IV. THE 1977 MBE PROVISION DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Congress did not abuse its special authority and competence when it enacted the 1977 MBE provision.[37/] That provision was a reasonable response to

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37/ Petitioners' argument that the 1977 MBE provision violates Title VI of the Civil Rights Act of 1964 and should therefore be struck down is absolutely frivolous. Because repeals by implication are not favored, Morton v. Mancari, 417 U.S. 535, 549-51 (1974); Universal Interpretative Shuttle Corp. v. Washington Metropolitan Area Transit Commission, 393 U.S. 186, 193 (1968); Posadas v. National City Bank, 296 U.S. 497, 503 (1936); Wood v. United States, 41 U.S.(16 Pet.) 342, 362-63 (1842); because the very idea of repeal of a later statute by an earlier statute borders on the ludicrous, see Araya v. McLelland, 525 F.2d 1194, 1196 (5th Cir. 1976); International Union of Electrical, Radio and Machine Workers v. N.L.R.B., 289 F.2d 757, 761 (D.C.Cir. 1960); and because the MBE provision is the more specific of the two statutes, regardless of the date of passage, Morton v. Mancari, 417 U.S. at 550-551; Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961), the MBE provision is not rendered inoperative by Title VI. As this Court has said, "[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." Morton v. Mancari, 417 U.S. at 551.

existing conditions, including the exclusion of minorities from government contracts and the notorious discrimination in the construction industry.

The MBE provision at issue in this case is not subject to the criticism that it is an "amorphous" response to social problems. University of California Regents v. Bakke, 438 U.S. at 307 (Powell, J.). To the contrary, the provision was "far more focused than the remedying of the effects of 'societal discrimination....'" Id.[38/]

38/ It is the position of the Lawyers' Committee that societal discrimination would by itself provide a sound basis for the limited preference of the 1977 MBE provision. See, e.g., University of California Regents v. Bakke, 438 U.S. at 362-73 (Brennan, J.); id. at 387-98 (Marshall, J.); id. at 402 (Blackmun, J.). This question need not be resolved in this case, however, in view of the specific past discrimination in government funded construction work which is addressed by the 1977 MBE provision.

It is, of course, not necessary for Congress to find discrimination on a case-by-case basis on the part of each private individual and government affected by the 1977 MBE provision. In utilizing the constitutional authority vested in it by the thirteenth and fourteenth amendments and the spending power, Congress, as this Court

(footnote continued)

(footnote continued)

has recognized, does not and cannot function as would a trial court or administrative agency in an adjudicatory proceeding. See, e.g., Katzenbach v. McClung, 379 U.S. 294, 302-05 (1964); South Carolina v. Katzenbach, 383 U.S. 301, 328-29 (1966); Oregon v. Mitchell, 400 U.S. 112, 133-34 (1970) (Black, J.); id. at 146-47 (Douglas, J.); id. at 216-17 (Harlan, J.); id. at 232-34 (Brennan, J.); id. at 283-84 (Stewart, J.). United Jewish Organizations v. Carey, 430 U.S. 144, 156-57, 161 (1977).

While Congress need not respond to discrimination on a state-by-state basis, it in fact had evidence concerning MBE's in New York State when it enacted the 1977 MBE provision. See p. 44 n.15 supra (effect of New York City fiscal crisis on MBE's); p. 49 n.17 supra (inadequacies of New York City SBA 8(a) office); Hearings on Small Business Administration 8(a) Contract Procurement Program Before the Senate Select Comm. on Small Business, 94th Cong., 2d Sess. 141 (Jan. 21, 1976) (testimony that New York State and City MBE contracting program was lacking); Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, Civil Rights Aspects of General Revenue Sharing 6 (Comm. Print Nov. 1975) (New York City guilty of discriminatory employment practices). Cf. U.S. Commission on Civil Rights, The Unfinished Business, Twenty Years Later...A report submitted to the U.S. Commission on Civil Rights by its Fifty-One State Advisory Committees 142 (Sept. 1977) (implementation of New York State MBE subcontracting program ineffective despite high number of minorities in state; furthermore, "New York City's contract compliance program has been left in shambles by the State courts").

The 1977 MBE provision was directed at a specific segment of society's activities where past discrimination was notorious. It dealt with the construction industry, where past discrimination has been rife. See pp. 61 to 64 supra; United Steelworkers v. Weber, 99 S.Ct. at 2725 n.1; id. at 2732 n.* (Blackmun, J., concurring); id. at 2735 (Burger, C.J., dissenting). Employment discrimination in the building trades has prevented and delayed the creation of minority construction businesses, since contractors have traditionally gained necessary familiarity with construction practices as tradesmen-employees. See p. 64 & n.29 supra. Such discriminatory inhibition of the formation of minority construction enterprises means that they are presently hampered by inexperience and small size, so that even a facially "neutral" system would operate to "perpetuate...past inequities." See p. 46 supra. These problems are exacerbated by the present unwillingness of white contractors to deal with minority

enterprises.[39] See, e.g., p. 45 n.15, p. 48 supra. Letting contracts to such white contractors would also exacerbate and perpetuate the effects of discrimination on the employment of minorities as construction workers; white firms, even years after the passage of Title VII, are far less likely than MBE's to have minority employees. See, e.g., pp. 18-19, p. 63 n.28, p. 73 n.34 supra.

39/ The reasonableness of Congress' concerns is buttressed by petitioners' evidence in this case, which indicates the existence of an "old boy" network effectively excluding minority businesses from participation in construction work. One general contractor testified that he did not even solicit MBE's to bid on subcontracts: there were four non-minority firms which he "generally contact[ed] with respect to getting a price for performance of" certain work. App. 65a-66a. An affidavit submitted by an industry official in support of petitioners' request for injunctive relief claimed that irreparable injury occurred when petitioners were required to "enter into subcontracts with subcontractors ...other than those with whom a long standing relationship of trust and confidence has been established." App. 29a.

Such thinking reflects a system operating to exclude minority enterprises, where contractors deem it irreparable harm to deal with a new enterprise and where MBE's are not even requested to submit bids. See United States v. Georgia Power Co., 474 F.2d 906, 925-26 (5th Cir. 1973) (word-of-mouth hiring violates Title VII by isolating blacks from 'web of information' in the company).

The 1977 MBE provision, moreover, was not directed at the construction industry at large, but only at a specific and limited portion of that industry's activities: the performance of public works contracts. Congress had evidence of the effective exclusion of minorities from government contracting. There was evidence of discrimination by government contracting officers, including, in particular, discrimination by state and local contracting officers in the disbursement of federal funds. See pp. 41-43 n.14, pp. 43, 48, 49, 56-61 supra. All of this evidence, and more, was before Congress when it enacted the 1977 MBE provision.[40/]

Congress' response to the conditions it perceived was temperate and reasonable.

40/ Because of the substantial evidence that the 1977 MBE provision was necessitated by past and present discrimination in the construction industry and in the awarding of government contracts, it cannot be said that the provision "stigmatizes" minorities. It is a response to perceived discrimination in a narrowly circumscribed arena, and not a response to any presumption that minorities are "inferior" or incapable of succeeding in a nondiscriminatory environment. See University of California Regents v. Bakke, 438 U.S. at 357-58, 360, 375-76 (Brennan, J.).

The MBE provision applied only to the 1977 PWEA amendments, not to all government projects. It was therefore temporary and self-limiting, with the result that its impact on white contractors was transitory. See United Steelworkers v. Weber, 99 S.Ct. at 2730; id. at 2734 (Blackmun, J., concurring). Moreover, the short term nature of the 1977 set-aside meant that its effects on both whites and minorities could be evaluated before similar provisions were considered. See Oregon v. Mitchell, 400 U.S. at 216-17 (Harlan, J.). The MBE provision was, moreover, reasonable in that it was limited to a maximum of ten percent of 1977 PWEA funds, less than the percentage of minority citizens in our nation.[41/]

41/ See United Steelworkers v. Weber, 99 S.Ct. at 2732 n.* (Blackmun, J., concurring) (black population alone is 11.7 percent in 1970).

The 10 percent figure is, of course, greater than the percentage of construction enterprises owned by minorities. This fact does not undercut the reasonableness of the MBE provision, because the number of minority construction firms has been impaired by discrimination. See, e.g., pp. 39, 46, 64 & n.29 supra.

Cf. University of California Regents v. Bakke, 438 U.S. at 374 n.58 (Brennan, J.). Even this ten percent figure was not cast in stone; it could be waived when the low percentage of minority contractors in a trade area made the 10 percent figure infeasible. Indeed, the ten percent of 1977 PWEA funds in fact set aside amounted to only one quarter of one percent (.25 percent) of annual construction expenditures in the United States. Fullilove v. Kreps, 584 F.2d 600, 607 (2d Cir. 1978). Thus, the impact on white contractors was minimal in view of the goals of the provision.

The 1977 MBE provision did not "unnecessarily trammel the interests of" white contractors. United Steelworkers v. Weber, 99 S.Ct. at 2730. It did not mandate the displacement of white contractors from projects previously available to them, or otherwise frustrate their existing expectations. See id. Congress did not impose a new minority business requirement on existing federal programs; it merely set aside ten percent of entirely new federal funds which would otherwise not have been available.

After passage of the 1977 PWEA amendments, white contractors found themselves not with less than they previously had but rather with more, access to 3.6 billion new federal dollars. These benefits were perhaps not as great as they could have been, absent the 1977 MBE provision, but they were still substantial,[42/] cf. Geduldig v. Aiello, 417 U.S. 484 (1974); General Electric Co. v. Gilbert, 429 U.S. 125 (1976), and Congress' allocation of funds was not unreasonable.

Petitioners' criticisms of the 1977 MBE provision are, in essence, policy arguments more properly directed

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42/ Moreover, since the 1977 MBE provision affected only one-quarter of one percent of this Nation's construction work, for only a single year, it did not prevent white contractors from pursuing their chosen professions. White contractors had complete access to 99.75 percent of the work available during the term of the MBE provision, and to all work thereafter. In contrast to exclusion from a program leading to a medical degree, see University of California Regents v. Bakke, supra, the MBE program had no residual effect on succeeding years for white contractors.

to Congress than to this Court.[43/] Petitioners argue that Congress erred in adopting the 1977 MBE provision because it was "non-effective", Building Contractors' Brief at 19, while they simultaneously urge other "less drastic" means, including tax incentives to encourage joint ventures between minority enterprises and established contractors; technical, financial and educational assistance programs; the provision of retired or other experienced construction industry executives to MBE's in the manner of Junior Achievement; assistance to MBE's in securing bonding, and so on, id. at 24-31. See also Brief for Petitioners at 26-27 (recommending that Commerce Department ensure that business in high unemployment areas become "aware of" federal projects, and assist such businesses in "familiarizing

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43/ The evidence on which the 1977 MBE provision was premised would enable it to survive "strict scrutiny", were the Court to analyze the provision in those terms. However, since this case involves an appropriate response to discrimination by Congress acting pursuant to its express mandate under the thirteenth and fourteenth amendments, the MBE provision need not be analyzed in such terms. See pp. 76 to 84 supra.

themselves" with general contractors who bid on federal projects).

Congress has in fact already adopted various of these proposals.[44/] But it had ample reason not to rely exclusively on these alternatives to reverse the historic exclusion of minorities from government contracts. Petitioners' recommendations, first of all, ignore

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44/ It was also rational to conclude that the stringent time limits necessarily imposed on 1977 PWEA expenditures made impossible the broader categorization of beneficiaries used in the 1978 Small Business Act amendments, which petitioners apparently approve. Brief for Petitioners at 27-28; Building Contractors' Brief at 29-30.

The 1978 Small Business Act amendments, as petitioners point out, favor "socially and economically disadvantaged individuals", and not exclusively minorities. While this broader category of beneficiaries may be politic for an ongoing program such as the Small Business Act, it would not have been reasonable for a short-term program operating under severe time constraints. This is apparent from the SBA procedure now necessary to determine which individuals other than minorities are "socially and economically disadvantaged", 44 Fed. Reg. 30673 (May 29, 1979)(to be codified in 13 CFR Part 124), a procedure clearly impracticable in the context of the 1977 PWEA program.

the fundamental fact that rapid disbursement of federal monies was integral to the 1977 PWEA amendments. See pp. 69 to 71 supra. Congress could have readily found that none of the recommended alternatives, such as tax incentives and assistance programs, would have had any effect at all within the stringent time limits required by the Act.

Moreover, even were the 1977 MBE provision not compelled by temporal constraints, Congress could still have readily determined that it was necessary. Petitioners' recomendations are strikingly similar to the SBA programs which had been tried in the past and which had been ineffective in curing the effects of discrimination against MBE's seeking access to government contracts. The SBA and OMBE had long been charged with the obligation of providing MBE assistance, MESBIC's had been charged with the responsibility of encouraging investment in minority enterprises, private contractors had been required to use "good faith" efforts to subcontract to MBE's, and "goals" for MBE utilization had been

mandated. Yet, as was made clear during the debates on the 1977 MBE provision, see, e.g., pp. 13 to 15, 18 to 19 supra, and was amply supported by Congress' experience, see, e.g., pp. 41-43 n.14, p. 45 n.15, p. 48, p. 49 n.17, p. 53 n.19 supra, the net effect of all these programs on minority access to government contracts had been minimal. While each of petitioners' suggestions may be helpful, and while each may address a portion of the problems faced by MBE's, Congress had ample reason to conclude that none of them would have effectively remedied the effects of past discrimination against MBE's in the construction industry or the unwarranted reluctance of government contracting officers and established white contractors to deal with minority enterprises. See 123 Cong. Rec. H1436-37, 1438 (daily ed. Feb. 24, 1977) (remarks of Rep. Mitchell). It is reasonable to conclude that petitioners' recommendations could be called "less drastic" than the 1977 MBE provision for only two reasons: they would be not

only too slow but also ultimately ineffective.[45/]

45/ It is the position of the Lawyers' Committee that Congress could proceed on an industry-wide basis, that the facts before Congress amply justified its nationwide approach, and that these same facts are appropriate for judicial notice. But if, on the facts of the record, this Court were to entertain doubts about the constitutionality of the 1977 MBE provision, as it has affected the particular Petitioners before this Court, then it should remand this case to the district court with instructions to allow Respondent Secretary of Commerce an opportunity for a full trial on the merits.

For if, despite the presumption of constitutionality, Respondent is required to place on the record facts supporting the 1977 MBE provision, extant when Congress adopted it, then that opportunity was denied Respondent when the district judge consolidated the hearing on a preliminary injunction with a trial on the merits, and held both on December 2, 1977, two days after the complaint was filed. See App. 47A-49A.

A remand would permit Respondent Secretary of Commerce to put on the record the abundant evidence, some of which has been cited in this Brief, which was before Congress. Then Petitioners would be unable to make a claim that Respondent had failed to give them "a demonstration that the challenged classification is necessary to promote a substantial state interest." University of California Regents v. Bakke, 438 U.S. at 320 (Powell, J.).

CONCLUSION

For the foregoing reasons, amicus respectfully submits that the judgment below should be affirmed.

Respectfully submitted,

John B. Jones, Jr.
Norman Redlich
Co-Chairmen

William L. Robinson
Richard T. Seymour
Norman J. Chachkin
Staff Attorneys

Lawyers' Committee for
Civil Rights Under Law
733-15th Street, N.W.
Washington, D.C. 20005

Mark Aaronson
San Francisco
Lawyers' Committee
for Urban Affairs

Of Counsel

Laurence S. Fordham
Henry P. Monaghan
Richard W. Benka
Robert D. Goldstein
Foley, Hoag & Eliot
10 Post Office Square
Boston, Massachusetts 02109

Attorneys for Amicus Curiae