No. 93-1841

In the Supreme Court of the United States

OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

FEDERICO PENA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE 10TH CIRCUIT

BRIEF OF THE STATES OF MARYLAND, ARIZONA, CONNECTICUT, HAWAII, ILLINOIS, INDIANA, MASSACHUSETTS, MINNESOTA, NEW MEXICO, NEW YORK, NORTH CAROLINA, OHIO, OREGON, WASHINGTON, WISCONSIN AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

J. JOSEPH CURRAN JR.
Attorney General of Maryland
*EVELYN O. CANNON
Assistant Attorney General

200 St. Paul Place, 20th Floor
Baltimore, MD 21202-2202
(410) 576-6330

*Counsel of Record

Of Counsel:
Eleni M. Constantine
National Association of
Attorneys General
444 N. Capitol St.
Washington, DC 20001

[Additional counsel listed on inside cover]

CHRISTINE O. GREGOIRE
Attorney General
of Washington
905 Plum Street
P.O. Box 40100
Olympia, WA 98504
(206) 753-6200

JAMES E. DOYLE
Attorney General
of Wisconsin
P.O. Box 7857
Madison, WI 53707
(608) 266-1221

ERIAS A. HYMAN
Acting Corporation
Counsel for the
District of Columbia
441 4th Street, N.W.
Washington, D.C. 20001
(202) 727-6248

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INTEREST OF THE AMICI CURIAE

Amici states implement many federal programs enacted by Congress to remedy racial discrimination, including the highway contracting minority incentives program challenged by petitioner in this case. Since this Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), challenges to such Congressionally-enacted remedial programs have generally been reviewed by the lower courts under a standard lower than the strict scrutiny which petitioner demands. A ruling by this Court imposing strict scrutiny on legislation enacted by Congress to remedy racial discrimination would call into question the continuing validity of these programs.

In addition, many states have enacted race-conscious programs to remedy discrimination. Like the incentive program at issue here, state remedial programs are based on legislative findings concerning problems and determinations of the best solutions. Amici believe those legislative findings should be accorded deference, not second-guessed by courts. Thus, the constitutionality of key state programs may be affected by the standards established with respect to the power of Congress to act in this case. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-92 (1989).

Amici believe that the decision of the court of appeals is correct, and submit this brief to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

This case involves a Congressionally-mandated race-conscious remedy to counter the continuing effects of past racial discrimination in federal procurement contracting.

Thus, it does not present the specific issue decided by this Court's landmark opinion 15 years ago in *Fullilove v. Klutznick*, 448 U.S. 448 (1980): Congressional legislation requiring states to implement a race-conscious remedy for the continuing effects of past discrimination by states is not subject to strict scrutiny. Nor does this case involve the central proposition of this Court's most recent "affirmative action" ruling in *Metro Broadcasting v. FCC*, 110 S.Ct. 2997 (1990): Race-conscious federal legislation may be justified by interests that are not remedial.

This case nonetheless is governed by the fundamental tenet that guided *Fullilove* and *Metro Broadcasting*: Congress, as the national legislature, specifically empowered by the Reconstruction Amendments to enforce those guarantees of racial equality, is to be accorded particular deference by this Court when Congress enacts legislation designed to remove the present results of past racial discrimination. That deference was constitutionally correct in 1980 and 1990 and remains so today.

Even if this Court were now to abandon proper deference to Congress in this area and, for the first time, to require that Congress provide a "compelling state interest" and adopt "narrowly tailored" race-conscious measures, basic separation of powers principles, and the specific powers granted to Congress under the Reconstruction Amendments, bar the Court from requiring of Congress the same type of factfinding necessary to support the imposition of a race-conscious remedy by a lower federal court or a state legislature. Instead, respect for Congress' special role in this area requires greater judicial deference to Congress'

factfinding in determining the need for, and the scope of, a race-conscious remedy.

As discussed below, that result is strongly supported by this Court's seminal decisions reviewing Congress' actions under section 5 of the Fourteenth Amendment. Those decisions recognize Congress' substantive power to identify equal protection violations as well as its broad remedial power to address them. Moreover, where, as here, the challenged legislation provides a race-conscious remedy for past racial discrimination by the federal government, the Thirteenth Amendment provides a specific textual source of Congressional power to identify "badges and incidents of slavery" and to address them with remedial power equivalent to that under section 5 of the Fourteenth Amendment.

Deference to Congress' factfinding in this context also reflects basic constitutional notions of the tripartite structure of the federal government. The institutional characteristics of Congress grant that branch factfinding capabilities that complement or improve on those available to the courts, and that are particularly relevant to determinations of the federal government's racial discrimination and the appropriate remedy.

This Court should not brush aside the holding of *Fullilove* and the long-standing principles on which that case rests regarding the Constitutional allocation of power between Congress and the Court to protect the rights of "discrete and insular minorities." For the reasons set out below, amici urge the Court to affirm the Tenth Circuit's ruling in this case.

ARGUMENT

I. The Reconstruction Amendments Require Judicial Deference to Congress' Determination of the Need for Legislation to Remedy Racial Discrimination by Private Parties or the Federal Government as well as the States.

A. *Fullilove* and *Metro Broadcasting* Reject Strict Scrutiny of Race-Conscious Remedial Legislation Enacted by Congress.

This Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), stands for the proposition that strict scrutiny, as defined by petitioner, is too intrusive a standard for judicial review of an act of Congress requiring states to set aside a percentage of federal construction funds for minority businesses as a remedy for past racial discrimination. *Metro Broadcasting v. FCC*, 110 S.Ct. 2997, 3008 (1990) ("A majority of the Court in *Fullilove* did not apply strict scrutiny to the race-based classification at issue."); *id.* at 3032 (O'Connor, J., dissenting) ("the Court correctly observes that a majority did not apply strict scrutiny....").

The principal *Fullilove* opinion, written by Chief Justice Burger and joined by Justices White and Powell, "recognize[s] the need for careful judicial evaluation 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." *Fullilove*, 448 U.S. at 480.

Although the Chief Justice noted that the remedial legislation at issue in *Fullilove* would pass even strict scrutiny, *id.* at 492, his test does not limit potential governmental interests to "compelling" ones, nor, in finding that the set-aside was "narrowly tailored," does his opinion impose a "least restrictive alternative" test. *See id.* at 479-90; *compare City of Richmond v. J.A. Croson Co.* 488 U.S. 469, 507-08 (1989) (reviewing city's minority set-aside under a least restrictive alternative standard).

Justice Marshall's opinion, joined by Justices Brennan and Blackmun, imposes a standard of review that is clearly more deferential than that of Chief Justice Burger: "[T]he proper inquiry is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives." *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring in the judgment). Moreover, Justice Marshall went on to conclude that the set-aside in *Fullilove* was not merely "substantially related," but "carefully tailored" to the "important and congressionally articulated goal of remedying the present effects of past discrimination." *Id.* at 521.[1]

Regardless of the precise formulations employed in articulating the standard of judicial review, in upholding the

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[1] Justice Powell also wrote a concurring opinion, stating that "racial classification ... is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest," *Fullilove*, 448 U.S. at 496 (Powell, J., concurring). Yet he, like the Chief Justice, made clear that he would not require that Congressional remedial legislation satisfy a "least restrictive means" test. *Id.* at 508. Whether one agrees with petitioner that Justice Powell adopted strict scrutiny or not, it remains true that a majority of the Court did not adopt a strict scrutiny test.

set-aside the separate opinions of a majority of the Court recognized Congress' power to identify racial discrimination and to implement a remedy for it, and the corresponding need for judicial deference to Congress' determinations in this area. The Chief Justice's opinion begins by noting the "deference" due to Congress as a "coequal branch" given express enforcement power under the Fourteenth Amendment. *Fullilove*, 448 U.S. at 472 (Burger, C.J.). Based on the Court's recognition of Congress' broad power under the enforcement clause of the Fourteenth Amendment in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and *Oregon v. Mitchell*, 400 U.S. 112 (1970), and of Congress' similarly broad power under the enforcement clause of the Fifteenth Amendment in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Chief Justice concluded that Congress may identify, and adopt remedial legislation to counter, the effects of past discrimination even where the Court would not find a violation of the Equal Protection clause. Inherent in such a view of Congress' power is corresponding judicial deference to Congress' determination of a "state interest" sufficient to require a race-conscious remedy. *Fullilove*, 448 U.S. at 476-77 (Burger, C.J.). Similarly, citing Congress' "broad remedial powers," *id.* at 483, the Chief Justice stated that in determining whether the program was "narrowly tailored," "doubts must be resolved in support of the congressional judgment that this limited program is a necessary step.... " *Id.* at 489.

Indeed, the Chief Justice's refusal to adopt either of the standards of judicial review that the Court had just articulated in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), *see Fullilove*, 448 U.S. at 492, and his adoption instead of a standard derived from *Morgan*,

Mitchell, and *South Carolina v. Katzenbach*, shows that he viewed remedial legislation by Congress as demanding a distinct and more deferential standard of judicial review than remedial action by other bodies. He saw the issues posed by the Congressional enactment in *Fullilove* as more like those posed by the Congressional enactments in *Morgan* than those posed by the Regents' minority preference in *Bakke* -- because Congress has greater powers in the equal protection area. *See also* 448 U.S. at 499 (Powell, J., concurring) ("Unlike the Regents ... Congress properly may - and indeed must - address directly the problems of discrimination in our society."); *id.* at 502 (Powell, J., concurring) ("It is beyond question ... that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects."); *id.* at 520, n.4 (Marshall, J., concurring in the judgment).

Four years ago, in *Metro Broadcasting*, the Court relied on *Fullilove* to uphold the FCC's minority preference in allocating broadcasting licenses in the interest of racial diversity in broadcasting. Echoing Justice Marshall's concurrence in *Fullilove*, the Court in *Metro Broadcasting* extended the deferential *Fullilove* standard to non-remedial as well as remedial legislation. "We hold 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." *Metro Broadcasting*, 110 S.Ct. at 3008-09.

The express holding of *Metro Broadcasting* squarely answers the second question presented in the instant petition for certiorari by rejecting the strict scrutiny standard proffered by petitioner in this case. Indeed, since the federal program challenged here is remedial, this case is an even stronger instance than *Metro* itself for application of a standard lower than strict scrutiny. *Cf. Metro Broadcasting*, 110 S.Ct. at 3031 (O'Connor, J., dissenting) (*Fullilove*'s lower standard "applies at most only to congressional measures that seek to remedy identified past discrimination.").[2]

Dissenting in *Metro Broadcasting*, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, argued that judicial deference to Congress' determination of a government interest warranting particular race-conscious relief is strictly confined to instances in which Congress imposes such mandates on the states, and does not extend to the administration of federal programs by federal officials. *Metro Broadcasting*, 110 S.Ct. at 3030-31 (O'Connor, J., dissenting). Looking to the text of the Fourteenth Amendment, the dissent argued that all Congress can do under that Amendment is provide oversight to the

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[2] Justice O'Connor's dissent in *Metro Broadcasting* distinguished *Fullilove* on three grounds: first, that it involved a Congressional mandate to the states pursuant to Congress' section 5 power; second, that it involved remedial legislation; and third, that the "substantially related to important government interests" test adopted by the *Metro Broadcasting* majority was not adopted by a majority in *Fullilove*. *Metro Broadcasting*, 110 S.Ct. at 3031-32 (O'Connor, J., dissenting). As discussed below, those points do not provide a basis to distinguish *Fullilove* from the instant case.

states' actions and prevent the states from violating the Equal Protection clause. *Id.*

But the majority rejected this narrow view of the basis for judicial deference to Congressional determinations in the area of equal protection. *Metro Broadcasting*, 110 S.Ct. at 3008, n.11. Indeed, the holding in *Fullilove* demonstrates that judicial deference to Congress' determinations when enacting remedial legislation to correct racial discrimination extends beyond review of legislation governing state action. The set-aside program at issue in *Fullilove* applied not only to states, but also to private parties. Accordingly, Chief Justice Burger's opinion, observing that Congress enacted the minority set-aside requirement under "an amalgam of its specifically delegated powers", *Fullilove*, 448 U.S. at 473 (Burger, C.J.), looks to section 5 of the Fourteenth Amendment to find affirmative power in Congress to correct the continuing effects of racial discrimination in the procurement practices of state and local governments, *id.* at 476, and to the Commerce Clause for the power to correct such effects in the practices of prime contractors on federally funded public works projects. *Id.* at 475-76, *citing Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). The Chief Justice finds that in either case, Congress has special powers to remedy racial discrimination:

> "It is fundamental that 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 guarantees. Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct.

Fullilove, 448 U.S. at 483-84 (Burger, C.J.) (referring back to discussion of Congress' power under the Commerce Clause, section 5 of the Fourteenth Amendment, and the Fifteenth Amendment). *See id.* at 490-91 (corresponding need for judicial deference).

Similarly, the concurring opinion of Justice Powell identified a broad base for Congress' power to "address directly [i.e. without the mandate of a court] the problems of [racial] discrimination in our society." *Id.* at 499. (Powell, J., concurring) Justice Powell saw Congress' power to address racial discrimination by private parties, when acting under its Commerce Clause power, as informed by Congress' authority to identify and address such discrimination under the Thirteenth, Fourteenth and Fifteenth Amendments. *Id.* at 499 - 501. Finally, the concurrence of Justice Marshall, joined by Justices Brennan and Blackmun, envisioned Congress' power to legislate for the purpose of remedying the present effects of past discrimination as presenting the converse situation to discrimination against "discrete and insular minorities" identified in Footnote Four

of the *Carolene Products* case.[3] Thus, strict scrutiny "is inapposite to racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past discrimination." *Fullilove,* 448 U.S. at 518 (Marshall, J., concurring in the judgment).

Moreover, since *Fullilove*, this Court has reiterated that Congress is particularly suited to identify racial inequity and devise an appropriate remedy. As Justice Scalia observed in *Croson*: "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." *Croson*, 488 U.S. at 522 (Scalia, J., concurring in the judgment). Justice Scalia noted that Congress, as the national legislature, is less likely to be dominated by a particular political faction that might engage in racial oppression, *id.* at 523, *citing* The Federalist No. 10, pp 82-84, and that historically, Congress, representing the national society, has led the fight for racial justice. *Croson*, 488 U.S. at 522 (Scalia, J., concurring)[4]; *Metro Broadcasting*, 110 S.Ct. at 3008-09.

In asking the Court to impose, on Congress' enactment of legislation designed to remedy past racial

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[3] *United States v. Carolene Products*, 304 U.S. 144, 152-53, n.4 (1938)

[4] In contrast, Justice O'Connor noted in *Croson* that Justice Marshall's *Fullilove* argument -- that legislation favoring "discrete and insular minorities" does not implicate the *Carolene Products* concerns that motivate strict scrutiny -- loses its force at the local level, where minorities may well be majorities in the government. *Croson* at 495-96 (O'Connor, J.).

discrimination in federal procurement, a strict scrutiny standard equal to that imposed on state and local government in *Croson*, petitioner effectively demands reversal of both *Fullilove* and *Metro Broadcasting*, and complete disregard of the basic principle of deference to Congress' power under the Reconstruction Amendments on which those key decisions rest.

B. The Reconstruction Amendments grant Congress substantive power to identify equal protection violations as well as power to remedy them.

As *Fullilove* recognizes, section 5 of the Fourteenth Amendment, and the parallel enforcement provisions of the Thirteenth and Fourteenth Amendments, confer not only remedial but substantive power on Congress to identify conduct endangering those guarantees of equal protection even where the Court has not done so and without regard to whether the Court would so find. The Reconstruction Amendments thus grant Congress the power to go beyond the Court in advancing the cause of "discrete and insular minorities," and require complementary deference by the Court to Congress' determinations in this area.

The seminal expression of this separation-of-powers principle is *Katzenbach v. Morgan*, 384 U.S. 641 (1966). The Court there upheld section 4(e) of the Voting Rights Act, which prohibited imposition of literacy requirements for voting on persons educated in a public or accredited private school in which the language of instruction was other than English. Finding that section 4(e) was a proper exercise of Congress' power under section 5 of the Fourteenth

Amendment, the Court held that Congress' section 5 power is not only remedial, but substantive. Congress is not confined to remedying violations of the Equal Protection clause identified by the courts; indeed, Congress may identify a threat to equal protection and act to remedy it "without regard to whether the judiciary would find [an equal protection violation]". *Id.* at 649. "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.* at 651. *Accord, Croson*, 488 U.S. at 490 (O'Connor, J.) ("Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.").

The *Morgan* Court held that the proper test of the affirmative reach of Congress' power under section 5 was that set out in *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819), to describe Congress' powers under the Necessary and Proper Clause. *Morgan*, 384 U.S. at 650. [5] *Morgan* noted that this same broad test had been held to define Congress' power under similar language in the Fifteenth and Eighteenth Amendments. *Morgan,* 384 U.S.

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[5] "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Morgan*, 384 U.S. at 650, *quoting McCulloch*, 17 U.S. at 421, and *citing Ex parte Virginia*, 100 U.S. 339, 345-46 (1880).

at 651. In renowned Footnote Ten, the Court held that Congress' power to enforce the Equal Protection clause is a one-way ratchet: Congress can act to protect, but has no power under section 5 "to restrict, abrogate, or dilute," the rights guaranteed by the Fourteenth Amendment. *Id.* at 651, n.10.

The holding of *Morgan* confirms what Footnote Ten says: that Congress' power to go beyond the authority of the Court is limited to situations where Congress acts to advantage the "discrete and insular minorities" that are inadequately represented in the political process and were therefore the focus of the Court's concern in *Carolene Products*. Requiring that New York's Puerto Rican population be allowed to vote effectively diluted the voting power of other voters in New York.[6] Yet no member of the Court except Justice Douglas was concerned about this question. *See Morgan*, 384 U.S. at 658-59 (Douglas, J., concurring in part) (noting possible challenge to section 4(e) on equal protection grounds by other voters). The majority found that such concern was not applicable because the Congressional measure enfranchised a disadvantaged minority. *Morgan*, 384 U.S. at 657. The Court explained that in the exercise of its powers under the Reconstruction Amendments Congress may apply the *Carolene Products* principle in favor of disadvantaged minorities, just as the Court itself does in conducting Equal Protection review where the legislation disadvantages such groups. *Ibid.*,

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[6] See *Oregon v. Mitchell*, 400 U.S. 112, 208 n.88 (1970) (Harlan, J.) ("Lowering of voter qualifications dilutes the voting power of those who could meet the higher standard...")

citing id. at 654-55 n.15.[7] In short, Footnote Ten of *Morgan* is to Congress as Footnote Four of *Carolene Products* is to the Court: a specific recognition of authority and responsibility to protect the rights of those disadvantaged in the political process.

Morgan directly supports deference to Congressional findings of racial discrimination, in a way markedly similar to *Fullilove*. The Court in *Morgan* deferred to Congress' determination that the legislation was needed to prevent discrimination in public services. *See id.* at 652 (hypothesizing various sufficient findings Congress might have made). Indeed, the deference inherent in the *Morgan* holding is made clear by the dissent's focus on the lack of "factual data" in the legislative record. *See Morgan*, 384 U.S. at 669 (Harlan, J., dissenting).[8]

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[7] *Korematsu v. United States*, 323 U.S. 214 (1944), is an example of the Court applying strict scrutiny to government discrimination against a racial minority -- the internment of American citizens of Japanese ancestry. Thus, contrary to petitioner's assertions, it does not support strict scrutiny of remedial legislation enacted by Congress.

[8] The historical background of the Reconstruction Amendments also supports judicial deference to Congress in remedial legislation. As commentators have recognized, the post Civil War Congress "... desired to secure the stated guarantees against a future unsympathetic Congress as well as the courts." John E. Nowak and Ronald D. Rotunda, Constitutional Law at 913. "The history will always be unclear, for the drafters had no reason to anticipate a time when the Court might be more liberal in granting and enforcing fourteenth amendment rights than the Congress.... Congress at this time was dominated by the Radical Republicans, who viewed themselves as the principal protectors of the recently freed slaves. The only Supreme Court that the members of Congress knew was a Court which had not applied the Bill of Rights to the States; had not assisted in giving the protection of the law to the abolitionists in the South prior to the War; had enforced the fugitive slave laws; and had invalidated

In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court unanimously upheld Congress' power to bar literacy tests for voter qualification on the ground that such tests discriminate against voters on account of race, even while it refused to defer to Congress' lowering of state voting age requirements. Justice Black's crucial opinion in that case clearly states that Congress' powers to enforce the Reconstruction Amendments are broadest when racial discrimination is at issue. "Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth and Fifteenth Amendments." *Mitchell*, 400 U.S. at 129, *see id.* at 127-129 (opinion of Black, J.). Justice Stewart agreed. *Compare id.* at 296 (opinion of Stewart, J.) (state regulations on voting age "do not invidiously discriminate against any discrete and insular minority" and therefore are beyond Congress' power under section 5) *with id.* at 282-84 (opinion of Stewart, J.) (literacy test ban is directed at preventing racial discrimination and therefore is within Congress' enforcement power under the Fifteenth Amendment and subject only to rational basis review by the Court).

Mitchell arguably narrows the congressional power and corresponding judicial deference in the equal protection area recognized in *Morgan* to situations where, as in the instant case, Congress has identified a threat to *racial* equality under law and has imposed a remedy. *See Mitchell*, 400 U.S. at 146 (opinion of Douglas, J.) (*Morgan* noted that section 4(e) could be sustained as remedying racial

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congressional legislation limiting the expansion of slavery into new territories." *Ibid.*

discrimination), *id.* at 132-33 (opinion of Black, J.) (same). But *Mitchell* confirms Congress' broad substantive powers and corresponding judicial deference in that situation. Indeed, all the Justices held in *Mitchell* that prohibiting literacy tests was a valid exercise of Congress' power under the enforcement clauses of the Fourteenth or Fifteenth Amendment, regardless of whether they viewed federal elections as a federal or state function. The Court apparently unanimously believed that the principle of judicial deference where Congress identifies and acts to remedy racial discrimination applies equally to Congress' imposition of a remedy on the federal government as it does to Congress' imposition of such a remedy on the states. *See Mitchell*, 400 U.S. at 117-18 (opinion of Harlan, J.) (summarizing the various opinions).[9]

C. The Thirteenth Amendment provides a specific textual mandate requiring judicial deference to Congress' determinations in legislating to eradicate the continuing effects of past racial discrimination.

As this Court has recognized for over a century, the enforcement clause of the Thirteenth Amendment "clothes

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[9] In *Heller v. Doe*, 113 S.Ct. 2637 (1993), respondents argued that Congress can confer on a disadvantaged group other than a racial minority special equal protection status denied by the Court. Although the Court declined to address this issue, *id.* at 2642, Justice Souter in dissent noted respondents' reliance on *Morgan* to support Congress' authority to raise the disabled to a "suspect class" in enacting the Americans with Disabilities Act. 113 S.Ct. at 2650-51, n.1 (Souter, J., dissenting). *See generally*, C. Guevara, *The Principled Way, A Path to Heightened Scrutiny for People with Disabilities* (Dec. 1994) (unpublished, lodged with the Court).

Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States," *Civil Rights Cases*, 109 U.S. 3, 20 (1883). Congress' enactments under the Thirteenth Amendment are subject only to rational review by the Court. *Jones v. Alfred E. Mayer Co.*, 392 U.S. 409, 440 (1968) ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."). Thus, where, as here, Congress enacts remedial legislation to eradicate continuing effects of past racial discrimination, the Thirteenth Amendment provides an express grant of power to Congress at least equivalent to Congress' power under section 5 and requiring at least equal deference by the Court.

In the Court's first opinion addressing the Thirteenth Amendment, the Court recognized Congress' power to eradicate racial discrimination with respect to the exercise of those "fundamental rights which are the essence of civil freedom," first among which was the "right to make and enforce contracts" that is at issue in this case. *Civil Rights Cases*, 109 U.S. at 22. The Court held, however, that the Thirteenth Amendment did not empower Congress to bar racial discrimination in public accommodation as a "badge of slavery", on the today-astonishing ground that at the time the Thirteenth Amendment was adopted, "free colored people" did not experience such discrimination as an "invasion of [their] personal status as a freeman." *Id.* at 25.[10]

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[10] *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791, 2812-13 (1992) (discussing repudiation of this view in *Brown v. Board of Education*, 347 U.S. 483 (1954))

In his prescient and eloquent dissent, the first Justice Harlan argued that the Thirteenth Amendment gave to Congress power to define and remedy "badges and incidents of slavery," *Civil Rights Cases*, 109 U.S. at 36-37 (Harlan, J., dissenting), and that where Congress legislates under that power to protect the rights of racial minorities, the Court should defer to Congress' action. *Ibid*; *see also id.* at 50-51 (judicial deference to Congress' similar Fifteenth Amendment authority). Justice Harlan's equally enlightened dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), in which the Court upheld state law segregation in public transport, makes clear that he saw Congress' Thirteenth Amendment power to identify "badges and incidents of slavery" as a one-way ratchet. Congress could not prevent the Court from identifying and removing other "badges and incidents," rather, both branches were entrusted by the Reconstruction Amendments with the responsibility to protect the rights of racial minorities. *Plessy*, 163 U.S. at 554-55, 564 (Harlan, J., dissenting).

Almost a century after the *Civil Rights Cases*, in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court adopted Justice Harlan's view of Congressional power under the Thirteenth Amendment, holding that it gives Congress power to identify "badges and incidents of slavery" even where the Court has not, and to pass legislation "necessary and proper" to eliminate them, subject to rational basis review by the Court. 392 U.S. at 439-40. The Court held that the scope of Congress' power under the Thirteenth Amendment, as under the Fourteenth, is defined by the *McCulloch* test. *Id.* at 443-44. Describing the history of the Thirteenth Amendment, and the Civil Rights Act of 1866 which it authorized, the Court held that the legislative

history confirms the plain language of the Amendment and the statute: the enacting Congress intended that they reach beyond state action to encompass private discrimination, as well as discrimination by states. *Id.* at 422- 37, *see also General Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982).

This Court has recognized Congress' power under the Thirteenth Amendment to require federal action to eradicate the legacy of racial discrimination, a power as broad as Congress' power to require state action to eradicate the legacy of racial discrimination under section 5 of the Fourteenth Amendment. In *Hurd v. Hodge*, 334 U.S. 24 (1948), argued and decided together with *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Court held that Congress had authority to impose on the District of Columbia, a federal enclave, the same equal protection requirements as on the states, *Hurd*, 334 U.S. at 33, n.14, and that Congress could prevent federal courts from enforcing racially discriminatory covenants to the same extent that it could bar state courts from doing so. *See id.* at 35-36.[11] *See also Jones v. Mayer*, 392 U.S. at 417-19.

Just as Congress under the Fourteenth Amendment has one-way power to require affirmative action by states, so Congress under the Thirteenth Amendment has one-way power to go beyond simply mandating strict racial equality

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[11] The Court based its holding in *Shelley* on the Fourteenth Amendment and on Section 1 of the Civil Rights Act of 1886, as amended in 1870 pursuant to Congress' authority under section 5 of the Fourteenth Amendment. In *Hurd*, the Court relied on Section 2 of the same Act (enacted under the Thirteenth Amendment), and found its holding in *Shelley* closely analogous. *Hurd*, 334 U.S. at 33.

in private or federal action that affects basic rights, including the right to contract, in the interest of eradicating "badges or incidents of slavery." As noted, the text of the Amendment itself grants express power to protect the rights of racial minorities; the Amendment is not race-neutral, nor do we need a Footnote Ten to understand, as the first Justice Harlan saw, that Congress' power thereunder is only to advance, not oppress, such "discrete and insular minorities." Modern Thirteenth Amendment jurisprudence includes the proposition that Congress' power encompasses the prohibition of racial discrimination in the making and enforcing of private contracts, *Runyon v. McCrary*, 427 U.S. 160 (1976), while allowing affirmative action by private employers, *United Steelworkers v. Weber*, 443 U.S. 193 (1979). And Congress' Thirteenth Amendment power extends to create, in 42 U.S.C. §1985(3), a special federal remedy for racial minorities against "conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men." *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971).

This view of Congress' power under the Thirteenth Amendment is buttressed by the Court's jurisprudence describing Congress' power under the Fifteenth Amendment. Like the Thirteenth Amendment, the text of the Fifteenth contains an express one-way grant of authority to Congress to protect the voting rights of racial minorities. And like the Thirteenth Amendment, the Fifteenth is binding on the federal government as well as on the states. The leading modern case on the Fifteenth Amendment, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), incorporates a vision of Congress' substantive and remedial authority to protect the voting rights of racial minorities equivalent to that

enunciated that same Term in *Morgan* for Congress' powers under the Fourteenth Amendment. *South Carolina v. Katzenbach*, 383 U.S. at 325-27.

Similarly, in *City of Rome v. United States*, 446 U.S. 156 (1980), the Court held that "under §2 of the Fifteenth Amendment, Congress may prohibit practices that ... do not violate §1 of the Amendment." *Id.* at 177. Subject only to rational basis review, Congress may determine that certain voting rights provisions are "appropriate methods of attacking the perpetuation of earlier, purposeful racial discrimination, regardless of whether the practices they prohibit were discriminatory only in effect." *Id.* at 176-77. In certain circumstances, the Court has upheld the use of racial criteria by a state pursuant to the Voting Rights Act to advance the voting rights of racial minorities. *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977).[12] Congress can thus identify threats to minority voting rights even where the Court has not and can authorize race-conscious remedial measures.

D. Congress' determination of the need for race-conscious legislation to remedy racial discrimination by the federal government is entitled to deference and should be upheld.

As the dissent in *Metro Broadcasting* stated, this Court has "repeatedly recognized that the [federal] Government possesses a compelling interest in remedying the effects of identified racial discrimination." *Metro Broadcasting*, 110 S.Ct. at 3033 (O'Connor, J., dissenting).

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[12] *Cf. Shaw v. Reno*, 113 S.Ct. 2816, 2829 (1993) (discussing *UJO*).

Indeed, as the dissent noted, Congress "clearly" has the power to adopt "narrowly tailored race-conscious measures ... to remedy discrimination in the [federal] allocation of broadcasting licenses." *Id.*, *see also id.* at 3036 ("The remedial interest may support race classifications because that interest is necessarily related to past racial discrimination.")[13] Thus, in the context of remedial legislation enacted by Congress, it makes little difference whether the Court requires a "compelling" or merely a "substantial" interest - remedying past racial discrimination, including racial discrimination by the federal government, meets either test. *Fullilove*, 448 U.S. at 492 (Burger, C.J.) (remedial program at issue would meet the strict scrutiny standard set out in *Bakke*); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 268 (1986) (O'Connor, J., concurring) ("[A]s regards certain state interests commonly relied upon in formulating affirmative action programs, the distinction between a 'compelling' and an 'important' governmental purpose may be a negligible one.")

Similarly, in reviewing the fit between a race-conscious remedy chosen by Congress and the racial discrimination which Congress sought to remedy, *Fullilove* establishes a test which does not depend on whether the fit is termed "narrow" or "substantial": Has Congress "adopted means to ensure that the award of a particular preference advances the asserted [remedial] interest." *Metro Broadcasting*, 110 S.Ct. at 3039 (O'Connor, J., dissenting), *citing Fullilove*, 448 U.S. at 487-88 (Burger, C.J.) and

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[13] In *Metro*, the race-conscious legislation at issue was not adopted for any remedial purpose, and the dissent argued that it therefore was not intrinsically related to race, as remedial legislation would be. *Id* at 5071.

Croson, 488 U.S. at 488-89 (O'Connor, J.). *See generally Wygant v. Jackson Board of Education*, 476 U.S. at 287 (O'Connor, J., concurring). ("[T]he Court is ... in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program ... which implements [a remedial] purpose by means that do not impose disproportionate harm on ... individuals directly and adversely affected...). Whatever adjectives are chosen to describe the "fit," the issue is at bottom whether Congress has adopted procedures to ensure that those charged with implementing the program, and those potentially adversely affected by it, may in a particular instance rebut through the administrative process the general findings Congress made in adopting the remedial program, and show that the particular award does not advance the asserted remedial interest, and therefore imposes disproportionate harm on nonminorities. *Fullilove*, 448 U.S. at 487-89 (Burger, C.J.).[14]

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[14] States using federal highway transportation funds on state projects are required to follow procedures established under 49 C.F.R., Part 23, and provide, *inter alia*, a certification process for challenging the status of a business as a "disadvantaged business enterprise." For example, as required under 49 C.F.R. § 23.69(a), Maryland has a program providing that "[a]ny individual or organization may challenge the socially and economically disadvantaged status of any individual presumed to socially and economically disadvantaged if that individual is an owner of a Maryland certified disadvantaged or minority business enterprise." Manual on Federal Disadvantaged and Minority Business Enterprise Program, Maryland Department of Transportation, at 96 (1993). (copy lodged with the Court). Under Maryland's program, a certified entity may be decertified if the firm does not meet certification standards as a disadvantaged/minority business enterprise. *See id.* at 47. *See also, eg.* N.J.S.A. 52:32-17 *et seq.* (1985).

Of far greater significance than the words used to describe the standard of judicial review is the type of factfinding that the Court will require of Congress in identifying continuing effects of past racial discrimination. On this point *Fullilove* expresses a clear consensus from which the Court has not retreated: "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove*, 448 U.S. at 478 (Burger, C.J.). When Congress enacts legislation, it is permitted to rely upon historical documentation and previous congressional findings and investigations; it is not necessary for Congress to make specific findings for each individual piece of legislation. *Ibid.; id.* at 502-503 (Powell, J., concurring); *Metro Broadcasting*, 110 S.Ct. at 3013. *See Metro Broadcasting*, 110 S.Ct. at 3031 (O'Connor, J., dissenting) (affirming *Fullilove*); *id.* at 3043 ("Congress' "considered judgment [is] embodied in measures crafted through the legislative process and subject to hearings and deliberation").

Petitioner and its amici argue that Congress did not create a sufficient factual record to support its determination of racial discrimination in federal contracting. They would require "empirical support," and "evidence" in the record, *see eg.* Pet. Br. at 35, to support Congress' express findings in the Act of prior discrimination in federal contracting. Setting aside for the moment the fact that in *Fullilove* itself the Court reviewed and held more than sufficient Congress' determination of racial discrimination *in federal construction contracting*, *Fullilove*, 448 U.S. at 477-78 (Burger, C.J.); *accord*, *Metro Broadcasting*, 110 S.Ct. at 3031 (O'Connor, J., dissenting) (in *Fullilove* "Congress had identified discrimination that had particularly affected the construction

industry"), petitioner's crabbed view of Congress' power misapprehends the nature of the legislative process and Congress' role in the Constitutional system.

Under the standard proposed by petitioner, legislative bodies would be required to make specific findings of fact, based solely on evidence in the "record" that could be demonstrated to be true with the kind of certainty that is only possible in the physical sciences.[15] Indeed, legislative enactments would be subject to a stricter standard of review than decisions of a trial court. While findings of a trial court must be upheld unless "clearly erroneous," *Anderson v. Bessemer City*, 470 U.S. 564 (1985), petitioner would require that Congress' legislative determinations in this area not be upheld unless specific evidence in the record demonstrates to a virtual certainty that they are correct.[16] In short, petitioner demands judicial review that would always be "strict in theory, but fatal in fact." *Fullilove*, 448 U.S. at 507 (Powell, J.). The Court has never subjected remedial Congressional legislation to such a standard.

The institutional characteristics of Congress indeed require that it not be so hamstrung, for Congress is far more able than the judiciary to engage in long-term factual determinations regarding the continuing existence of effects of past discrimination, and to revise and monitor remedial

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[15] Petitioner argues that such factfinding is required whether the standard of review is strict or intermediate scrutiny, *compare* Pet. Br. at 35 *with id.* at 43.

[16] One amicus describes the proposed standard by saying that Congress' determinations should be subject to the same scrutiny as the allegations of a Title VII plaintiff. Br. of Ass'd General Contractors at 23.

legislation.[17] First, Congress is not confined to relying on the parties (or amici) in a particular proceeding, nor is Congress confined in acquiring information by judicial rules of evidence. The Constitution anticipates that as the representative of the people, Congress, unlike a court or the executive, acquires information from the collective daily contacts and personal experiences of its elected members. Legislators and their staffs accumulate an understanding of a situation exceeding that any individual judge could hope to gain. "Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue." *Fullilove*, 448 U.S. at 502-03 (Powell, J., concurring).

Second, Congress continues to acquire experience and knowledge about a particular problem over time. Congress inherently relies on "information and expertise that [it] acquires in the consideration and enactment of earlier legislation." *Fullilove*, 448 U.S. at 503 (Powell, J., concurring); *see also id.* at 478 (Burger, C.J.) ("Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination.").

These advantages are particularly relevant to findings regarding the continuing effects of past discrimination such

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[17] *See generally* Note, *Principles of Competence: The Ability of Public Institutions to Adopt Remedial Affirmative Action Plans*, 53 U.Chi. L.Rev. 581, 602-06 (1986).

as those at issue here. Congress is in a better position than the Court to identify racial discrimination by the federal government and government perpetuation of private discrimination, given its oversight of federal programs. Congress as a representative body is in a better position than the Court to gauge the present effects of present or past racial discrimination in federal programs, through the feedback legislators receive from their constituencies. Congress is in a better position than the Court to reassess and reevaluate remedial legislation on a regular basis, and is indeed impelled to do so by the regular prospect of elections. *See Fullilove*, 448 U.S. at 489 (Burger, C.J.) (set-aside "subject to reassessment and reevaluation by Congress").

E. This Court should not abandon the long-standing principle of deference to Congress' factfinding in identifying and remedying racial discrimination.

In attempting to extend the theory set out in *Croson* to Acts of Congress, petitioner asks the Court to abandon its long-held view of Congress' authority under the Reconstruction Amendments, and abruptly to alter the respective powers of Congress and the Court in this area.

Petitioner's basis for such a drastic change in basic Constitutional rules is remarkably short on authority. Petitioner ignores the many decisions of this Court which expressly rest on deference to Congress' factfinding in the exercise of its power under the Reconstruction Amendments, and attempts to construct an argument for strict scrutiny out

of a few phrases in *Fullilove*. Pet. Br. at 24-27.[18] Indeed, the shallowness of petitioner's legal argument indicates that petitioner is simply asking the Court to make a "basic change in the law upon a ground no firmer than a change in ... membership." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791, 2814 (1992) (citations omitted). As *Casey* emphasized, such a result is "unjustifiable ... under principles of stare decisis." *Id.* at 2814. More fundamentally, where as here, the issue is rooted in "an intensely divisive [national] controversy," to overrule established precedent "would subvert the Court's legitimacy beyond any serious question." *Id.* at 2815.

Congress' authority under the Reconstruction Amendments to identify and remedy racial discrimination is the direct result of the most "intensely divisive controversy" of this nation: the Civil War. The Court's repeated affirmance of Congress' special powers under those Amendments has provided a firm ground for federal remedial civil rights legislation in many areas.[19] As the Court recognized in *Casey*, in the area of civil rights, as in that of abortion, implementation of the Constitutional principles announced by the Court has come at a uniquely high price of "criticism, ostracism, or...violence." *Casey*,

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[18] Petitioner's use of language in *Fullilove* while disregarding the holding of the case exemplifies a practice this Court strongly criticized in its first two opinions this Term. *United States v. Shabani*, 63 USLW 4001, 4002 (1994); *U.S. Banccorp Mortgage v. Bonner Mall*, 63 USLW 4005, 4007 (1994).

[19] Federal mandates have in turn been crucial in making effective state remedial programs. *See, eg.* State of New Jersey, *Governor's Study Commission on Discrimination in Public Works Procurement and Construction Contracts* at 31 (1993)(copy lodged with the court).

112 S.Ct. at 2815 (discussing implementation of *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Roe v. Wade*, 410 U.S. 113 (1973)). The Court has a corresponding obligation. "To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing." *Id.*

The Court must act with particular care where, as here, it is asked to disrupt the balance of power between the Court and Congress and to make new rules for Congress to live under. Changing the rules on a coequal branch is an inherently suspect enterprise, and one which should be undertaken only pursuant to a clear Constitutional mandate. Here, on the contrary, the Constitution and the Court's prior decisions consistently grant Congress special power and require corresponding judicial deference to Congress' identifying and remedying racial discrimination. Petitioner presents no legitimate basis to depart from that authority.

CONCLUSION

For the reasons stated above, amici states urge the Court to affirm the Tenth Circuit's decision in this case.

Respectfully submitted,

JOSEPH CURRAN
Attorney General of MD
* EVELYN O. CANNON
Assistant Attorney General
200 St. Paul Place
Baltimore, MD 21202
* *Counsel of Record*

Of Counsel:
Eleini M. Constantine
444 N. Capitol Street
Washington, D.C. 20001

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