No. 93-1841

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FEDERICO PENA,
SECRETARY OF TRANSPORTATION, *et al.*,
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37.3 of this Court, the National Association For The Advancement Of Colored People (NAACP) respectfully submits this brief *amicus curiae* in support of Respondents. Written consent to the filing of this brief has been granted by counsel for all parties. Copies

of the letters of consent have been lodged with the Clerk of the Court.

The NAACP is the oldest and largest civil rights organization in America, with over 500,000 members in some 1,800 branches throughout the country. The NAACP appears frequently in this Court representing the interests of blacks and other minorities and often files briefs *amicus curiae* in cases of special importance to Black Americans.

This case is of particular concern to the NAACP because it involves consideration of a statutory protection which Congress has extended to the minority construction industry. Over the years, the NAACP has expended a large proportion of its resources attempting to open the Nation's construction industry to black workers and contractors. We have filed suit against construction labor unions and contractors as well as public agencies dispensing funds for public construction projects where blacks and others were excluded from employment opportunities. We have persistently urged Congress and the executive branch to create programs which foster opportunities for minorities to compete fairly in the building construction industry.

The instant case raises a challenge to a statutory vehicle which holds substantial promise for facilitating the entry of blacks into the construction industry and to the very authority of Congress to enact such remedial legislation. If Petitioners were successful in this challenge, blacks and other minorities who wish to participate in the Nation's construction industry would be harmed.

Because this case raises questions of paramount significance to the public interest, we believe that our perspective will complement the brief of Respondents and assist the Court in the resolution of these issues.

SUMMARY OF ARGUMENT

We had thought the question before the Court, whether the Court should review *federal* minority set-aside programs under strict scrutiny or heightened scrutiny, to have been well-established. In *Fullilove v. Klutznick*, 448 U.S. 448 (1979), and more recently in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the Court has recognized that it must grant some measure of deference to Congress' policy choices in the exercise of its enumerated powers -- in particular, its powers under Section 5 of the Fourteenth Amendment. Furthermore, the Court has held that the constraints of the Equal Protection Clause on Congress itself are not the same constraints as the Clause demands of the states. Thus, heightened scrutiny is the appropriate standard of review for remedial statutes enacted by Congress.

In our view, whatever uncertainty concerning the proper standard of review existed prior to *Croson* and *Metro Broadcasting*, *see United States v. Paradise*, 480 U.S. 149, 166-67 n.17 (1987); *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 480 (1986), has been resolved. But in any event, even were the Court to apply strict scrutiny, the question of the "formulas of analysis" employed by the Court may be irrelevant, as the socially and economically disadvantaged business enterprise preference program created under the Small Business Act "would survive judicial review under either 'test.'" *Fullilove*, 448 U.S. at 492 (opinion of Burger, C.J.); *see also Paradise*, 480 U.S. at 166-67 (opinion of Brennan, J.); *Sheet Metal Workers*, 478 U.S. at 480.

I. THE COURT'S PRIOR DECISIONS CORRECTLY ESTABLISH THAT FEDERAL MINORITY PREFERENCE PROGRAMS ARE SUBJECT TO HEIGHTENED SCRUTINY.

A. Congress has plenary authority to enact set-asides such as Section 502 of the Small Business Act, 15 U.S.C. § 644(g). It may claim its authority from "an amalgam of its specifically delegated powers." *Fullilove*, 448 U.S. at 473 (opinion of Burger, C.J.). Most prominent among these are the "broad remedial powers of Congress" (*id.* at 483) to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

It is the special province of Congress "to enforce equal protection guarantees," a vested "competence and authority" shared with "no [other] organ of government, state or federal." *Fullilove*, 448 U.S. at 483. Thus, "Congress ... has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Croson*, 488 U.S. at 490.

That Congress has been vested with the power to enforce Section 1 of the Fourteenth Amendment suggests that Congress enjoys powers in preference to the states. *See Croson*, 488 U.S. at 490-92. As the Seventh Circuit has recognized, "[t]he joint lesson of *Fullilove* and *Croson* is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do." *Milwaukee County Pavers Ass'n v. Fielder*, 922 F.2d 414, 423-24 (7th Cir.) (Posner, J.), *cert. denied*, 500 U.S. 954 (1991).

Because of Congress' express power to enforce the Fourteenth Amendment, this Court should respect the policy choices made by Congress in the exercise of its discretion. *Metro Broadcasting*, 497 U.S. at 563. The federal courts

stand as sentinels to secure congressional compliance with the minimal guarantees of the Equal Protection Clause, but must recognize the equal, and perhaps even superior, claim of Congress to insist on state conduct beyond those minimal dictates. *Katzenbach*, 384 U.S. at 651 & n.10. Similarly, the Court should accord even greater latitude to congressional judgment of the need for federal remedial programs.

While in our view Congress may claim sufficient authority in Section 5 for the provision of the Small Business Act under review here, Congress need not rest its authority on Section 5 alone. The grant program is an exercise of Congress' authority under the Spending Clause, U.S. Const. art. I, § 8, cl. 1, and the Commerce Clause, U.S. Const. art. I, § 8. cl. 3. Under the Spending Clause Congress may "further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Fullilove*, 448 U.S. at 474. Through its spending power, Congress may encourage what it may not compel, *South Dakota v. Dole*, 483 U.S. 203 (1987), and may discourage what it cannot outright forbid. *Harris v. McRae*, 448 U.S. 297 (1980). And through its commerce power, Congress might regulate directly "the practices of prime contractors on federally funded public works projects." *Fullilove*, 448 U.S. at 475 (*citing Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)).

B. Because of the deference due Congress in the exercise of its enumerated powers, the Court has insisted that federal racial preference programs satisfy only heightened scrutiny. In *Fullilove*, this Court considered a provision of the Local Public Works Capital Development and Investment Act of 1976, as amended by the Public Works Employment Act of 1977, which required a ten percent Minority Business Enterprise (MBE) participation in local public works projects funded through federal grants.

The Court noted that the MBE requirement in the Public Works Act was part of the "ongoing efforts toward deliverance" of "equality of economic opportunity" by the Small Business Association. 448 U.S. at 463 (opinion of Burger, C.J.). Three members of the Court upheld the set-aside through "close examination" (*id.* at 472) and "careful judicial evaluation" (*id.* at 480) in order "to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal." *Ibid.* Those justices emphasized that the inquiry into *Congress'* powers was of "limited scope" (*ibid.*).

Three additional members of the Court made explicit their view that the exacting scrutiny with which the Court judged invidious discrimination was "inapposite to racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination." 448 U.S. at 518 (Marshall, J., concurring in the judgment). Accordingly, "the proper inquiry is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives." *Id.* at 519.

Any lingering doubts about the standard of review for congressional remedial efforts was put to rest in *Metro Broadcasting*. In that case the Court considered an equal protection challenge to the Federal Communications Commission's minority preference policy. A majority there stated unambiguously that "benign race-conscious measures mandated by Congress -- even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination -- are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." 497 U.S. at 564-65 (footnote omitted).

The Court made plain in *Metro Broadcasting* that it "appl[ied] that standard" recognized in *Fullilove*. *Id.* at 564. *See* "Joint Statement, Constitutional Scholars' Statement on Affirmative Action After *City of Richmond v. J.A. Croson Co.*," 98 Yale L.J. 1711 (1989).

Nothing in the Court's opinion in *Croson* is to the contrary. The majority in that case found that the Court's "treatment of an exercise of congressional power in *Fullilove*" was not dispositive of treatment afforded an exercise of municipal power. *Croson*, 488 U.S. at 491. While a plurality of the Court suggested, as had Justice Powell in *Fullilove* (448 U.S. at 507 (Powell, J., concurring); *see also Wygant v. Jackson Board of Education*, 476 U.S. 267, 273 (1986) (Powell, J., concurring); *Regents of the University of California v. Bakke*, 438 U.S. 265, 305 (1978) (Powell, J., concurring)) that strict scrutiny should govern all cases of racial discrimination (488 U.S. at 494 (opinion of O'Connor, J.); *see also id.* at 520 (Scalia, J., concurring in the judgment)), the plurality very carefully pointed out that the Court could not accord the City of Richmond the same level of deference as it had accorded Congress in *Fullilove*. As the plurality stated: "That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision." 488 U.S. at 490 (opinion of O'Connor, J.) (emphasis in original). Applying heightened scrutiny to federal remedial programs recognizes both that Congress has primary responsibility for remedial programs and that the Equal Protection Clause is expressly a constraint on the states.

C. That Congress should possess the authority to remedy broad-based societal discrimination is consistent with

the conceptual underpinnings of our structure of government, whose roots can be traced to the ideas of Locke and Hobbes. *See* G. Mace, *Locke, Hobbes, And The Federalist Papers*, 7-8 (1979). In their view, the natural equality which all people possess by right is inevitably disrupted by dynamics beyond their control. When free individuals agree to be bound by the laws of a government, it is with the understanding that the government will, among other things, act to remedy unjust inequalities. This necessarily entails the proposition that the government has the power to take measures sufficient to achieve that end. The pre-eminence accorded our national legislature -- in the sense of its duty to act for the general welfare -- identifies it as the body endowed with a unique and particular power to confront the problems of society as a whole. When Congress acts to remedy the evils of discrimination, it does so with an authority not present in statehouses or town halls. Accordingly, it is appropriate that Congress should be given greater deference than state and local governments in securing the guarantees of the Equal Protection Clause.

II. EVEN IF THE COURT WERE TO APPLY STRICT SCRUTINY, THE SMALL BUSINESS ACT DISADVANTAGED BUSINESS ENTERPRISE PREFERENCE IS NARROWLY TAILORED TO A COMPELLING GOVERNMENTAL INTEREST.

The compelling rationale for the MBE program in *Fullilove* -- what the plurality referred to as the "ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity," 448 U.S. at 463 -- had its origins in the same section of the Small Business Act at issue here, Section 8(a), 15 U.S.C. § 637(a). *See Fullilove*, 448 U.S. at 463-64. That section authorizes the SBA, as "necessary or appropriate" to let subcontracts to "socially and economically disadvantaged small business

concerns." 15 U.S.C. § 637(a)(1)(B). *See also* 15 U.S.C. § 644(g). 15 U.S.C. § 637(d)(3)(A) further provides:

> It is the policy of the United States that small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency . . . .

The House Subcommittee on SBA Oversight and Minority Enterprise has explained the need for such authority:

> The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.
>
> . . . .
>
> ... The presumption must be made that past discriminatory systems have resulted in present economic inequalities. In order to right this situation, the Congress has formulated certain remedial programs designed to uplift those socially or economically disadvantaged persons to a level where they may effectively participate in the business mainstream of our economy.

448 U.S. at 465-66 (*quoting* H.R. Rep. No. 468, 94th Cong, 1st Sess. 1-2 (1975)). In a subsequent report the House Committee on Small Business found:

> [W]e 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.

Id. at 466 n.48 (*quoting* H.R. Rep. No. 1791, 95th Cong, 1st Sess. 182 (1977)).

Furthermore, the Small Business Act's DBE program is less restrictive, and therefore less coercive, than the MBE program at issue in *Fullilove*. The Public Works Employment Act required a ten percent set-aside for MBE's. *See* 448 U.S. at 454. By contrast the Department of Transportation, the federal contracting agency here, does not require contractors participating in the Federal Lands Highway Program (as was Adarand Constructors) to hire DBE's. Rather they are encouraged to do so through an additional incentive payment. DOT indirectly subsidizes the hiring of DBE's, payments which Congress could plainly authorize DOT to make directly to DBE's.

The DBE program is not overinclusive. As implemented by DOT, the DBE program does not rely on broad definitions or stereotypes of what constitutes a Disadvantaged Business Enterprise, but is narrowly tailored to the driving need described by Congress to "uplift ... socially or economically disadvantaged persons," including minorities. Congress defined a "socially and economically disadvantaged" small business as one of which at least 51 percent is owned by "socially and economically disadvantaged individuals includ[ing] Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, *or any other individual found to be disadvantaged.*" 15 U.S.C. § 637(d)(3)(C) (emphasis added).

The DOT regulations implementing this section further define DBE's to make clear that those within this list "are presumed to be both socially and economically disadvantaged," but that "[t]his presumption is rebuttable."

49 C.F.R. Part 23, Subpart D, App. C. The regulations explain that "[t]his means that ... a third party may present evidence that the firm's owners are not truly socially and/or economically disadvantaged, even though they are members of one of the presumptive groups." The classification of a business as a DBE cannot be overinclusive for the simple reason that the presumption is always subject to challenge. The statute but provides for an inference of fact, not a presumption of law. *See NLRB v. Curtin Matheson*, 494 U.S. 775, 814-15 (1990) (Scalia, J., dissenting). In *Fullilove*, the plurality found it "significant" that the "administrative scheme [of MBE classification] provides for waiver and exemption," (448 U.S. at 487 (opinion of Burger, C.J.)), and the DBE scheme here provides for even greater flexibility.

For similar reasons the DBE classification is not underinclusive. The same DOT regulations provide that "[i]ndividuals who are not presumed to be socially and economically disadvantaged by virtue of membership in one of these groups may, nevertheless, be found to be socially and economically disadvantaged on a case-by-case basis." 49 C.F.R. Part 23, Subpart D, App. C. Social disadvantage must "stem from his or her color; national origin; gender; physical handicap; long-term residence in an environment isolated from the mainstream of American society; or other similar cause beyond the individual's control." The social disadvantage must be "chronic, longstanding, and substantial, not fleeting or insignificant" and should be linked to "impairment of business opportunities." *Ibid.*

All of these factors suggest that no one is presumptively excluded from participation in the DBE program on the basis of race, color or national origin, just as no one conclusively qualifies for the DBE program on the basis of race, color, or national origin. In this respect the DBE program is far *less* underinclusive than the MBE program upheld in *Fullilove*. *See* 448 U.S. at 485-86.

Finally, the DBE program implemented by DOT suffers from none of the flaws of the Richmond program in *Croson*. The DBE program is narrowly tailored to remedy the effects of prior discrimination as found by Congress. Like "the congressional scheme upheld in *Fullilove*," which "allowed for a waiver of the set-aside provision where an MBE's higher price was not attributable to the effects of past discrimination" (*Croson*, 488 U.S. at 508), the DBE program does not impose an absolute preference for persons based solely on their race or color. Unlike the Richmond scheme under which "a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoy[ed] an absolute preference over other citizens based solely on their race," (*id.* at 508), the DBE program is race-neutral. Although it plainly encourages minority participation in the DBE program by granting minorities the rebuttable presumption that they are socially and economically disadvantaged, Congress has carefully and adequately explained, as this Court concluded in *Fullilove*, the basis for that presumption of fact.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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