No. 89-453

In the Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law is a nonprofit organization established in 1963 at the request of the President of the United States to involve leading members of the bar throughout the country in a national effort to insure civil rights to all Americans. Through its national office in Washington, D.C., and its several affiliate Lawyers' Committees, such as the Washington, D.C., Lawyers' Committee for Civil Rights Under Law, the organization has over the past 27 years enlisted the services of thousands of members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, mu-

nicipal services, the administration of justice, and law enforcement.[1]

SUMMARY OF ARGUMENT

Racial and ethnic discrimination continues to impose significant barriers to the opportunities of minorities throughout our society. Congress has unique power and competence to identify and remedy the effects of this society-wide discrimination, and should be given latitude to utilize racial preferences where it concludes they are appropriate. This congressional power stems in large measure from the Reconstruction era amendments, which gave Congress preeminent authority over matters of race and entrusted Congress to enforce the constitutional guarantees of equality.

In this case, Congress has confronted the tangible present-day effects of society-wide discrimination on the vitally important broadcast industry. It has concluded that this discrimination has resulted in the virtual absence of minorities from the ranks of owners of broadcast licenses, which in turn has practically excluded minority viewpoints from the airwaves. In addition to the interest in remedying discrimination for its own sake, Congress has a substantial interest in promoting a diversity of perspectives in broadcasting. And, Congress has good reason to believe that a minority preference policy in awarding broadcast licenses will in fact enhance diversity in broadcasting. This diversity interest further supports Congress' use of racial preferences.

Congress' action is entitled to substantial deference by this Court. Although there must be judicial review of the factual support underlying any race-based measure, here that review must take into account Congress' wealth of experience in addressing the problems of discrimination and its familiarity with the realities and complexities of

[1] The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

the broadcasting industry. Similarly, while the minority preference should be narrowly tailored to its objectives, Congress must have leeway in its choice of means. It should be permitted to employ group remedies that do not require its beneficiaries to prove they are "victims" of discrimination, and that place some burden on nonminorities without upsetting firmly rooted expectations.

ARGUMENT

This case concerns the power of Congress to respond to problems caused by racial and ethnic discrimination in our society. The Lawyers' Committee for Civil Rights Under Law believes that Congress has unique competence to identify these problems and must be given the necessary latitude to address them. This principle was at the core of a series of landmark decisions more than two decades ago in which this Court upheld sweeping federal legislation designed to combat society-wide discrimination against racial and ethnic minorities.[2] It was also this principle that guided this Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), upholding Congress' de-

[2] *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 442-43 (1968) (42 U.S.C. § 1982 intended to address society-wide racial discrimination that was "herd[ing] men into ghettos and mak[ing] their ability to buy property turn on the color of their skin"); *Katzenbach v. Morgan*, 384 U.S. 641, 652-53 (1966) (section 4(e) of Voting Rights Act designed to guarantee equal rights to all Americans); *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (Voting Rights Act deemed appropriate response to the "insidious and pervasive evil" of racism); *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964) (characterizing the racial discrimination prohibited by Title III of 1964 Civil Rights Act as a problem of "nationwide scope"); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) (describing society-wide discrimination as "a moral problem" with "disruptive effects"); *see also Oregon v. Mitchell*, 400 U.S. 112, 133 (1970) (opinion of Black, J.) (since racial and ethnic discrimination is "a serious national dilemma that touches every corner of our land," Congress has power to "deal with [this problem] with nationwide legislation").

termination that in order to redress the lingering effects of past racial and ethnic discrimination on public contracting, it was necessary to take the race and ethnicity of contractors into account.

This principle of congressional competence carries even greater force in this case, because here Congress is addressing the consequences of past racial and ethnic discrimination in an area of vital national concern—broadcasting—over which it traditionally has exercised broad oversight.[3] Congress has concluded that the virtual absence of minorities from the ranks of owners of broadcast licenses is a result of past society-wide discrimination, and has limited the diversity of perspectives conveyed over the nation's airwaves.[4] The preference granted to minorities in comparative licensing proceedings reflects a considered response on the part of Congress to this deeply vexing problem.[5] We urge the Court to uphold it.

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[3] *See FCC v. League of Women Voters*, 468 U.S. 364, 376-77 (1984) (Court has "long recognized" that Congress must have ability to regulate "scarce and valuable resource" of broadcast licenses and "seek to assure that the public receives . . . a balanced presentation of information on issues of public importance"); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973) (Court must review challenges to broadcast regulation mindful of Congress' extensive role in "the development of our broadcast system [for] over [a] half century").

[4] Some defenders of the minority preference policy have argued that its objective is not to remedy the effects of past discrimination, but rather to serve the "non-remedial" objective of promoting a diversity of perspectives in broadcasting. While the policy does have this diversity objective, *see infra* Part II, its "non-remedial" elements cannot be divorced from the remedial elements. For if not for past discrimination, there would be no need to take affirmative steps to increase minority ownership of broadcast licenses as a means of increasing the diversity of perspectives to which the television and radio audience is exposed.

[5] Congress clearly has acted here. After holding a series of hearings between 1982 and 1987 on minority ownership of broadcast licenses, Congress ordered the FCC to continue granting a minority

I. CONGRESS MAY USE MINORITY PREFERENCES TO REMEDY THE PRESENT EFFECTS OF SOCIETY-WIDE DISCRIMINATION ON BROADCASTING

A. Congress Must Be Allowed to Remedy the Consequences of Society-Wide Discrimination Through Race-Conscious Measures

Our nation still suffers from the legacy of racial discrimination. In many sectors of our society, the gaps between minorities and nonminorities are enormous.[6] While other factors also may be at work, society-wide discrimination is responsible, in large part, for our failure to resolve what in 1944 Gunnar Myrdal labeled the "American

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preference in comparative proceedings. That directive, which came in the 1987 appropriations bill, passed both the House of Representatives and the Senate, and was signed into law by the President. *See* Pub. L. No. 100-202, 101 Stat. 1329-31 (1987). Congress issued similar directives to the FCC in the 1988 and 1989 appropriations bills. *See* Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988); Pub. L. No. 101-162, 103 Stat. 1020 (1989). Together, the three measures demonstrate that the minority preference policy is one that is mandated by Congress.

[6] The evidence of continuing discrimination-related disparities between the races is by now disturbingly familiar: Minorities are disproportionately trapped in the cycle of poverty and crime that grips our inner cities; their educational achievements lag far behind those of nonminorities; and they are far more likely to feel alienated from, and disillusioned with, our nation's political and social institutions. *See, e.g.*, B. Blauner, *Black Lives, White Lives: Three Decades of Race Relations in America* (1989); C. Wilkinson, *American Indians, Time and the Law: Native Societies in a Modern Constitutional Democracy* (1987); W. Wilson, *The Truly Disadvantaged: The Inner City, the Underclass and Public Policy* (1987); *The Mexican American Experience: An Interdisciplinary Anthology* (R. de la Garza ed. 1985); Committee on the Status of Black Americans, *A Common Destiny: Blacks in American Society* (1989); American Council on Education and the Education Commission of the States, *One-Third of a Nation: A Report of the Commission on Minority Participation in Education and American Life* (1988); U.S. Dept. of Commerce, *Statistical Abstract of the United States*, Tables 634, 747 (1989).

Dilemma." [7] Congress must be permitted to address the present-day consequences of past society-wide discrimination, through race-conscious measures if appropriate.

1. *Past society-wide discrimination has concrete effects today that Congress must have latitude to address*

Where society-wide discrimination has resulted in specific identifiable problems—in this case, a virtual absence of minority broadcasters and an accompanying lack of diversity in broadcasting—it is not an "amorphous" concept that is "ageless in its reach into the past." [8] Rather, it is a concrete, tangible phenomenon that continues to haunt us. In view of the formidable barriers that society-wide discrimination still poses to the opportunities of minorities, "Congress properly may—and indeed must—address directly the problems of discrimination in our society," and in some situations must be able to do so through race-conscious means.[9]

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[7] G. Myrdal, *An American Dilemma: The Negro Problem and Modern American Democracy* (1944). As a report released by the National Research Council only last year conclusively demonstrates, Myrdal's label is, unfortunately, still an apt one. *See A Common Destiny, supra* note 6, at 5 ("legacy of discrimination and segregation" continues to hinder attempts by black Americans to "remov[e] barriers" to full participation in society). That report also reveals the persistence of the problems that were described in the seminal 1968 Report of the National Advisory Commission on Civil Disorders [hereinafter *"Kerner Commission Report"*]. *See also* K. Karst, *Belonging to America: Equal Citizenship and the Constitution* ch. 9 (1989) (past discrimination is contributing factor to the condition of minorities who constitute a disproportionate percentage of the marginalized poor in America).

[8] *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 723 (1989) (quoting *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.)).

[9] *Fullilove*, 448 U.S. at 499 (Powell, J., concurring). *See id.* at 482 (opinion of Burger, C.J.) ("[w]e reject the contention that in the remedial context Congress must act in a wholly 'color-blind' fashion").

Like this case, *Fullilove* involved congressional action to remedy a problem in an important industry, public contracting, caused by the continuing effects of past discrimination. In adopting the race-conscious measure at issue there, Congress concluded that existing race-neutral procurement practices were resulting in the "perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities." 448 U.S. at 473 (opinion of Burger, C.J.).[10] Notably, these were "barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct." *Id.* at 478 (opinion of Burger, C.J.). Because race-neutral action only reinforced a racially skewed system of contracting, Congress decided that race-conscious action was appropriate to overcome the legacy of discrimination.

Last term's decision in *Croson* reaffirmed that Congress may predicate race-conscious action on the need to cure the identified present-day consequences of past society-wide discrimination. The plurality declared that while state and local governments may use race-conscious measures only to remedy identified discrimination in particular sectors and industries within their jurisdictions, Congress may do so to "redress the effects of society-wide discrimination." [11]

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[10] *See Fullilove*, 448 U.S. at 505-06 (Powell, J., concurring) (past discrimination, which was not "identified with . . . exactitude," had effects that were being perpetuated by present procurement practices); *id.* at 520 (Marshall, J., concurring) ("present effects of past racial discrimination" continued to impair access of minority businesses to public contracting opportunities); *see also Croson*, 109 S. Ct. at 718 (plurality opinion) (Congress' action in *Fullilove* was predicated on belief that the "effects of past discrimination had impaired the competitive position of minority businesses").

[11] *Croson*, 109 S. Ct. at 719. This reaffirmation of *Fullilove* is not acknowledged by the Department of Justice. Nowhere does it come to grips with the fact that, unlike the City of Richmond,

While it may be true that in the short run the use of racial and ethnic preferences to remedy the effects of past society-wide discrimination "carries a danger of stigmatic harm," [12] in the long run minority preferences are designed in part to overcome stigma. Stigma is, after all, an intended product of discrimination: "[I]t is hardly consistent with the respect due to these States, to suppose that they regarded . . . as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the State sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation." *Dred Scott v. Sandford*, 60 U.S. (19 Howard) 393, 416 (1857).[13] Stigma continues to this day. In employing minority preferences, Congress has concluded that ultimately, stigma can only be overcome by more minorities performing in positions of consequence and thereby breaking down stereotypes and dispelling prejudices that were formed by stigma in the first place.

Congress may tackle society-wide discrimination through race-based measures. Instead, the Department of Justice injects the *Croson* limitations on state and local government action into this case and condemns Congress for failing to have identified discrimination with the degree of particularity that this Court required of the City of Richmond. The questions that the Department of Justice poses—whether there was any evidence of prior discrimination against minorities by the FCC or in the broadcasting industry—are the wrong ones to be asking here. *See* Brief of the United States as *Amicus Curiae* Supporting Petitioner at 20-21 [hereinafter "Brief of U.S."].

[12] *Croson*, 109 S. Ct. at 721. Here, though, there is very little danger of stigmatic harm, since minorities must meet basic financial qualifications and the other qualifications for a broadcast license are unrelated to "merit."

[13] *See also Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

2. *The Constitution gives Congress the unique power to address the consequences of society-wide discrimination*

Congress has unique power to remedy the consequences of society-wide discrimination, and its judgments about how to exercise that power are entitled to deference. Congress' special authority in matters of race derives, in large part, from the positive grant of legislative power that it enjoys pursuant to the Thirteenth, Fourteenth and Fifteenth Amendments, all of which were adopted during the post-Civil War Reconstruction era.[14]

As this Court stated in *Croson*, the Reconstruction era amendments "worked a dramatic change in the balance between congressional and state power over matters of race." [15] The amendments firmly established that Congress is the political institution uniquely competent to address society-wide problems related to racial discrimination, problems of national dimension. Having lived through the discord of the Civil War, the architects of the amendments were suspicious of local government when it came to race, and thus "limit[ed] the power of the states and enlarg[ed] the powers of Congress" so as to unify the nation again. *Ex parte Virginia*, 100 U.S. 339, 345 (1879).

Consequently, as this Court has recognized, "in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guaran-

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[14] As Chief Justice Burger pointed out in *Fullilove*, Congress may also address the effects of society-wide discrimination under its Commerce and Spending Powers. *Fullilove*, 448 U.S. at 475-76.

[15] *Croson*, 109 S. Ct. at 719. *See id.* at 736 (Scalia, J., concurring) (Congress' powers "concerning matters of race were explicitly enhanced by the Fourteenth Amendment"); *see also United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) (under Fifteenth Amendment Congress can compel states to take action to ensure guarantees of full citizenship).

tees." *Fullilove*, 448 U.S. at 483 (opinion of Burger, C.J.). Congress' remedial power is not restricted to situations where state action has violated the Constitution. The enforcement provisions of the Reconstruction era amendments not only authorize Congress to ensure that states comply with the principles of equality, but also to "define situations . . . that threaten [those] principles . . . and to adopt prophylatic rules to deal with those situations." [16]

These prophylactic rules may be race-based. In *Fullilove*, Congress had determined that the existing government contract procurement system perpetuated the effects of past discrimination and denied minorities equality under the law. This Court held that Congress could pre-

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[16] *Croson*, 109 S. Ct. at 719. *See Katzenbach v. Morgan*, 384 U.S. at 648-50; *see also City of Rome v. United States*, 446 U.S. 156, 177 (1980) (Congress could adopt rule barring certain state conduct with respect to voting as a means of promoting purposes of Fifteenth Amendment, even where state arguably had not violated the Amendment).

Nevertheless, the Department of Justice insists that "unlawful" state action must be implicated before Congress can legislate under section 5 of the Fourteenth Amendment, and from there argues that there is no such action here since broadcast licensing only involves the federal government, not the states. Brief of U.S. at 18 n.10. But even assuming that unlawful state action is required, the Department of Justice's argument is wrong, for it was states that perpetrated and tolerated much of the society-wide discrimination that is to be remedied here. In any event, the question of the existence of state action—lawful or unlawful—is academic. Congress clearly can address problems of race relations under the Thirteenth Amendment and the Commerce Clause, both of which apply to purely private as well as state action. *See Fullilove*, 448 U.S. at 475 (opinion of Burger, C.J.) (approving remedial legislation that affected private conduct under Congress' Commerce Power); *Norwood v. Harrison*, 413 U.S. 455, 470 (1973) (private discrimination subject to remedial legislation under section 2 of Thirteenth Amendment). Furthermore, Congress may be able to remedy private discrimination under section 5 of the Fourteenth Amendment. *See United States v. Guest*, 383 U.S. 745 (1966); *Katzenbach v. Morgan*, 384 U.S. at 652-53.

scribe a race-conscious remedy even absent proof of unlawful discrimination by the states.[17] In this case, as we will show in Part IB, the existing broadcast licensing system also perpetuates the effects of past society-wide discrimination. Here too, Congress has the power to use racial preferences to address the problem.

The shifting of power from the states to the national government after the Civil War embodied in part the republican political theory expounded by James Madison and others.[18] Madison feared that parochial interests and factionalism, particularly at the local level, would subvert the democratic process and the proper operation of government.[19] His solution was a national legislature that would rise above the fray of local factions and deliberate matters of national dimension. It would, of course, operate with checks and balances so as to limit the power of its own factions and even of its majority.[20] The House of Repre-

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[17] *See Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.); *see also UJO v. Carey*, 430 U.S. at 155 (Congress could require states to act on the basis of race to secure Fifteenth Amendment guarantees).

[18] *See* L. Tribe, *American Constitutional Law* 2-7 (2d ed. 1988) (Reconstruction era amendments reflected Madison's theory that national government would be more likely to protect individual liberties than local government); Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 508-09 (1989) (Reconstruction era amendments, which "gave a new primacy to our national institutions" at the expense of local ones, carried out intention of republican political theorists); *see also Croson*, 109 S. Ct. at 736 (Scalia, J., concurring) ("[a] sound distinction between federal and state (or local) action based on race rests not only on the substance of the Civil War Amendments, but upon social reality and governmental theory").

[19] The Federalist No. 10, at 77-78 (J. Madison) (C. Rossiter ed. 1961). *See also* R. Dahl, *Democracy and Its Critics* 218 (1989); Sunstein, *Interest Groups In American Public Law*, 38 Stan. L. Rev. 29, 39-45 (1985).

[20] *See* The Federalist No. 10, at 82-83; The Federalist No. 51, at 322-23 (J. Madison) (C. Rossiter ed. 1961).

sentatives and the Senate would act as checks on each other; together, they would "discern the true interests of the[] country," and promulgate legislation expressing the national will without sacrificing justice to "temporary or partial considerations." [21]

Over the past three decades, Congress has identified a national interest—indeed a commitment—in eradicating discrimination and its effects. Through a wide array of legislation, it has acted to fulfill that commitment.[22] The

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[21] The Federalist No. 10, at 82. *See also Brown v. Hartlage*, 456 U.S. 45, 56 n.7 (1982) ("[i]n the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good") (quoting The Federalist No. 51, at 325). In *Croson*, Justice Scalia stressed that it is consistent with the republican vision of government to trust Congress on matters of race. He explained:

> [R]acial discrimination against any group finds more ready expression at the state and local level than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very begining of our national history.

109 S. Ct. at 737 (Scalia, J., concurring).

[22] *See, e.g.*, Civil Rights of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified at 5 U.S.C. § 535(19) *et seq.*); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a *et seq.*); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971 *et seq.*); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified at 18 U.S.C. §§ 231 *et seq.*); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000 *et seq.*); Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641; Emergency School Aid Act of 1978, Pub. L. No. 95-561, 92 Stat. 2252 (codified at 20 U.S.C. § 3191-3207); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. §§ 1971 *et seq.*); Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132; Fair Housing Act Amendments of 1988, Pub. L. No. 100-430, 102

minority preference policy at issue in this case is part of this overall effort.

B. Congress Had Sufficient Factual Support for the Minority Preference Policy

This Court has made it clear that race-based remedial action must have sufficient factual support. In this case that requirement is satisfied, as Congress had ample basis to believe that historical patterns of discrimination have resulted in an almost complete absence of minorities as owners of broadcast licenses.

Although judicial review of the factual support for race-based action must always be searching, where Congress has acted appropriate deference is in order,[23] even when fundamental rights are at stake.[24] While Congress may not simply presume that society-wide discrimination has had effects that need to be remedied, the facts on which Congress predicates its action need not be found with the same specificity and precision that this Court demands of states and cities, and need not be compiled in formal findings.[25] Moreover, when considering the record underly-

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Stat. 1619; *see also* 42 U.S.C. § 1981; 42 U.S.C. § 1982; 42 U.S.C. § 1983.

[23] Mindful that an act of Congress was at issue in *Fullilove*, Chief Justice Burger acknowledged that this Court was assuming "the gravest and most delicate duty that [it] is called on to perform," *Fullilove*, 448 U.S. at 472 (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)), and he called for "appropriate deference." *Id.* at 472. *See also Morrison v. Olson*, 108 S. Ct. 2597, 2626 (1988) (Scalia, J., dissenting) (the "harmonious functioning of the [political] system demands that [this Court] ordinarily give some deference, or a presumption of validity" to federal legislation).

[24] *See CBS v. Democratic Nat'l Comm.*, 412 U.S. at 102 (Court must approach its review of First Amendment challenge to congressional action with "great delicacy"). *Cf. Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976) (Court generally presumes that overriding national interest will justify discriminatory rule that is "expressly mandated by the Congress or the President").

[25] *See Fullilove*, 448 U.S. at 502 (Powell, J., concurring) (Congress' role as promulgator of "national rules for the governance of

ing any federal statute, this Court looks beyond the formal legislative history, taking into account all relevant information that was at Congress' disposal when it acted.[26]

This approach is particularly appropriate here, since Congress was not operating on a blank slate. It has legislated repeatedly in the area of race relations and "made national findings that there has been societal discrimination in a host of fields." *Croson*, 109 S. Ct. at 727. Beginning with the Civil Rights Act of 1957, which created both the United States Civil Rights Commission and the Civil Rights Division of the Department of Justice, and continuing to the present, Congress has passed significant legislation addressing the problems of racial discrimination that have affected the country.[27] This legislation is routinely the subject of oversight hearings and is regularly amended better to achieve its purposes.[28] This long, difficult, and frustrating process has made Congress aware of what has worked, what has not worked, and what needs to be tried. It has acquainted Congress with those areas of our society that are especially unaffected by mere antidiscrimination measures. It should be un-

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our society simply does not entail the same concept of record-making that is appropriate to a judicial or administrative proceeding"); *id.* at 478 (opinion of Burger, C.J.) ("Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings"); *cf. Oregon v. Mitchell*, 400 U.S. at 284 (Stewart, J., concurring in part and dissenting in part) (compared to local legislatures, "Congress may paint with a much broader brush").

[26] *Fullilove*, 448 U.S. at 503 (Powell, J., concurring) (Congress' "special attribute lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue").

[27] *See supra* note 22.

[28] *See, e.g.*, Equal Opportunity Act of 1972, *supra* note 22 (extending reach of Title VII of 1964 Civil Rights Act); Voting Rights Act Amendments of 1982, *supra* note 22 (extending reach of Voting Rights Act of 1965); Fair Housing Act Amendments of 1988, *supra* note 22 (extending reach of Fair Housing Act of 1968).

necessary for Congress to redocument the fact and history of discrimination every time it contemplates enacting another law.[29]

Congress' experience in addressing the problems of racial discrimination was complemented in this case by its familiarity with the workings of the broadcasting industry. When it directed the FCC to continue implementing the minority preference policy in comparative proceedings, Congress already knew that most of the licenses were initially awarded—at bargain basement rates—at a time when minorities were effectively excluded from the bidders' table by discrimination that was pervasive and officially sanctioned in many parts of the country.[30] It already knew that today the central barrier to enter broadcasting is an economic one, the need for substantial risk capital. It already knew that this barrier has had a disproportionate impact on minorities largely attributable to society-wide discrimination. And, Congress also knew that because the broadcasting industry is a mature one, and the frequency spectrum already well saturated, the most inexpensive way to acquire a license is through the comparative hearing process.[31]

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[29] *See Fullilove*, 448 U.S. at 503 (Powell, J., concurring) (in light of the "information and expertise that [it has] acquire[d] in the consideration and enactment of earlier legislation," Congress should not be required "to make specific factual findings with respect to each legislative action" it takes in the area).

[30] *See Bakke*, 438 U.S. at 393-94 (opinion of Marshall, J.) (in all walks of life, "[t]he enforced segregation of the races continued into the middle of the 20th century" and was not "limited solely to the Southern States").

[31] The Department of Justice asserts that approximately 9% of all existing broadcast licenses change hands in any given year. Brief of U.S. at 21 n.12. But unlike at the outset of FCC licensing, radio and television stations today are not being given away for almost nothing; they are sold at significant premiums that derive from the increased value of broadcast stations over time. Having been excluded from the market when licenses were virtually free,

Viewed against that backdrop, the minority preference in comparative proceedings has sufficient factual support. To ignore Congress' substantial experience in confronting the consequences of racial discrimination and in deciding how best to allocate broadcast licenses is to "blind [oneself] to the realities familiar to the legislators." *Katzenbach v. Morgan*, 384 U.S. at 653.[32]

II. THE INTEREST IN PROMOTING DIVERSITY OF PERSPECTIVES IN BROADCASTING FURTHER SUPPORTS THE USE OF MINORITY PREFERENCES IN LICENSING

While Congress has a strong interest in remedying society-wide discrimination for its own sake, there is even a stronger public interest in remedial action that simultaneously serves other important goals. In this case, Congress determined that society-wide discrimination not only has resulted in the virtual absence of minority license owners in the broadcast industry, but that this in turn has had a significant deleterious effect on the diversity of perspectives reflected in broadcasting. The minority preference policy thus serves both the purely "backward-looking" in-

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and stations were built at cost, minorities are now being shut out because price tags are prohibitive. The minority preference policy applies only to the allocation of new licenses for new stations, not the licenses for existing stations that are being transferred at exorbitant rates each year. As such, the policy enables minorities to break into the industry on terms comparable to those on which nonminorities entered when broadcast licensing first began.

[32] The Department of Justice contends that the 1982 amendments to the Communications Act, which authorized the FCC to grant a preference to minorities in the random award of licenses through lotteries, have no bearing on the similar preference granted in comparative proceedings. Brief of U.S. at 19 n.11. Yet the very legislative history of the 1982 amendments that the Department of Justice cites refers back to the reports and studies on which the FCC initially predicated the comparative proceeding preference. *See* Pub. L. No. 97-259, 96 Stat. 1087, 1094 (1982) (codified at 47 U.S.C. § 309(i)(3)(A)); H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43-45 (1982).

terest of remedying past wrongs and the "forward-looking" interest of promoting diversity in broadcasting. This diversity interest is substantial and further supports the policy.

A. Forward-Looking Interests May Support the Use of Racial Preferences

This Court repeatedly has stated that the use of racial preferences may be justified only by a weighty governmental interest.[33] As the Court's previous decisions indicate, in most cases that interest will be a purely remedial one. However, there is no reason that a forward-looking interest cannot suffice, and the Court has never so held.[34]

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[33] Although that interest must be "compelling" in the case of a state or local government program, *see Croson*, 109 S. Ct. at 721, the precise standard applicable to a congressional program is not clear. In *Fullilove*, Justice Marshall (joined by Justices Brennan and Blackmun) stated that this interest must be "important," 448 U.S. at 519, Justice Powell used "compelling," *id.* at 496, and Chief Justice Burger's plurality opinion stated that the objective served by the program need only be "within the powers of Congress." *Id.* at 473.

[34] There is language in *Croson* that could be interpreted as limiting the use of racial preferences to remedial contexts. *See Croson*, 109 S. Ct. at 721 ("[u]nless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility"). However, because the racial preference at issue in *Croson* was defended only on remedial grounds, the Court had no occasion to and did not decide whether forward-looking justifications might have sufficed. Moreover, construing *Croson* to preclude forward-looking justifications is at odds with Justice O'Connor's acknowledgement that interests other than remedying past discrimination might be sufficiently important to support race-conscious action. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("And certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies").

To the contrary, several Justices have acknowledged that the use of racial preferences might be supported by an important governmental interest other than remedying discrimination.[35] These Justices recognized that in some contexts race-conscious action fosters values other than compensating minorities for past discrimination, and can "produce tangible . . . future benefits." *Croson*, 109 S. Ct. at 731 n.1 (Stevens, J., concurring).

This case involves another context in which race is relevant for reasons above and beyond remedying past discrimination. As explained in the following sections, the minority preference at issue serves the important forward-looking interest of promoting the diversity of perspectives reflected in broadcasting.

B. The Promotion of Diversity of Perspectives in Broadcasing Is a Substantial Interest

The promotion of diversity of viewpoints in broadcasting is a substantial governmental interest. It is central to the values embodied in the First Amendment, and has always guided the allocation of broadcast licenses.[36]

The goal of diversity in broadcasting is at least as important as the goal of diversity in higher education, which Justice Powell, writing in *Bakke*, found sufficiently

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[35] *See Bakke*, 438 U.S. at 311-15 (opinion of Powell), J.); *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring); *id.* at 313-14 (Stevens, J., dissenting); *Croson*, 109 S. Ct. at 730 & n.1 (Stevens, J., concurring); *cf. United States v. Paradise*, 480 U.S. 149, 167-68 n.18 (1987) (plurality opinion).

[36] The "public interest" standard that guides FCC decisionmaking "necessarily invites reference to First Amendment principles . . . and, in particular, to the First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources.'" *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978) (quoting *CBS v. Democratic Nat'l Comm.*, 412 U.S. at 122 and *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

weighty to support race-conscious admissions policies in public universities. There, Justice Powell concluded that such action would further the strong First Amendment interest in promoting a diverse student body, which he reasoned would enhance a "robust exchange of ideas." 438 U.S. at 313. As important as this interest is, it has direct ramifications only for that portion of our population that attends college. In contrast, the mass media reach almost the entire population. For better or worse, radio and television have a "uniquely pervasive" influence on American life,[37] and play a critical role in educating the public and promoting the exchange of ideas. Therefore, Congress has good reasons for attempting to ensure that perspectives reflected through the broadcast media are not limited or distorted by the continuing effects of discrimination.

To the extent that there is any doubt about the importance of diversity in broadcasting, that doubt should be resolved in favor of the choice that Congress has made. While the Constitution may demand that courts conduct a searching inquiry to ensure that a racial preference is supported by a weighty goal, it does not authorize courts to substitute their own judgments for the considered and reasonable judgment of Congress. This is particularly true where, as here, Congress has acted in an area in which it has substantial power and expertise.

C. Congress Had Sufficient Basis to Link Diversity of Ownership With Diversity of Perspectives in Broadcasting

The dissent below argued that the minority preference policy does not support the goal of enhanced diversity in broadcast programming, because there was no "basis for believing that minority ownership would lead to 'minority programming' in some sense that is both intelligible and

[37] *Sable Communications of California, Inc. v. FCC*, 109 S. Ct. 2829, 2837 (1989).

permissible."[38] This is incorrect and misses the point of the policy. Congress had every reason to believe that the minority preference policy would, in fact, expand the diversity of perspectives reflected in broadcasting, and not just in programming. For it is not only programming but also perspective—which includes considerations other than simply what show to run or song to play—that is at the crux of the policy.

When the minority preference policy was begun, broadcasting was basically an all-white industry, as it still is to a large extent today. This simple fact has had profound consequences for the diversity of perspectives reflected in broadcasting. The inclusion of minority owners clearly would enhance that diversity. It is not "stereotyping" to acknowledge that different racial and ethnic groups have unique perspectives that may be reflected in programming choices, selection of station managers, presentation of news, solicitation of advertisers, and community relations.[39] It is unrealistic to pretend otherwise. While in any particular case the proposition may prove false, in the aggregate the inclusion of minority owners has to make a difference.

The link between diversity in ownership and diversity in perspectives may not lend itself easily to empirical proof, but the Constitution requires only a close relationship between means and ends, not a guarantee.[40] This is

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[38] *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 358 (D.C. Cir. 1989) (Williams, J., dissenting), *cert. granted sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 715 (1990).

[39] *Cf.* T. Sowell, *The Economics and Politics of Race* 244 (1983) ("[t]he most obvious fact about the history of racial and ethnic groups is how different they have been—and still are . . .").

[40] In *Bakke*, Justice Powell did not require empirical proof that the admission of minority students to a medical school would in fact enhance the exchange of ideas or enrich the educational experience of the student body. For him, that common sense proposi-

particularly true when what is being reviewed is an act of Congress, which must make predictive judgments of the type at issue here all the time. The judicial task, therefore, should be to ensure that Congress had sufficient reason to believe that the racial preference would serve its purpose so that "there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 109 S. Ct. at 721. Here, Congress had ample reason to believe that including minority owners in the previously all-white broadcast industry would augment the diversity of viewpoints conveyed in broadcasting.[41]

III. THE MINORITY PREFERENCE POLICY SATISFIES ANY REASONABLE APPLICATION OF THE NARROWLY TAILORED TEST

Just as there should be deference to a determination by Congress that an important interest justifies the use of race-conscious measures, there should be deference to the means that Congress selects to serve that interest. For in both cases, Congress has special competence to act to

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tion was enough. He explained that "[a]n otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity." *Bakke*, 438 U.S. at 314 (opinion of Powell, J.).

[41] Congress did not rely on common sense alone. It had before it federal government findings on the consequences of having a mass media dominated by white ownership. *See* United States Commission on Civil Rights, *Window Dressing on the Set: Women and Minorities in Television* 2 (1977) ("a mass medium dominated by whites will ultimately fail in its attempts to communicate with an audience that includes blacks"); *Kerner Commission Report*, *supra* note 7, at 203 ("The media report and write from the standpoint of a white man's world. . . . This may be understandable, but it is not excusable in an institution that has the mission to inform and educate the whole of our society").

remedy the consequences of discrimination in our society. Moreover, the choice of means is a peculiarly legislative function; while a court must review a race-conscious measure to ensure that it is narrowly tailored to meet its objective, the court should not substitute its judgment for the considered judgment of Congress. Indeed, this Court has stated: "We are mindful that '[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power.' " [42]

In this case, Congress' choice of means satisfies any reasonable application of the narrowly tailored test. Three general principles governing the narrowly tailored inquiry here deserve mention.

First, some burden on nonminorities is permissible. The dissent below, however, appears to endorse the "unique opportunity" approach taken by Judge Silberman in the *Shurberg* case, which also is currently before this Court.[43] Under that approach, it is unacceptable for a nonminority to be denied a particular license—a "unique opportunity

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[42] *Fullilove*, 448 U.S. at 480 (opinion of Burger, C.J.) (quoting *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 603 (1949)). *See also Fullilove*, 448 U.S. at 480 (opinion of Burger, C.J.) ("stress[ing] the limited scope of the Court's [narrowly tailored] inquiry" in cases involving "the legislative authority of Congress"); *id.* at 515 n.14 (Powell, J., concurring) (narrowly tailored analysis "vari[es] with the nature and authority of [the] governmental body"). Notwithstanding these basic tenets, which figure prominently in the opinions of Chief Justice Burger and Justice Powell in *Fullilove*, the Department of Justice makes the bold assertion that "deference is not appropriate in deciding whether the particular remedy chosen by Congress is 'narrowly tailored' . . . ." Brief of U.S. at 15. What is most startling is that the Department of Justice claims that the opinions of Chief Justice Burger and Justice Powell support this proposition.

[43] *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 943 (D.C. Cir. 1989), *cert. granted sub nom. Astroline Communications Co. v. Shurberg Broadcasting of Hartford, Inc.*, 110 S. Ct. 715 (1990).

to own a broadcasting station"—because of a minority preference given to a competitor. *Shurberg*, 876 F.2d at 917. Judge Silberman claimed that the minority preference at issue in *Shurberg* was unconstitutional because "[i]t is a Hartford station Shurberg wants and, after all is said and done, he has been absolutely denied an opportunity to compete for one merely because of his race." *Id.* at 918. Similarly, the dissent below complained that "[h]ere, as in *Shurberg*, Metro was denied a comparative hearing on the only new license currently being offered in the Orlando area." *Winter Park*, 873 F.2d at 368 (Williams, J., dissenting).

This approach goes overboard in its attempt to protect the interests of nonminorities. In any case involving a minority preference, the plaintiff will always be able to claim that he did not get a particular thing that he wanted because of the preference. For example, some nonminority contractors undoubtedly lost out on contracts as a result of the minority preference program approved in *Fullilove*. But, as the Court declared in *Fullilove*: "It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." [44]

Here, the burden shared by nonminorities is acceptable. The minority preference is only one consideration in the comparative hearing process, and does not automatically preclude nonminorities from acquiring broadcast licenses. Moreover, a broadcast license does not have the sort of personal value that demands utmost protection. Unlike the layoffs of individual teachers at issue in *Wygant*, no one's likelihood is at stake. Nor does the minority pref-

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[44] *Fullilove*, 448 U.S. at 484 (opinion of Burger, C.J.). *See also Wygant*, 476 U.S. at 280-81 (plurality opinion) ("[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy").

erence policy upset anybody's "firmly rooted expectation[s]," [45] since it affects only those who are competing for broadcast licenses, not those who already own them. Finally, ownership of a broadcast license has always been considered a privilege; Congress and the FCC may deny licenses or place restrictions on license owners as required by the public interest.[46] The failure to obtain such a privilege could hardly be deemed a substantial burden.

Second, the narrowly tailored test should not require that minority preferences benefit only minorities who are shown to be actual "victims" of discrimination.[47] Such a requirement would be illogical in a case such as this, where the minority preference serves a goal beyond remedying discrimination. But even where a minority preference is purely remedial, the "victims only" requirement conflicts with this Court's recognition that minority preferences need not be designed to remedy individual cases of discrimination. Justice O'Connor observed in *Wygant*:

> [T]he Court has forged a degree of unanimity; it is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored,' or 'substantially related,' to the correction of prior discrimination . . . .[48]

As this statement acknowledges, and as Congress has recognized, group remedies can be appropriate because

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[45] *Johnson v. Transportation Agency,* 480 U.S. 616, 638 (1987).

[46] *See generally Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 386-92 (1969).

[47] Some courts have imposed such a requirement. *See, e.g., Shurberg,* 876 F.2d at 912 (opinion of Silberman, J.); *Main Line Paving Co. v. Philadelphia Bd. of Educ.,* 725 F. Supp. 1349, 1361 (E.D. Pa. 1989); *see also Winter Park,* 873 F.2d at 368 (Williams, J., dissenting).

[48] *Wygant,* 476 U.S. at 287. *Cf. Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC,* 478 U.S. 421, 482 (1986) (under Title VII, court-ordered race-conscious relief need not be limited to actual victims of discrimination).

racial and ethnic discrimination is designed to and has in fact oppressed and stigmatized groups. Decades of egregious discrimination against black people, for example, has affected all black people. When a black person benefits from a minority preference, black people as a group move one step closer to overcoming the effects of that discrimination. Requiring beneficiaries of minority preferences to prove that they personally have been victims of discrimination simply misses the point of what minority preferences are trying to remedy.

The argument that minority applicants for broadcast licenses are well-off and do not need preferences misses the mark for the same reason. As a group, minorities are still underrepresented in the pool of qualified applicants for broadcast licenses, as a result of discrimination. Congress determined that without preferences, some minority applicants will win licenses, but minorities as a group will still be greatly underrepresented among broadcast owners, and diversity will suffer. Only the extra push that a preference provides will make up the ground lost by past discrimination.

Third, Congress must have some discretion in its consideration of race-neutral alternatives. As we have argued, Congress has unique power and competence to remedy the consequences of society-wide discrimination, and to decide that race-conscious measures are appropriate. Of course, where the goals of a race-conscious measure clearly may be adequately served by race-neutral means, the race-conscious measure should not be preferred. But when the efficacy of race-neutral alternatives is not so clear, Congress should not be stripped of its discretion to choose how best to implement its remedial policies.[49] In such situations, Congress certainly should not be required to exhaust race-neutral alternatives before proceeding with race-conscious action; indeed, such a requirement

[49] *See Fullilove*, 448 U.S. at 508 (Powell, J., concurring) (Congress should not be required to choose the least restrictive means of implementing its goals).

was not even imposed on state and local governments in *Croson*. *See* 109 S. Ct. at 728.

In this case, Congress reasonably determined that the minority preference in comparative proceedings was necessary. The policy was adopted only after ten years of unsuccessful regulatory efforts to rectify the acute underrepresentation of minority owners in broadcasting.[50] This informed judgment of Congress was reasonable. It is entitled to deference by this Court.

CONCLUSION

For the reasons stated herein, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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[50] *See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 979-80 (1978). Because of First Amendment restrictions, direct regulation of programming content would be unconstitutional.