IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1007

H. EARL FULLILOVE, et al., *Petitioners*

v.

JUANITA M. KREPS, Secretary of Commerce, et al., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE SECRETARY OF COMMERCE IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23a-41a) is reported at 584 F.2d 600. The opinion of the district court (Pet. App. 1a-22a) is reported at 443 F. Supp. 253.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1978. The petition for a writ of

certiorari was filed on December 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the minority business enterprise provision of the Public Works Employment Act of 1977 is invalid under the Fifth Amendment to the Constitution or Title VI of the Civil Rights Act of 1964.

STATUTE INVOLVED

Section 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116, 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 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.

STATEMENT

1. In the summer of 1976, Congress enacted legislation designed to alleviate national unemployment and to stimulate the economy by distributing two billion dollars to state and local governments for public works projects. The legislation, entitled the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999, charged the Secretary of Commerce with the responsibility of dispersing the funds through the Economic Development Administration. The Act provided that the funds were to be available for the period ending September 30, 1977 (Section 111, 90 Stat. 1002). In May 1977 Congress amended the 1976 Act by authorizing an additional four billion dollars for similar projects. The total of six billion dollars was to be available for the period ending December 31, 1978 (42 U.S.C. 6710).

The new statute, entitled the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116, made various changes in the 1976 Act, including the addition of Section 103(f)(2), 42 U.S.C. 6705(f)(2), the "minority business enterprise" provision. Section 103(f)(2) provided that "[e]xcept to the extent that the Secretary determines otherwise, no grant shall be made under the Act * * * 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." The circumstances under which the Secretary will waive the 10 percent minority set-aside requirement are de-

tailed in regulations promulgated under the Act (13 C.F.R. 317.19(b)(2)). Congress ensured that funds appropriated under the Act would reach the private sector by requiring state and local grantees to contract with private contractors for the construction of the projects. Section 103(e)(1), 91 Stat. 116, 42 U.S.C. 6705(e)(1).

As authorized by the Act, the Secretary of Commerce issued regulations to implement the minority business enterprise provision. The regulations provided (13 C.F.R. 317.19(b), 42 Fed. Reg. 27434 (1977)):

> (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.
>
> (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.

All grants authorized by the Act were awarded by September 30, 1977. The State of New York and New York City were among the grantees awarded funds.[1] Congress has not authorized or appropriated

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[1] Information submitted at trial reveals that New York State received at least 45 grants totalling $42,119,000 from funds appropriated in 1977 and that New York City received at least 83 grants totalling $193,838,646.

any additional funds to be awarded, and no further funds have been granted or remain to be granted for projects governed by the minority business enterprise provision.

2. On November 30, 1977, petitioners—four associations of construction firms and a mechanical contracting firm specializing in heating and air conditioning work—filed this action in the United States District Court for the Southern District of New York, seeking injunctive and declaratory relief. They contended that Section 103(f)(2) establishes an impermissible racial classification and violates the Fifth and Fourteenth Amendments, the Reconstruction civil rights statutes (42 U.S.C. 1981, 1983, 1985), and Titles VI and VII of the Civil Rights Act of 1964 (42 U.S.C. 2000d, 2000e). Petitioners sought to enjoin the Secretary of Commerce and the state and local entities that had received funds distributed under the Act from enforcing the minority business enterprise provision in Section 103(f)(2). Petitioners also sought a declaratory judgment that Section 103(f)(2) is "unconstitutional, illegal, void and unenforceable."

The district court denied all requests for relief and dismissed the complaint (Pet. App. 1a-22a). The court held that the minority business enterprise provision of the Act was a constitutionally valid exercise of congressional power to remedy the effects of past discrimination in the construction industry (Pet. App. 5a). The court acknowledged that this provision "distinguishes among various business enterprises, at least in part, based upon the racial background of

their principals" (Pet. App. 9a), but it concluded that the race-conscious provision served "a compelling state interest" (Pet. App. 9a, 10a-17a) and that "other available means of accomplishing the objective would not, in practice, prove to be less discriminatory" (Pet. App. 9a, 17a-20a).

The court of appeals affirmed (Pet. App. 23a-41a). In upholding the minority business enterprise provision, the court stated that it was unnecessary for it to determine "[w]hether rigid scrutiny is mandated whenever an act of Congress conditions the allocation of federal funds in a manner which differentiates among persons according to their race * * * for we are of the opinion that even under the most exacting standard of review the MBE provision passes constitutional muster" (Pet. App. 28a) (footnote omitted). The court of appeals agreed with the district court that the minority business enterprise provision in the 1977 Act was intended to remedy past discrimination against minority construction businesses (Pet. App. 32a). The court also agreed with the district court that there was an ample basis to support Congress' conclusion that the severe shortage of potential minority entrepreneurs with general business skills is a result of their historical exclusion from the mainstream economy and that "the history of discrimination was specific to the construction industry" (Pet. App. 35a-36a).

The court of appeals then analyzed the adverse effect of the minority business enterprise provision on non-minority contractors. The effect, the court con-

cluded, was quite limited and did not fall upon a " 'small, ascertainable group of non-minority persons' " (Pet. App. 38a, quoting from *EEOC* v. *Local 638, Sheet Metal Workers*, 532 F.2d 821, 828 (2d Cir. 1976). The set-aside for minority contractors, the court noted (Pet. App. 38a-39a),

> extends to only .25 percent of funds expended yearly on construction work in the United States. The extent to which the reasonable expectations of [petitioners], who are part of that industry, may have been frustrated is minimal. Furthermore, since according to 1972 census figures minority-owned businesses amount to only 4.3 percent of the total number of firms in the construction industry, the burden of being dispreferred in .25 percent of the opportunities in the construction industry was thinly spread among nonminority businesses comprising 96 percent of the industry. Considering that non-minority businesses have benefited in the past by not having to compete against minority businesses, it is not inequitable to exclude them from competing for this relatively small amount of business for the short time that the program has to run.

ARGUMENT

1. The decision of the court below is correct. As we contend in our Jurisdictional Statement (pages 17-24) in *Kreps* v. *Associated General Contractors of California*, No. 78-1382, the minority business enterprise provision of the 1977 Act falls within Congress' authority to fix the terms and conditions under which it grants money, see *Lau* v. *Nichols*, 414 U.S. 563,

569 (1974); *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 142-143 (1947); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940), and its special powers to enforce the objectives of the Civil War Amendments, see *Regents of the University of California* v. *Bakke*, No. 76-811 (June 28, 1978) slip op. 33 n.41 (opinion of Powell, J.); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). For the reasons stated by the court of appeals in its thorough opinion and in our Jurisdictional Statement in No. 78-1382, Section 103 (f)(2) is consistent with both the Fifth Amendment to the Constitution and Title VI of the Civil Rights Act of 1964.[2]

2. There is no conflict among the courts of appeals. The court below is the only court of appeals to reach the merits of the constitutionality of the statute. The two other courts of appeals that have heard cases involving the provision at issue here have affirmed the denial of preliminary injunctions against enforcement of the provision on the grounds (among others) that plaintiff had failed to show a sufficient likelihood of success on the merits to warrant interim relief.[3]

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[2] We are furnishing a copy of our Jurisdictional Statement in No. 78-1382 to counsel for petitioners.

[3] *Constructors Association of Western Pennsylvania* v. *Kreps*, 573 F.2d 811 (3d Cir. 1978); *Ohio Contractors Association* v. *Economic Development Administration*, 580 F.2d 213 (6th Cir. 1978).

Eleven district courts have rejected challenges to the statute. Cases upholding the constitutionality of the challenged provision are: *Rhode Island Chapter, Associated General Contractors of America* v. *Kreps*, 450 F. Supp. 338 (D. R.I. 1978); *Associated General Contractors of Kansas* v. *Secretary*

3. The significance of the issue presented in this case is diminished because the purposes of the statute have already been largely accomplished. All of the funds authorized and appropriated under the Act have been awarded to state and local grantees. The vast majority of contracts have been let. The scattered contracts that remain to be let are outstanding for

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of Commerce, No. C.A. 77-4218 (D. Kan. Feb. 9, 1978); *Indiana Constructors, Inc.* v. *Kreps*, No. IP 77-602-C (S.D. Ind. Jan. 4, 1979); *Associated General Contractors of America, Inc., Alaska Chapter* v. *Kreps*, No. F78-1 (D. Alas. Oct. 10, 1978), appealed filed, No. 78-3421 (9th Cir. Oct. 19, 1978); *Frank Coluccio Construction Co.* v. *Kreps*, No. F78-9-Civ. (D. Alas. Oct. 5, 1978).

Decisions denying preliminary injunctions are: *A. J. Raisch Paving Co.* v. *Kreps*, No. C.A. 77-3977 (N.D. Cal. Dec. 15, 1977), appeal filed, No. 77-2497 (9th Cir. Dec. 20, 1977); *Florida East Coast Chapter, Associated General Contractors of America* v. *Secretary 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); *Virginia Chapter, Associated General Contractors of America, Inc.* v. *Kreps*, 444 F. Supp. 1167 (W.D. Va. 1978); *Carolinas Branch, Associated General Contractors of America* v. *Kreps*, 442 F. Supp. 392 (D.S.C. 1977); *Michigan Chapter, Associated General Contractors of America, Inc.* v. *Kreps*, No. C.A. M-77-165 (W.D. Mich. Jan. 4, 1978).

Three district courts have rendered decisions adverse to the constitutionality of the statute: *Wright Farms Construction, Inc.* v. *Kreps*, 444 F. Supp. 1023 (D. Vt. 1977) (unconstitutional as applied); *Montana Contractors Association* v. *Secretary of Commerce*, Nos. CV77-62-M, CV77-153-BLG (D. Mont. Jan. 10, 1979) (unconstitutional as applied); *Associated General Contractors of California* v. *Secretary of Commerce*, 459 F. Supp. 766 (C.D. Cal. 1978), appeals filed, Nos. 78-1107, 78-1108, 78-1114, 78-1382 (Nov. 17, 1978) (unconstitutional on its face).

special reasons. For instance, they may be for the second or third phase of a project for which later phase contracts are not to be let until the first phase has been completed, or, in the case of defaults on an earlier contract, rebidding may be required. In these circumstances, a decision by this Court on the merits of the constitutional issue would be largely academic. The issues presented by this petition are "too moribund" to warrant this Court's exercise of its certiorari jurisdiction. *Darr* v. *Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting).[4] It is possible that Congress may in the future provide new funding for public works employment acts such as the 1977 Act or enact new legislation providing a preference for minority contractors. But it is likely that any constitutional challenges to such new statutory provisions would arise in a significantly different context. Several public works employment bills were introduced in 1978, although none was enacted. The bills,

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[4] Although the scattered contracts that remain to be let appear to be sufficient to render this case not moot at present, it is possible that the case would become moot by the time this Court could consider and decide it. Because the case is before the Court on a petition for discretionary review, it would be unnecessary to remand the case to be dismissed as moot, either now or at any time in the future (compare *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950)). Instead, as we suggested in our opposition in *Velsicol Chemical Corp.* v. *United States*, No. 77-900, cert. denied, 435 U.S. 942 (1978), the proper course upon determining that this case is moot and would not otherwise warrant plenary review by this Court is to deny the petition. A copy of our opposition in *Velsicol* has been provided to counsel for petitioners.

however, contained differing minority business enterprise provisions. It is by no means clear that any future legislation will track the minority business enterprise provision at issue in this case. Differences in the congressional findings supporting any new minority business enterprise provisions and in the degree and kind of the minority preference may make a significant difference in the constitutional analysis, as this Court made clear in *Regents of the University of California* v. *Bakke*, No. 76-811 (June 28, 1978).

CONCLUSION

The petition for a writ of certiorari should be denied.[5]

Respectfully submitted.

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MARCH 1979

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[5] If the Court notes probable jurisdiction in *Armistead* v. *Associated General Contractors*, No. 78-1107, and the related cases, Nos. 78-1108, 78-1114, and 78-1382, it may wish to hold this case pending the disposition of those cases.