975).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 1978, I served two copies of the foregoing Brief for the Federal Appellees by United States Mail, first class, postage prepaid on counsel for the parties as follows:

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