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 PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

RONALD A. ZUMBRUN
* JOHN H. FINDLEY
ANTHONY T. CASO
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Pacific Legal Foundation

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioner, Adarand Constructors, Inc. (Adarand). 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 this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus is submitting this brief because it believes its public policy perspective and litigation experience opposing race-based decisions by government agencies will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Fifth and Fourteenth Amendments to the United States Constitution. Amicus believes the lower court's opinion poses a serious threat to the fair administration of federal highway projects because the race-based presumption of disadvantage contained in the Subcontracting Compensation Clause (SCC) induces prime contractors to hire minorities solely on the basis of race, rather than other more relevant factors such as experience, financial strength, and bid amount. As such, the SCC violates fundamental notions of fairness.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 16 F.3d 1537 (10th Cir. 1994).

STATEMENT OF THE CASE

This case presents two issues: (1) whether the level of scrutiny for racial classifications should depend on the governmental entity establishing the classification; and (2) whether the race-based classifications for awarding highway construction contracts which are imposed to remedy broad-based societal discrimination, rather than clearly identifiable discrimination perpetuated by a state or its political subdivision withstand the applicable level of scrutiny.

The issues arose when the Central Federal Lands Highway Division (CFLHD) issued a solicitation for bids for the construction of a 4.7 mile section of highway to be located in the San Juan National Forest (West Dolores Project) in Southern Colorado. The SCC provision in the contract authorized payment of a monetary bonus to all prime contractors who hire subcontractors certified as Disadvantaged Business Enterprises (DBEs) to perform work amounting to more than 10% of the overall contract amount. DBE certification is attained by proving that the business is at least 51% owned by one or more "socially and economically disadvantaged" individuals. Minorities are presumed to be both socially and economically disadvantaged, regardless of whether they are actually disadvantaged. 15 U.S.C. § 637(d)(3)(C). Conversely, businesses owned or operated by white males are not presumed to be disadvantaged, irrespective of existing adverse social or economic factors. In fact, the race and ethnic criteria for establishing social disadvantage effectively precludes a white male owned business from ever attaining DBE certification.

After the CFLHD awarded the prime contract for the West Dolores Project to Mountain Gravel & Construction Company (Mountain Gravel), Adarand Constructors (Adarand), a construction company owned and managed by a white male, then submitted the lowest bid for the guardrail portion of the project to Mountain Gravel. Mountain Gravel awarded the subcontract to Gonzales Construction Company because Gonzales' DBE certification qualified Mountain Gravel to receive the SCC bonus payment, which more than offset the additional cost of hiring Gonzales.

Adarand filed suit in the United States District Court for the District of Colorado, challenging the constitutionality of the SCC by asserting that the SCC program violates the right of equal protection component of the Due Process Clause of the Fifth Amendment. After Cross Motions for Summary Judgment were filed, the District Court granted the United States' Motion for Summary Judgment.

Adarand subsequently filed a Notice of Appeal with the Tenth Circuit Court of Appeals. The Tenth Circuit upheld the validity of the race-based preference in the SCC.

SUMMARY OF ARGUMENT

In *City of Richmond v. Croson*, this Court recognized that all racial classifications must be subject to strict scrutiny. This assertion is not qualified by the identity of the originating governmental body. Contrary precedent of *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 457 (1990), which might suggest a lower level of scrutiny for Congressional actions does not apply to this case.

The SCC's race-based presumption of disadvantage contained in 15 U.S.C. § 637 violates nonminority individuals' constitutional rights. As recognized by Justice Powell, "this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations." *Fullilove v. Klutznick*, 448 U.S. at 497 (Powell, J., concurring). In this case there was no finding that there had ever been discrimination in the highway construction industry in Colorado. The policy behind the SCC is to provide subcontracting opportunities for small disadvantaged business enterprises. Given the 30-year passage of time since the Civil Rights Act of 1964, minority status alone is no longer sufficient to presume that the minority subcontractor has been both socially and economically disadvantaged, the two requisite criteria for DBE certification. Further, nonminorities are effectively precluded from DBE certification because their nonminority status prevents them from meeting the social disadvantage prong of the DBE certification process. As such, the Section 637 presumption of disadvantage impermissibly infringes nonminorities' constitutional rights to be treated as individuals.

Because there is no finding of prior discrimination in the highway construction industry, the race-based preference policy at issue must be justified by some other compelling governmental interest, none of which is apparent from the face of the legislation. Nor is the SCC program "narrowly tailored." First, it is not linked to identified discrimination and, second, race-neutral alternatives exist which would more adequately serve the policy underlying the SCC. Accordingly, the Section 637 presumption of disadvantage cannot withstand the strict scrutiny standard for ensuring compliance with equal protection guarantees.

Absent a supportable finding of prior discrimination, a government-imposed racial preference is clearly an arbitrary and capricious act and itself constitutes invidious discrimination. The equal protection guaranty protects individual rights and does not countenance group preference merely to obtain racial balance. For these reasons, the judgment below must be reversed.

ARGUMENT

I

THE STRICT SCRUTINY STANDARD OF REVIEW SHOULD APPLY FOR ALL RACE-BASED PROGRAMS, REGARDLESS OF ORIGIN

The constitutional challenge to the SCC's race-based presumption of disadvantage has properly been brought under the implied equal protection guarantee of the Fifth Amendment. This program, as well as all race-conscious programs, must be reviewed under the strict scrutiny test.

A. Strict Scrutiny Is the Appropriate Standard of Review for All Race-Conscious Programs

Amicus believes that all remedies based on a racial classification are subject to the most searching examination. This includes a race-conscious program approved by the federal government or a state or local government. The strict scrutiny standard has been traditionally used when examining "suspect" classifications based on race or national origin. The purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the governmental body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means

chosen "'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."[1] Strict scrutiny analysis requires the satisfaction of two prongs. First, any racial classification must be justified by a compelling governmental interest and, second, the means chosen by the government to effectuate its purpose must be narrowly tailored to meet that goal.[2]

The decision in *Korematsu v. United States of America*, 323 U.S. 214 (1944), provided an earlier constitutional analysis of equal protection. In that case, the Court upheld, by a six to three vote, the wartime restrictions on residents of Japanese origin but indicated that classifications based on race or national origin would not be consistent with the principles of the equal protection guarantee absent compelling governmental interest. This opinion established the basis for the standard of review of classifications based on race:

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes

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[1] *City of Richmond v. J. A. Croson Company*, 488 U.S. 469, 493 (1989) (plurality opinion of O'Connor, J.).

[2] *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274, 285 (1986) (plurality opinion); *Croson*, 488 U.S. at 493 (plurality opinion).

> justify the existence of such restrictions; racial antagonism never can.

Korematsu, 323 U.S. at 216.

This Court has rarely swayed from this standard of review when confronted with a classification based on race. "'Racial, and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.'" *Wygant*, 476 U.S. at 273 (plurality opinion of Powell, J., Burger, C.J., Rehnquist and O'Connor, JJ. (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 291 (1978))). In *Croson*, a majority of this Court held that race-based programs are suspect classifications subject to strict scrutiny by the courts. *Croson* (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ., 448 U.S. at 493; Scalia, J., concurring at 520).

B. Federally Approved Race-Conscious Programs Should Be Examined Under the Strict Scrutiny Standard

Amicus believes that the same analysis should apply regardless of whether a constitutional challenge to a race-conscious program is brought under the Fifth Amendment due process guarantee or the Fourteenth Amendment equal protection guarantee. The guaranty of equal protection prohibits the government from discriminating between individuals or groups on an illicit basis. This is consistent with this Court's earlier cases recognizing that there is no significant distinction between such limitations on the federal government and limitations on a state and local government. Even federal programs which are claimed to be remedial in nature are subject to strict scrutiny if they employ racial classifications because of the need to ensure that such

measures are being used to further the stated remedial interest and are being used no more broadly than the remedy demands.[3]

Since *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case to *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the Court has been consistent in holding that the Due Process Clause of the Fifth Amendment has an equal protection component which applies to the federal government in the same way as the Equal Protection Clause of the Fourteenth Amendment applies to the states. In *Bolling*, the Court invalidated segregation of public schools in the District of Columbia, finding that racial segregation violates the Due Process Clause. The Court explained the relationship of the Fifth and Fourteenth Amendments:

> The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court

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[3] *Metro*, 497 U.S. at 611 (O'Connor, J., dissenting) (citing *Croson*, 488 U.S. at 493-95, 498-502, and *Wygant*, 476 U.S. 267).

> has recognized, discrimination may be so unjustifiable as to be violative of due process.

347 U.S. at 499 (footnote omitted).

This recognition of an equal protection component within the Due Process Clause of the Fifth Amendment and Fourteenth Amendment renders Fifth Amendment and Fourteenth Amendment equal protection analyses indistinguishable.[4] Regardless of whether the issue before the Court involves traditional discrimination or reverse discrimination, the standard of scrutiny is the same. The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.[5] As to the person whose equal protection rights are being denied, the source of discrimination is irrelevant, since the extent of denial is not

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[4] *See Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); *see also United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) ("the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth"); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Johnson v. Robinson*, 415 U.S. 361, 364-65 n.4 (1974); *Bolling v. Sharpe*, 347 U.S. at 499-500; *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. at 604 (O'Connor, J., dissenting) ("[t]he Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of race classifications").

[5] *Croson*, 488 U.S. at 494 (plurality opinion of O'Connor, J., Rehnquist, C.J., White and Kennedy, JJ.) (quoting *Bakke*, 438 U.S. at 289-90).

diminished because the discrimination is sanctioned by federal rather than state authority.

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), this Court was confronted with the imposition of residency requirements for welfare eligibility which had been authorized by Congress in Section 402(b) of the Social Security Act. Writing for the majority, Justice Brennan ruled first that the state residency requirements impinged upon the fundamental right to travel and was not supported by a compelling state interest, second, that "Congress may not authorize the States to violate the Equal Protection Clause," *id.* at 641, and third, that the District of Columbia's residency requirement was a "discrimination ... 'so unjustifiable as to be violative of due process.'" *Id.* at 642 (quoting *Schneider v. Rusk*, 377 U.S. 163, 168 (1964)). The equal protection test stated in *Shapiro* required the application of the strict scrutiny standard of review whenever a classification impinged upon a suspect class or upon a fundamental interest. 394 U.S. at 629.

In *Weinberger v. Wiesenfeld*, 420 U.S. 636, this Court reaffirmed: "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Id.* at 638 n.2. Again in *Regan v. Taxation With Representation*, 461 U.S. 540, 542 n.2 (1983), this Court stated: "The Due Process Clause imposes on the Federal Government requirements comparable to those that the Equal Protection Clause of the Fourteenth Amendment imposes on the States." Only twice has this Court departed from the recognized unity of the Fifth Amendment and Fourteenth Amendment equal protection analyses: *Fullilove v. Klutznick*, 448 U.S. 448, which was decided before *Richmond v. Croson*, and *Metro Broadcasting v.*

Federal Communications Commission, 497 U.S. 547, which presented issues that negate its precedential value.

1. Metro Broadcasting v. FCC Is Not Relevant Precedent to the Case at Bar

In *Metro Broadcasting v. Federal Communications Commission*, underlying First Amendment concerns existed which were sufficient to preclude that decision from application to the case at bar. The issue before the Court in *Metro* concerned an FCC "distress sale" policy which promoted minority ownership of broadcast stations by allowing a broadcast licensee, under certain conditions, to assign its license to an FCC-approved minority enterprise without a hearing. The program was challenged as being violative of the equal protection component of the Due Process Clause of the Fifth Amendment. In a 5-4 decision, this Court upheld the program, but inherent in the reasoning of the Court was the recognition that the public interest aspect of the FCC's role "necessarily invite[d] reference to First Amendment principles." *Metro*, 497 U.S. at 567 (citations omitted). The Court noted that "the scarcity of [electromagnetic] frequencies [permits] the Government ... to put restraints on licensees in favor of others whose views should be expressed on this unique medium.'" *Id.* at 566-67 (brackets in original; brackets added; citations omitted). Justice O'Connor took exception to the reliance of the majority on the notion "that a particular and distinct viewpoint inheres in certain racial groups, and that a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants because [that applicant is more] 'likely to provide [that] distinct perspective.'" *Metro*, 497 U.S. at 618 (brackets added; brackets in original) (O'Connor, J., dissenting). As Justice O'Connor and several others on this Court have recognized, racial classifications

must never be characterized as "routine legislation" and must be subjected to a strict standard of scrutiny.[6]

While amicus questions the underlying logic which prompted the majority in *Metro* to deviate from *Bolling* and its progeny, and strongly urges this Court to reconsider the tenuous reasoning of that case, the *Metro* decision is of no moment in the case at bar. Unlike *Metro*, this case does not present conflicting constitutional problems because the viewpoint dissemination issues which so concerned the majority in the *Metro* decision are not now before the Court. *Metro* is not relevant precedent because of the unique nature of the FCC's role in protecting the public interest and should, therefore, not be construed as limiting the scope of *Croson*. For very different but no less significant reasons, *Fullilove v. Klutznick* is also not controlling in this case.

2. Fullilove v. Klutznick Is Not Relevant Precedent to the Case at Bar

Fullilove was decided nine years prior to this Court's decision in *Croson* which determined that strict scrutiny applies to all preferences that favor members of minority groups. *Metro*, 497 U.S. at 609 (O'Connor, J., dissenting). Consequently, the precedential power of *Fullilove* is suspect. Even if the Court finds that *Fullilove* raises issues of stare decisis, the challenged SCC program is distinguishable from the Minority Business Enterprise (MBE) set aside considered by the *Fullilove* Court because the SCC program is not a

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[6] *Metro*, 497 U.S. at 603 (O'Connor, J., Rehnquist, C.J., Scalia and Kennedy, JJ., dissenting) (urging strict scrutiny for all racial classifications, including those contained in the challenged FCC distress sale); *id.* at 634 (Kennedy and Scalia, JJ., dissenting).

remedy for identified past discrimination and impacts individuals rather than states or their political subdivisions.

a. The Race-Based Presumption of Disadvantage Does Not Remedy Identified Past Discrimination Because It Is Not Victim Specific

In considering the applicability of *Fullilove* in light of *Croson*, Justice O'Connor said that "Fullilove applies at most only to congressional measures that seek to remedy identified past discrimination." *Metro*, 497 U.S. at 607 (O'Connor, J., dissenting). Others on the Court have also indicated that Congress must select a means which is victim specific in order to remedy the present effects of past discrimination.[7] A review of the original legislation which served as the model for the SCC, *Adarand Constructors, Inc. v. Pena*, 16 F.3d at 1546, and was upheld in *Fullilove*, indicates that the SCC is not true to the underlying goals of the legislation because it does not remedy identified past discrimination.

In 1977, Congress enacted the Public Works Employment Act as a means of directing federal funds into the minority business community in order to provide economic stimulus. *Fullilove*, 448 U.S. at 458-59 (opinion of Burger, C.J., joined by White and Powell, JJ.). This Act

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[7] *Fullilove*, 448 U.S. at 487 (opinion of Burger, C.J.) (stating that benign racial or ethnic classifications can have deleterious effects when they stray from narrow remedial justifications, and must therefore be limited to accomplishing the remedial objectives of Congress); *Id.* at 510 (Powell, J., concurring) ("I believe that Congress' choice of a remedy should be upheld [if it] redress[es the] identified discrimination").

was a continuation of a short-term program which was prompted by a problem of national unemployment. *Id.* at 456-57. The 1977 Act included, in part, a mandatory set-aside provision that 10% of the work must come from Minority Business Enterprises, but included a waiver provision for situations where 10% minority participation was not feasible. *Id.* at 459. In considering the mandatory nature of the 1977 amendment, Congress heard testimony that "'every agency of the Government has tried to figure out a way to avoid'" allocating funds to the minority business community. *Id.* at 461 (quoting 123 Cong. Rec. 5329 (1977)) (remarks of Rep. Mitchell). The dearth of minority business participation in government contracting was due to the "longstanding existence and maintenance of barriers impairing access by minority enterprises to public contracting opportunities, or sometimes as involving more direct discrimination." *Id.* at 463. So the MBE set-aside provision was enacted to rectify this disparity of contracting opportunities and, as such, was deemed by the *Fullilove* Court as sufficient to invoke its authority under Section 5 of the Fourteenth Amendment. *Id.* at 463. The challenged program was only an experimental "pilot project" however, and placed conditions upon states' ability to qualify for federal funds.[8] The allocation of the initial burden of

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[8] "Congress, after due consideration, perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity. In this effort, Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives; this is especially so in programs where voluntary cooperation with remedial measures is induced by placing conditions on federal expenditures." *Fullilove*, 448 U.S. at 490 (opinion of Burger, C.J., joined by White and Powell, JJ.).

compliance to the recipient of the federal funds was an important factor in Congress' passing of the legislation. *Id.* at 461. Significantly, the project was deemed to be solely remedial because a waiver provision limited its reach. In upholding this experimental program, Chief Justice Burger observed that it "press[ed] the outer limits of congressional authority." *Id.* at 490.

In contrast, the DBE certification procedure includes a presumption of disadvantage which negates any assurance that the challenged program will remedy identified past discrimination. DBE certification is accomplished by a showing that the applicant has been economically disadvantaged by virtue of an impaired "ability to compete in the free enterprise system ... due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. § 637(a)(6)(A).[9] So the threshold step for achieving DBE certification is establishing social disadvantage. Nonminorities are definitionally precluded from establishing social disadvantage because only "those who have been subjected to *racial or ethnic prejudice or cultural bias because of their identity as a member of a group* without regard to their individual qualities," are defined as socially disadvantaged. 15 U.S.C. § 637(a)(5) (emphasis

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[9] While Section 637(a) of the Small Business Act (SBA) does not presume that minorities are disadvantaged, Section 637(d) employs the same language as Section 637(a), and does contain a race-based presumption of disadvantage. Congress has never taken issue with the SBA's presumption of disadvantage and respondents have stipulated that the Small Business Act establishes such a presumption. Respondents' opposition to petition at 6 n.6. Therefore, this presumption is properly before the Court, regardless of the language of Section 637(a).

added). Consequently, nonminorities may never qualify as DBEs because failure to establish social disadvantage ends the inquiry.[10]

In defining social and economic disadvantage, minorities are presumed to be both socially and economically disadvantaged, regardless of individual upbringing, capital resources, prior affirmative action program participation, or social benefits. 15 U.S.C. § 637(d)(3)(C). This presumption enables a minority applicant to simply claim DBE status without any substantiation,[11] and thereby receive the benefits of the SCC program. This presumption is a momentous change from the program upheld in *Fullilove*, which rightfully placed the burden of compliance squarely on the shoulders of the beneficiary.[12] Congress was clear in its

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[10] "Recipients should always make a determination of social disadvantage before proceeding to make a determination of economic disadvantage. If the recipient determines that the individual is not socially disadvantaged, it is not necessary to make the economic disadvantage determination." 49 C.F.R. Pt. 23, Subpt. D, App. C (1992).

[11] "In making certification decisions, the recipient ... relies on this presumption, and does not investigate the social or economic status of individuals who fall into one of the presumptive groups." 49 C.F.R. Pt. 23, Subpt. D, App. A, at 216.

[12] *Fullilove*, 448 U.S. at 464 n.44 (citing the pertinent provisions of Section 8(a) of the SBA program, in which the applicant must identify with the disadvantages of his or her racial group generally, and must have personally been affected by these disadvantages such that the applicant's ability to enter into the mainstream of the business system

(continued...)

intent that the term "minority" only included such "'minority individuals as [were] considered to be economically or socially disadvantaged.'" *Fullilove*, 448 U.S. at 471 (opinion of Burger, C.J., joined by White and Powell, JJ.) (citation omitted).

b. The SCC Exceeds the Scope of Congress' Section 5 Authority as Recognized in Fullilove Because It Impacts Individuals Rather Than States

Section 5 of the Fourteenth Amendment grants Congress the power to enforce the provisions of the amendment by appropriate legislation. U.S. Const. Amend. XIV, Section 5. While the various opinions in *Fullilove* considered many sources of congressional authority upon which to base the propriety of the challenged program, it is "clear that it was § 5 that led the Court to apply a different form of review to the challenged program." *Metro*, 497 U.S. at 606 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting). As has been previously noted, the MBE program which the *Fullilove* Court upheld pressed the outer limits of congressional authority. Aside from its nonremedial nature, the SCC also exceeds the limits of congressional Section 5 authority because it does not act with respect to the states, a prerequisite for Section 5 authority. Admendment XIV, Section 1. While the MBE program in *Fullilove* concerned the ability of a *state* to receive federal funds, the DBE program under review here concerns incentive payments to *individuals* who employ certified DBE's. This is hardly the

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[12] (...continued)
was hampered). "'Membership alone in any group is not conclusive that an individual is socially disadvantaged.'" *Id.*

type of "oversight of certain of the States' actions" which this Court has recently endorsed. *Metro*, 497 U.S. at 606 (citing *Croson*, 488 U.S. at 488-91 (opinion of O'Connor, J., Rehnquist, C.J., and White, J.)).

The requirement that congressional action brought under Section 5 speak to the states is illustrated by the cases which challenged the Voting Rights Act of 1965. This Act suspended the use of literacy tests in certain jurisdictions where it found serious racial discrimination in voting. Literacy tests were suspended even in localities within these jurisdictions where courts had not found actual voting discrimination through the use of literacy tests. In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the constitutionality of this broad suspension of literacy tests by Congress was challenged. The Court found that Congress had the power to prohibit *state* action which perpetuated the effects of past intentional discrimination. *Id.* at 325. Similarly, in *Rome v. United States*, 446 U.S. 156 (1980), the Act was upheld even though it was being applied to prevent a race-neutral annexation in the City of Rome, Georgia. The Court held that when there has been a history of intentional race discrimination, Congress could prohibit race-neutral electoral system changes which had a discriminatory impact. In each of these cases, the legislation spoke to state or local government, not individuals. Conversely, the challenged SCC speaks to individuals, not state or local government. Not insignificantly, the SCC provides incentives to individuals to do the very thing which 42 U.S.C. § 1981 was enacted to prevent: discrimination in private contracting against individuals solely on account of race or ethnicity.

The DBE program lacks the prerequisite characteristics for exercising Section 5 power because it does not remedy identified past discrimination and speaks to

individual rather than state actions. As a consequence, the basis for the Court's judgment in *Fullilove*, whatever it may have been, is absent today. Racial classifications enacted under non-Section 5 powers, as noted above, must not violate the equal protection guarantees and the standard for measuring such compliance is the strict scrutiny standard of *Croson*.

Amicus considers the precedential value of *Fullilove* to be minimal in light of *Croson*, and finds the precedential value of *Metro* to be undermined by the First Amendment concerns of the majority. Amicus urges this Court to adopt one standard in examining all race-based preference programs, regardless of origin. A strict scrutiny standard of review would be in complete harmony with the goal of a color-blind society free from racial bias.

II

THE SCC CANNOT PASS STRICT SCRUTINY BECAUSE IT IS NOT WELL TAILORED AND THERE HAVE BEEN INSUFFICIENT FINDINGS TO JUSTIFY THE USE OF RACIAL CLASSIFICATIONS

Section 5 of the Fourteenth Amendment grants to Congress the power to enforce the Equal Protection Clause of the Fourteenth Amendment. Because this unique power gives "Congress a particular, structural role in the oversight of certain of the States' actions," *Metro*, 497 U.S. at 606 (O'Connor, J., dissenting) (citing *Croson*, 488 U.S. at 488-91), this Court has followed a different form of review for remedial legislation enacted pursuant to Section 5. *Fullilove*, 448 U.S. at 479 (opinion of Burger, C.J.). The racial classification considered by the *Fullilove* Court was upheld under this different form of review. Amicus contends that, unlike the set-aside provision considered in *Fullilove*,

Section 5 authority is lacking in this case because there has been no showing of state-sponsored discrimination warranting a remedy and, in any event, the SCC impacts individual actions, rather than state actions.

A. The SCC Is Not Narrowly Tailored Because There Are Inadequate Limits to the Applicability of the SCC's Presumption of Disadvantage

The express underlying purpose of the SCC is to benefit DBEs. However, it is the procedure for DBE certification which indicates that the SCC is a thinly veiled apparatus for discriminating against nonminorities to the benefit of minority enterprises, regardless of economic disadvantage. Such an apparatus does not merely press the limits of congressional authority which were strained by the MBE set-aside program considered in *Fullilove*, it shatters these limits by ignoring them completely.

The clear intent of Congress, as noted by the *Fullilove* Court, that the term "minority" only include those minorities who were truly economically or socially disadvantaged, is defeated by the presumption of disadvantage contained in the challenged program before the Court. Section 637 defines "economically disadvantaged" as the inability of a socially disadvantaged (*i.e.*, minority) individual to compete with a nonsocially disadvantaged (*i.e.*, nonminority) individual. Absent a causal link between an applicant's minority status and economic disadvantage, that minority applicant should be on the same footing as an economically disadvantaged nonminority applicant: Both are economically disadvantaged for reasons other than race or ethnicity.

The DBE certification procedure contrasts greatly with the MBE set-aside program upheld by the splintered

Fullilove Court. In *Fullilove* the program was upheld largely due to the existence of a waiver. *Fullilove*, 448 U.S. at 487 (opinion of Burger, C.J.). Grantees were allowed to avoid the minority set-aside requirement by demonstrating that their best efforts would not succeed in achieving the targeted percentage of minority participation. *Id.* at 487-88. The absence of such a waiver from the SCC procedures, as well as the race-based presumption of social disadvantage, indicates a deficiency in the limitations on its application to those for whom the Small Business Act of 1953 was designed to benefit.

Any currently existing minority-owned business which was subject to the traditional discrimination that existed in 1964, when Congress first enacted sweeping civil rights legislation, has benefited from 30 years of affirmative action programs and can no longer be presumed to have suffered from the "diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."[13] Similarly, those minority-owned businesses which have been in existence for less than 30 years have likewise enjoyed the benefits of affirmative action, without having endured the pre-1964 atmosphere of discrimination and contract preclusion. Therefore, eliminating the presumption of disadvantage would improve the victim specificity of the DBE certification process because it would retard the ability of nondisadvantaged minorities to obtain DBE certification without harming those truly in need of DBE certification.

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[13] 15 U.S.C. § 637(a)(6). Amicus believes that the competitive nature of the construction industry is such that any business which has existed for more than 30 years is not likely to be economically disadvantaged either.

Significantly, the only party who has an incentive to challenge DBE certification under the current program is an unsuccessful competitor.[14] The prime contractor has no incentive because he has either hired the subcontractor in order to receive the SCC bonus, or has simply hired the best subcontractor available, who happens to be a DBE. Amicus believes that this burden is wrongly imposed on competing subcontractors for two reasons: First, subcontractors do not, nor should they be expected to, have the resources or expertise to investigate the individual backgrounds of their minority competitors. Second, such a burden encourages litigation which is, at the very least, counter-productive to the business of highway construction.[15] Amicus believes

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[14] *See* 49 C.F.R. § 23.69(b):

> The recipient's challenge procedure shall provide as follows: (1) Any third party may challenge the socially and economically disadvantaged status of any individual (except an individual who has a current 8(a) certification from the Small Business Administration) presumed to be socially and economically disadvantaged if that individual is an owner of a firm certified by or seeking certification from the recipient as a disadvantaged business.

[15] The competitor who challenges a competitors eligibility for DBE status is in a no-win situation because such a challenge will not endear the challenger to the prime contractor, who will likely lose the SCC bonus payment as a result of the challenge, and the cost of the challenge will have to be recouped somehow--most likely through higher bids on future contracts, which will lessen the challenger's chance of being awarded those contracts.

that these deficiencies in the DBE certification procedure are fatal to a defense that the SCC withstands strict scrutiny. Additionally, the lack of findings of specific discrimination negate any applicability of Section 5 authority in this case.

B. The Race-Based SCC Bonus Provision May Not Be Applied to the Highway Construction Industry Because There Have Been Insufficient Findings of Discrimination

The rights created by the Fourteenth Amendment enure to individuals, not racial classes, *Shelley v. Kraemer*, 334 U.S. 1 (1948); therefore the authority of Section 5 extends only to the extent necessary to protect individual rights. The Fourteenth Amendment commands: "No State shall ... deny to any *person* within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, Section 1 (emphasis added). This Court has remained true to the text of the Fourteenth Amendment in recognizing that the rights created by the first section of the Fourteenth Amendment are *personal* rights, guaranteed to the individual. *Shelley v. Kraemer*, 334 U.S. at 22. As such, the enforcement authority granted Congress by Section 5 of the Fourteenth Amendment is only appropriate when there are findings of specific instances of discrimination by a state or political subdivision. As Justice O'Connor has found: "[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." *Croson*, 488 U.S. at 499 (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.). It follows then that mere generalized assumptions of discrimination are insufficient to warrant Section 5 remedies.

The common denominator in the various opinions concerning Section 5 authority is the prerequisite that a state or political subdivision has *acted* in such a way as to deprive

an individual of equal protection of the law.[16] So absent denial or invasion of equal protection of the law by a state or local government, whether intentional or by passive participation in racial exclusion by private parties, Section 5 is not a source of authority for congressional action in this case. The widespread discrimination which spawned the Civil Rights Act of 1964 and other legislation authorizing affirmative action might have justified deference to Congress, for a period of time subsequent to 1964, in assuming "that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from ... contracting opportunities." *Fullilove*, 448 U.S. at 484-85. Amicus believes, however, that the societal gains made over the last 30 years have resulted in greater public awareness of the evils associated with racial discrimination. To be sure, racial discrimination has not been, and may never be, completely eliminated from society. But there is less likelihood today that state-sponsored discrimination is so pervasive as to require nonspecific remedial legislation by Congress. The benefit which minority-owned businesses have reaped over the past 14 years since the MBE set-aside program was approved in *Fullilove* are such that the "barriers impairing access to minority enterprises [that were] extant for so long," *Id.* at 463, are no longer present, nor have they been for a number of years.

Racial classifications by any governmental entity threaten the color-blind ideal upon which the Fourteenth

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[16] For example, in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 732 (1982), the Court noted that Section 5 grants power "'to secure ... equal protection of the laws against State denial or invasion.'" (Quoting *Ex Parte Virginia*, 100 U.S. 339, 346 (1880).)

Amendment rests. As Justice Powell has said, "[t]he time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin." *Fullilove*, 448 U.S. at 516 (Powell, J., concurring). It is, therefore, not unreasonable to require Congress to make findings of state-sponsored discrimination that are sufficiently definite to ensure that the remedy addresses the problem in a way that does not equate to unlawful federal-sponsored discrimination. Amicus is aware that this requirement should not be so stringent as to require "imposition of adjudicatory procedures" to a point that Congress becomes a lower federal court. *Id.* at 503. However, the findings should be specific enough to allow for an effective remedy that is solely remedial in nature. The findings should also be based on evidence that goes beyond much-criticized disparity studies,[17] and instead overcome the fear that Congress "has neither the dispassionate objectivity nor the flexibility that are needed to mold a race-conscious remedy around the single objective of eliminating the effects of past or present discrimination." *Id.* at 527 (Rehnquist and Stewart, JJ., dissenting); *Croson*, 488 U.S. at 522 (Scalia, J., concurring) (noting that these political qualities are doubted in a national legislature). But without some evidence of individual discrimination by a state, Congress is merely remedying the effects of societal discrimination.[18] Constructing an

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[17] *See, e.g.*, George R. LaNoue, *The Disparity Study Shield: Baltimore and San Francisco*, RACIAL PREFERENCES IN GOVERNMENTAL CONTRACTING 69 (1993); George R. LaNoue, *Social Science and Minority Set-Asides*, THE PUBLIC INTEREST, Winter 1993.

[18] "There is no reason to assume, and nothing in the legislative history suggests, much less demonstrates, that [minorities are] equally entitled to reparations from the

(continued...)

effective remedy for such an injury of nebulous origin would be impossible because the reach of the remedy would be just as indefinite.[19]

No experiment should be allowed to run indefinitely lest its objectives be forgotten. Such is the case with the *Fullilove* pilot program which was the genesis for the SCC. The SCC program as it is currently applied goes beyond the remedial nature of the pilot program upheld in *Fullilove*. The rebuttable presumption of disadvantage in the SCC does not equate to the waiver of the MBE program in *Fullilove* since the burden to rebut is improperly on a third party rather than the beneficiary. There is nothing in the record to show that Congress made any relevant fact findings when it applied the challenged SCC provision to the highway construction industry. While the *Fullilove* Court determined that Congress had sufficient findings to employ racial classifications in 1976, those same findings are not of infinite applicability and should not be found to carry over into all other affirmative action legislation.

Section 5 authority is lacking in this case because neither Colorado nor any political subdivision within

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[18] (...continued)
United States Government." *Fullilove*, 448 U.S. at 538 (Stevens, J., dissenting).

[19] *See Bakke*, 438 U.S. at 307 (Powell, J.) ("'societal discrimination,' [is] an amorphous concept of injury that may be ageless in its reach into the past"); "'[i]n the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.'" *Croson*, 488 U.S. at 498 (O'Connor, J.) (brackets added) (citing *Wygant*, 476 U.S. at 276).

Colorado has been shown to have engaged in discrimination in the highway construction industry, yet there is no provision which suspends the DBE program in Colorado. Maintenance of the DBE program where there is no evidence of discrimination perpetuates the dangerous stereotypes of inferiority[20] and favoritism which many members of this Court have long sought to eliminate.[21] Logic dictates that voluntary compliance with the Constitution requires no remedial action by Congress. The assertion of Section 5 authority is undercut by the nonremedial nature of the SCC, and is also discredited by the applicability of the SCC to private individuals, rather than any state or political subdivision.

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[20] "'[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.'" *Fullilove*, 448 U.S. at 531 (Stewart and Rehnquist, JJ. dissenting) (brackets in original) (quoting *Bakke*, 438 U.S. at 298).

[21] *See Fullilove*, 448 U.S. at 534 n.5 (Stevens, J., dissenting) (comparing the guidelines of the Economic Development Administration for defining the racial characteristics of beneficiaries with the First Regulation to the Reichs Citizenship Law of November 14, 1935, translated in 4 Nazi Conspiracy and Aggression, Document No. 1417-PS, at 8-9 (1946), which specified the protocol for classifying Jews); *Metro Broadcasting*, 497 U.S. at 634 n.1 (Kennedy and Scalia, JJ., dissenting) (citing same, as well as Population Registration Act No. 30 of 1950, Statutes of the Republic of South Africa 71 (1985)).

CONCLUSION

Forty years have passed since this Court held that segregation violates the equal protection guaranty of the Constitution, whether by a state or the federal government, *See Brown v. Board of Education of Topeka*, 347 U.S. 483 and *Bolling v. Sharpe*, 347 U.S. 497. It has been 30 years since the passage of the Civil Rights Act of 1964, which prohibited private discrimination on the basis of race or ethnicity. The ensuing decades have seen tremendous societal changes as this nation proceeds on its "quest to achieve a society free from racial classification." *Fullilove*, 448 U.S. at 516 (Powell, J., concurring). Five years ago, in *Richmond v. Croson*, 448 U.S. 469, this Court established strict scrutiny as the appropriate level of review for all race-based measures. Such a review is necessary to ensure that racial classifications are effective in remedying the effects of discrimination and are not the result of simple racial politics. *Id.* at 493. The race-based presumption of disadvantage before the Court today is an example of racial politics because Congress had insufficient findings of discrimination to warrant such a highly suspect tool. As such, this presumption is an unconstitutional violation of the petitioner's right to equal protection of the law and is simply wrong. This Court has never held that two wrongs make a right, and only by finding that all racial classifications, regardless of

origin, are subject to strict scrutiny can this Court assure that such a disruptive doctrine does not become the law of this land.

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Respectfully submitted,

RONALD A. ZUMBRUN
* JOHN H. FINDLEY
ANTHONY T. CASO
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Pacific Legal Foundation