No. 93-1841

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FEDERICO PENA, Secretary of Department of Transportation; THOMAS D. LARSEN, Administrator of the Federal Highway Administration; LOUIS N. MacDONALD, Administrator Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,
Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AND EQUAL OPPORTUNITY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici will address the following question:

(1) Whether, in an as-applied challenge, a federal race-conscious set-aside program for awarding highway construction contracts survives constitutional scrutiny when that program was not adequately explained by a statement of legislative/administrative purpose but rather was developed in a haphazard, internally inconsistent manner?

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation is a non-profit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting economic liberty, free-enterprise principles, and a limited and accountable government.

WLF has a record of longstanding interest and involvement regarding the controversial issues of affirmative action, racial quotas, and reverse discrimination. In pursuit of its view that the Constitution and the civil rights laws protect all citizens against

discrimination, WLF has appeared before this Court as well as other state and federal courts in many of the leading cases in the area. *See, e.g., Shaw v. Reno*, 113 S. Ct. 2816 (1993); *Metro Broadcasting, Inc. v. Federal Communications Comm'n,* 497 U.S. 547 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Podberesky v. Kirwan*, No. 93-2527, ___ F.3d ___ (4th Cir. Oct. 27, 1994).

The Equal Opportunity Foundation (EOF) is a non-profit educational organization founded in 1987 dedicated to establishing in America a colorblind government in a colorblind society, and, to that end, to protecting the civil rights of all Americans. EOF has appeared before this Court as *amicus curiae* on a number of occasions, including in *Shaw v. Reno*, 113 S. Ct. 2816 (1993), and *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993).

Because of *amici*'s unique perspective in their commitment to a free market where individuals can compete without suffering from intentional race-based discrimination, their brief will bring relevant matter to the attention of the Court that most likely will not be raised by the parties. *Amici* submit this brief in support of Petitioner with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF FACTS

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case contained in Petitioner's brief.

In brief, Petitioner Adarand Constructors, Inc. ("Adarand") is a highway construction company which specializes in the installation of guardrail systems and highway signs. In 1989, Adarand was the low bidder on a guardrail subcontract let by Mountain Gravel & Construction

Company ("Mountain Gravel"), which had won a contract from the federal government to construct five miles of highway in a national forest in southwestern Colorado.

Despite Adarand's low bid, Mountain Gravel awarded the guardrail subcontract to Gonzales Construction ("Gonzales"). Although Gonzales's bid was higher, awarding the subcontract to Gonzales instead of Adarand resulted in a lower net cost to Mountain Gravel, due to a system of contract incentives employed by the Central Federal Lands Highway Division (CFLHD), the federal agency that issued the highway construction contract to Mountain Gravel.[1]

CFLHD's contract with Mountain Gravel included a clause known as the Subcontracting Compensation Clause (SCC), which provides for a bonus payment to the prime contractor equal to 10% of the dollar value of subcontracts given to companies certified by CFLHD as "disadvantaged business entities" ("DBEs"). Because Gonzales had been certified by CFLHD as a DBE and Adarand had not, the availability of a bonus payment to Mountain Gravel if it subcontracted to Gonzales (but not if it contracted to Adarand) made it economically advantageous for Mountain Gravel to award a subcontract to Gonzales despite Adarand's lower bid.

CFLHD includes a Subcontracting Compensation Clause (included in the Joint Appendix at 24-27) as § 108 of all its sealed-bid contracts. The SCC defines a "DBE" as including: (1) "a small business concern owned and controlled by socially and economically disadvantaged individuals as defined under the FAR [Federal Acquisition Regulation] Contract Clause 52.219-8 [48 C.F.R. § 52.219-8]"; and (2) "a woman owned business as defined

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[1] CFLHD is a regional division of the Federal Lands Highway Program (FLHP). The FLHP is part of the Federal Highway Administration, which in turn is part of the U.S. Department of Transportation (DOT).

under FAR Contract Clause 52.219-13 [48 C.F.R. § 52.219-13]." FAR 52.219-8 states that a prime contractor "shall presume" that Hispanic Americans (as well as members of a number of other ethnic groups) are "socially and economically disadvantaged"; Gonzales obtained its DBE status based on that presumption, because it is owned and controlled by a Hispanic American.[2]

CFLHD apparently developed its practice of including the SCC in its sealed-bid contracts (a practice hereinafter referred to as the "SCC Program") based on two federal statutes: the Small Business Act ("SBA"), 15 U.S.C. § 631 *et seq.*, and the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"), Pub. L. No. 100-17, 101 Stat. 132. The SBA provides that the President annually shall establish a "Government-wide goal" for the award of federal government procurement contracts to DBEs and that the goal may be no lower than 5% of the total value of all federal government procurement contracts. 15 U.S.C. § 644(g)(1). The SBA further provides that each agency within the federal government annually must establish a goal for DBE contract participation that presents, for that agency, "the maximum practical participation" by DBEs in the agency's contracts. *Id.* In no event, however, does the SBA permit an agency's DBE-participation goal to be lower than the President's government-wide goal. *Id.*[3]

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[2] Interestingly, there is absolutely no requirement under the SCC that a women-owned business be owned or controlled by a socially and economically disadvantaged individual in order to qualify as a DBE; such a business automatically qualifies as a "DBE" within the SCC's definition of that term so long as it meets FAR 52.219-13's definition of "women-owned."

[3] The SBA does not mandate that an agency attain its DBE contract participation goal. However, agencies that fail to meet their annual goals must provide to the Small Business Administration written justifications for their failure to do so. 15 U.S.C. § 644(h)(1).

STURAA authorized the appropriation of federal transportation funds for a variety of purposes for fiscal years 1987 through 1991; the highway construction contract awarded to Mountain Gravel drew on funds appropriated under STURAA. STURAA provides that at least 10% of funds authorized to be appropriated under the act "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." STURAA, § 106(c)(1). As *amici* discuss in more detail *infra*, STURAA's definition of "small business concerns owned and controlled by socially and economically disadvantaged individuals" differs in material respects from the SBA's definitions of that term. Neither the SBA nor STURAA makes reference to establishment of programs anything akin to the SCC Program.

Adarand objected that CFLHD had discriminated against it on the basis of race by including the SCC in the Mountain Gravel prime contract. It argued that the discrimination consisted of providing financial incentives to Mountain Gravel to choose subcontractors from a class of companies defined in large part by the company owner's race.

Adarand filed suit for declarative and injunctive relief against various DOT officials on August 10, 1990 in U.S. District Court for the District of Colorado. The suit alleged that use of the SCC violated the Fifth and Fourteenth Amendments to the U.S. Constitution as well as Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* The district court granted summary judgment to defendants on April 21, 1992 (Pet. App. 27-37), and the U.S. Court of Appeals for the Tenth Circuit affirmed that decision on February 16, 1994. Pet. App. 1-24. This Court granted Adarand's *certiorari* petition on September 26, 1994.

SUMMARY OF ARGUMENT

The Court has repeatedly made clear that government-sponsored racial discrimination is highly disfavored under

the law. Racial classifications are no less suspect simply because they are employed on behalf of a historically disadvantaged minority group rather than on behalf of the white majority.

Although Respondents claim to be providing preferences to "disadvantaged" individuals without regard to race, the programs at issue in this case cannot qualify as race-blind because they invoke race to create presumptions of disadvantage. In other words, the government is conferring a significant benefit -- access to a presumption of social and economic disadvantage that is the key to valuable entitlements -- on grounds that are highly disfavored.

Amici concur with Adarand's contention that the federal government has violated its rights under the equal protection component of the Fifth Amendment's Due Process Clause by failing to demonstrate that the racial preferences granted under the SCC were narrowly tailored to remedy present effects of past discrimination. However, *amici* believe that the racial preferences at issue are unconstitutional for the additional reason that they were adopted in a haphazard manner, with little apparent regard for the program's remedial effects or even for internal consistency.

Judicial review under the Fifth Amendment's Due Process Clause includes consideration not only of the substance of the action under review (*e.g.*, did the action comport with principles of equal protection) but also of the procedural character of the decisionmaking process. When Congress is adopting measures (such as racial classifications) that raise such troubling and fundamental constitutional concerns, due process demands that Congress act in a deliberate manner that demonstrates to reviewing courts that it has weighed both costs and benefits and has given thought to the extent of racial preferences that are necessary to achieve remedial goals. Because Congress has not acted in a deliberate manner in this case, its efforts

at racial line-drawing cannot pass muster under the Due Process Clause.

ARGUMENT

I. RACIAL CLASSIFICATIONS ARE HIGHLY DISFAVORED UNDER THE LAW, AND THE CLASSIFICATIONS EMPLOYED IN THIS CASE WERE INARGUABLY RACIAL IN NATURE

A long line of decisions from this Court makes clear that programs that discriminate on the basis of race are highly disfavored under the law. Racial classifications are a "highly suspect tool" that reviewing courts should uphold only under extremely limited circumstances. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 483 (1989) (plurality opinion); *id.* at 520 (Scalia, J.). That is so because, "Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993)(quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Courts are also mindful of the potential harmful effects of even the most remedial of racial classifications: "Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw v. Reno,* 113 S. Ct. at 2832.

Racial classifications are no less suspect simply because they are employed on behalf of a historically disadvantaged minority group rather than on behalf of the white majority. *Croson*, at 494 (plurality opinion); *Regents of University of California v. Bakke*, 438 U.S. 265, 295-99 (1978)(Powell, J.). *Shaw v. Reno* put to rest any argument that the Court will treat deferentially racial classifications that favor groups that suffered from past discrimination. In a decision that called into question the constitutionality of drawing congressional districting lines according to the race of constituents, the Court said:

> [The dissent] argues that racial gerrymandering poses no constitutional difficulties when district lines are drawn to favor the majority. . . We have made clear, however, that equal protection analysis "is not dependent on the race of those burdened or benefitted by a particular classification." *Croson*, 488 U.S., at 494 (plurality opinion) see also *id.*, at 520 (Scalia, concurring in judgment). Accord *Wygant [v. Jackson Board of Education]*, 476 U.S. [267,] 273 [(1986)] (plurality opinion). Indeed, racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.

Shaw v. Reno, 113 S. Ct. at 2829.

Despite the highly suspect nature of all racial classifications, they are nonetheless permissible in limited circumstance; for example, for the purpose of overcoming the present effects of past discrimination. But a mere statement that one's purpose is to overcome the present effects of past discrimination in no way lessens the need for judicial inquiry because "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493.[4]

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[4] The one occasion on which the Court was willing to impose a more deferential standard of review based on a government actor's assertion that its race-based classifications were "benign" was *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990). But *Metro Broadcasting* is distinguishable as a First Amendment case in which the Court was willing to defer to congressional regulation of broadcasting "in order to protect the rights of the viewing and listening audience" in a case in which the racial preference at issue had been "specifically approved -- indeed, mandated -- by Congress." *Id.* at 567, 563. The broader pronouncements of *Metro*

(continued...)

The odious nature of racial classifications is not lessened simply because it is the federal government, rather than a state or local government, that has employed the classification. A federally-mandated racial classification creates the same dangers of "lasting harm to our society" as does a classification mandated at some other level of government, and it is just as destructive of "the doctrine of equality." Moreover, there is no reason to believe that a federally-drawn racial classification is any less likely to be "motivated by illegitimate notions of racial inferiority or simple racial politics" than is one drawn at the state or local level. Accordingly, there is no reason for the courts to approach a racial classification less suspiciously simply because it is federally drawn.

The parties to this action have engaged in a lengthy debate over what to call the level of judicial scrutiny to be given to the SCC Program. Adarand argues for "strict scrutiny," while Respondents have argued for a somewhat lesser degree of scrutiny.[5] *Amici* take no position in that debate (other than to take exception to the court of appeals's characterization of "intermediate scrutiny" as a "lenient" standard of review), because we see little point in focusing on the precise wording of the proper standard of review. Rather than attempting to create a host of finely-gradated standards of review, *amici* urge the Court to approach all cases involving challenged racial classifications with a recognition of the need for searching

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[4] (...continued)
Broadcasting are difficult to reconcile with the Court's earlier pronouncements in *Croson* and its later pronouncements in *Shaw v. Reno*. Accordingly, *Metro Broadcasting* appears to be an aberration whose continued vitality is limited to cases involving broadcasting issues.

[5] The court of appeals sided with Respondents in this debate. Citing *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the court of appeals held, "if Congress has expressly mandated a race-conscious program, a court must apply a lenient standard, resembling intermediate scrutiny, in assessing the program's constitutionality." Pet. App. 15.

review, both of the motives of those drawing the racial classifications and of the effects of those classifications.[6]

Perhaps mindful of the Court's oft-expressed disapproval of racial classifications, Respondents argue that the classifications involved in this case are not really racial but rather are an effort to distinguish individuals who have faced social and economic disadvantage, from those individuals who have not. *See* Respondents' Opposition to Petition for Certiorari at 12-13. Respondents contend, "There is no question on the record in this case that Gonzales was in fact disadvantaged, and [Adarand] was not." *Id.* That statement is a mischaracterization of the record. All that the record shows is that Gonzales was presumed to be "disadvantaged" (within the meaning of the SCC) by virtue of its owner's Hispanic-American heritage, and that Adarand was presumed not to be "disadvantaged" because its owner was not a member of one of the favored races. In sum, on this record the only distinction between Gonzales and Adarand is racial.

The racial nature of the SCC's line-drawing is not diminished by arguing that Adarand could have overcome the effects of the SCC's racial presumptions by either: (1) challenging Gonzales's claim to DBE status under 13 C.F.R. § 124.603; or (2) seeking DBE status for itself. A racial presumption does not lose its status as racial discrimination simply because it is possible for those harmed by the presumption to overcome its effects. As Judge Posner of the Seventh Circuit has written, in

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[6] The Thirteenth and Fourteenth Amendments' grant to Congress of power to enforce those amendments has little bearing on the issue, since a court reviewing a congressionally mandated racial classification cannot determine whether the classification really promotes the guarantees of those amendments without first engaging in a careful inquiry. As Justice Powell noted in *Fullilove*, Congress's enforcement authority "must be exercised in manner that does not erode the guarantees of [the Thirteenth and Fourteenth] Amendments. The Judicial Branch has the special responsibility to make a searching inquiry into the justification for employing a race-conscious remedy." *Fullilove*, 448 U.S. at 510 (Powell, J., concurring).

rejecting a claim that the SBA's DBE program does not constitute racial discrimination:

> [A] racial presumption is a form of racial discrimination, as would be obvious if the state had a rebuttable presumption that black subcontractors ought not to be permitted to work on state highway projects. . . Anyone who is not [black, Hispanic, Asian, American Indian, or a woman] must prove that he is socially and economically disadvantaged in fact. The presumption can be rebutted, but given the difficulty of establishing whether a particular individual is socially and economically disadvantaged the availability of the presumption is likely to be decisive. This means that the state is conferring a significant benefit -- access to a presumption of social and economic disadvantage that is the key to valuable entitlements -- on grounds that *Croson* forbids a state to use without establishing that the purpose is to rectify invidious discrimination. The state can if it wants redistribute wealth in favor of the disadvantaged, but it cannot get out from under *Croson* by pronouncing entire racial and ethnic groups to be disadvantaged.

Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419, 421-22 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991).[7]

In sum, there can be no serious argument that the discrimination endured by Adarand in this case is not

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[7] Nor could Respondents seriously argue that the voluntary decision of a nongovernment actor (Mountain Gravel) to award the guardrail subcontract to Gonzales insulates them from a racial discrimination claim. Such an argument is akin to arguing that a government entity is not engaged in racial discrimination if it awards a bounty to real property owners who sell their property to whites but not to those who sell to nonwhites -- because the government has done nothing affirmatively to prevent real property owners from selling to nonwhites. Clearly, no court would accept the latter argument.

racial in nature. Consequently, Respondents' actions in this case are inherently suspect and must be subjected to a searching inquiry.

II. THE HAPHAZARD MANNER IN WHICH THE RACIAL PREFERENCES AT ISSUE WERE ADOPTED IS REASON ENOUGH TO FIND A DUE PROCESS VIOLATION

Adarand contends that the federal government has violated its rights under the equal protection component of the Fifth Amendment's Due Process Clause by failing to demonstrate that the racial preferences granted under the SCC were narrowly tailored to remedy present effects of past racial discrimination. While fully concurring in that argument, *amici* believe that the racial preferences at issue in this case are unconstitutional for the additional reason that they were adopted in a haphazard manner, with little apparent regard for the program's remedial effects or even for internal consistency.

The Due Process Clause is at least as concerned with procedure as it is with substance; quite apart from the question of whether the racial preferences at issue here are substantively defensible is the question of whether the manner in which those preferences were put into place comports with notions of due process. At a minimum, the procedural component of the Due Process Clause demands that if the federal government intends to adopt "remedial" racial classifications, it must do so in a considered manner that demonstrates to reviewing courts that it has weighed both costs and benefits and has given thought to the extent of racial preferences that are necessary to achieve remedial goals.

As Justice Stevens argued in *Fullilove*:

> Whenever Congress creates a classification that would be subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment if it had been fashioned by a state legislature, it

> seems to me that judicial review should include a consideration of the procedural character of the decisionmaking process. A holding that the classification was not adequately preceded by a consideration of less drastic alternatives or adequately explained by a statement of legislative purpose would be far less intrusive than a final determination that the substance of the decision is not "narrowly tailored to the achievement of that goal." . . . If the general language of the Due Process Clause of the Fifth Amendment authorizes this Court to review Acts of Congress under the standards of the Equal Protection Clause of the Fourteenth Amendment -- a clause that cannot be found in the Fifth Amendment -- there can be no separation-of-powers objections to a more tentative holding of unconstitutionality based on a failure to follow procedures that guarantee the kind of deliberation that a fundamental constitutional issue of this kind obviously merits.

Fullilove, 448 U.S. at 551-52 (Stevens, J., dissenting).

The federal government's elaborate system of granting racial preferences in the award of construction contracts (hereinafter, the "Federal Construction Procurement Program") displays few of the earmarks of a carefully considered remedial program demanded under Justice Steven's due process analysis. Rather, it is a haphazard program marked by vague statutory language, inconsistent standards, resort to race as a short-hand method of determining disadvantage, and administrative programs adopted without regard to the extent of preferences necessary to overcome perceived continuing effects of past discrimination. In short, the Federal Construction Procurement Program violates the Fifth Amendment's Due Process Clause as a result of the procedurally deficient manner of its implementation.

As noted above, two separate federal statutes -- the SBA and STURAA -- provide the basis for CFLHD's DBE

program. The SBA provides several different definitions of a DBE, and neither is consistent with STURAA's definition.[8] Moreover, neither statute makes an effort to quantify how much preference for DBEs is necessary in order to remedy past discrimination; rather, they call on federal agencies to provide "at least" specified levels of funding to DBE, and the SBA declares a policy of providing to DBEs "the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." SBA § 8(d)(1), 15 U.S.C. § 637(d)(1).

The SBA. The CFLHD's obligation under the SBA to provide contracting opportunities to DBEs arise under 15 U.S.C. § 644(g)(1). That section requires the President annually shall establish a "Government-wide goal" for the award of contracts to DBEs and that the goal may be no lower than 5% of the total value of all federal government procurement contracts. Section 644(g)(1) further provides that each agency within the federal government annually

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[8] The principal inconsistency between the SBA and STURAA is that STURAA includes women within the presumptively-disadvantaged category (STURAA, § 106(c)(2)(B)) while the SBA does not. Up until this past month, the SBA made no special provision for women-owned businesses. On October 6, 1994, 15 U.S.C. § 644(g) was amended to create a government-wide goal for participation by women-owned businesses in procurement activities at 5% of the total value of all contract awards -- without regard to whether the women-owners are either socially or economically disadvantaged. *See* Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, § 7106(a)(2). In an apparent effort to mask the inconsistencies between the SBA's and STURAA's definitions of a DBE, Respondents argue that the SCC Program was initiated for the sole purpose of fulfilling the CFLHD's DBE contracting obligations under the SBA, 15 U.S.C. § 644(g). Respondents' Opposition Brief at 11 n.8. Respondents also cite to the Tenth Circuit's finding (Pet. App. 4) that STURAA does not provide statutory authority for the SCC Program. *Id.* That explanation of the origins of the SCC Program cannot be correct, because the SCC Program has for some time granted automatic DBE status to women-owned businesses, and such a preference for women-owned businesses could only have come from STURAA, not from the SBA. Thus, the SCC Program must have been developed to fulfill CFLHD's obligations under both STURAA and the SBA.

must establish a goal for DBE contract participation that presents, for that agency, "the maximum practical participation" by DBEs in the agency's contracts. In no event, however, does § 644(g)(1) permit an agency's DBE-participation goal to be lower than the President's government-wide goal.

Section 644(g) speaks in terms of a need to establish goals for contract participation by "small business concerns owned and controlled by socially and economically disadvantaged individuals." However, § 644(g) is silent regarding the definition of that phrase, nor does § 644(g) refer back to any other statutory provision for purposes of providing a definition.

A comprehensive definition is included at § 8(a)(4)(A) of the SBA, 15 U.S.C. § 637(a)(4)(A), but by its terms, that definition applies only to § 8 of the SBA.[9] Another

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[9] Section 8(a)(4)(A) provides:

> For purpose of this section, the term "socially and economically disadvantaged small business concern" means any small business concern which meets the requirements of subparagraph (B) [relating to control of the concern] and -
>
> (i) which is at least 51 per centum unconditionally owned by-
>
> (I) one or more socially and economically disadvantaged individuals,
>
> (II) an economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe), or
>
> (III) an economically disadvantaged Native Hawaiian organization, or
>
> (ii) in the case of any publicly owned business at last 51 per centum of the stock of which is unconditionally owned by-

(continued...)

definition is included at § 8(d)(3)(C), 15 U.S.C. § 637(d)(3)(C), but that provision is not really a definitional section at all; rather, it sets forth contract language to be included in procurement contracts let by federal agencies.[10]

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[9] (...continued)

(I) one or more socially and economically disadvantaged individuals,

(II) an economically disadvantaged Indian tribe (or a wholly owned business entity of such a tribe), or

(III) an economically disadvantaged Native Hawaiian organization.

Section 8(a)(5) defines "socially disadvantaged individuals" as "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."

[10] Section 8(d)(3) requires contract language which, *inter alia*: (1) states that it is United States policy that "small business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency"; (2) requires the contractor to carry out that policy when awarding subcontracts "to the fullest extent consistent with the efficient performance" of the contract; and (3) defines (for purposes of the contract only) the term "small business concern owned and controlled by socially and economically disadvantaged individuals" as a small business concern:

> (i) which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and
>
> (ii) whose management and daily business operations are controlled by one or more of such individuals.
>
> The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic American, Native Americans, Asian Pacific Americans, and

(continued...)

Moreover, § 8(d)(3)(C) states explicitly that its definitions apply only to terms used in contracts mandated under § 8(d)(2). Accordingly, one cannot be sure what entities Congress had in mind when it mandated (in § 644(g)) that each agency establish goals for contract participation by "small business concerns owned and controlled by socially and economically disadvantaged individuals."

Moreover, there are huge differences between the definitions of "socially and economically disadvantaged individuals" as set forth in § 8(a) and § 8(d). Section 8(d) includes the racial presumption to which Adarand objects so strenuously -- the presumption that all Black American, Hispanic Americans, Native Americans, and Asian Pacific Americans are "socially and economically disadvantaged." On the other hand, Section 8(a) contains no presumptions regarding social or economic disadvantage based on the race of small business owners.[11] DOT has simply assumed

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[10] (...continued)
other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act [15 U.S.C. § 637(a)].

15 U.S. C. § 637(d)(3)(C).

[11] Moreover, the legislative history of § 8(a) indicates that when it established the preference for socially disadvantaged individuals in 1978, Congress intended that preference to be invoked on a race-blind basis. The House of Representatives had adopted revisions to § 8(a) that would have included explicit presumptions that all members of certain racial and ethnic groups were socially and economically disadvantaged. House Report No. 95-949, 95th Cong., 2nd Sess. 24-25 (March 13, 1978). However, those presumptions were deleted from the bill as adopted (Act of October 24, 1978, P.L. 95-507) at the insistence of the Senate and the Conference Committee. *See* Sen. Report No. 95-1070, 95th Cong., 2nd Sess. 37 (May 17, 1978); 124 Cong. Rec. 29637 (Sept. 15, 1978)(remarks of Sen. Weiker); 124 Cong. Rec. 29639-40 (Sept. 15, 1978)(remarks of Sen. Nunn); H.R. Conf. Rep. No. 95-1714, 95th Cong., 2nd Sess. 21-22 (Oct. 4, 1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 3881-83 ("because of present and past discrimination many minorities have suffered social (continued...)

(without providing any basis for doing so) that the racial presumptions set forth in § 8(d)(3)(C) are incorporated into the term "socially and economically disadvantaged individuals" as used in § 644(g). *Amici* respectfully suggest that a congressional intent to so incorporate the § 8(d)(3)(C) presumptions (but not § 8(a)'s lack of a presumption) cannot fairly be inferred from the statutory language -- particularly since § 644(g) includes a reference to § 8(a)[12] but no reference to § 8(d).

The SBA's vagueness also encompasses the extent to which socially and economically disadvantaged individuals are to be favored in the contracting process. The SBA

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[11] (...continued)
disadvantagement. . . However, the Conferees realize that other Americans may also suffer from social disadvantagement because of cultural bias. For example, a poor Appalachian white person who has never had the opportunity for a quality education or the ability to expand his or her cultural horizons, may similarly be found socially disadvantaged.")

Amici note that despite the language of § 8(a) and its legislative history, the Small Business Administration has interpreted § 8(a) as including the precise racial preferences that the Senate conferees had worked so hard to delete. *See* 13 C.F.R. § 124.105 (SBA presumes that members of the following groups are socially disadvantaged: Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans (defined as persons with origins from 26 listed countries), and Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldive Islands, or Nepal)). Given § 8(a)'s (as well as § 644(g)'s) silence on the issue of racial preferences, it is probable that SBA possesses the *power* to issue such regulations. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But the lack of any explicit congressional authorization for such regulations is one more reason to doubt that Congress adopted racial preferences with the requisite deliberateness necessary to withstand a due process challenge.

[12] Section 644(g)(2)(B) states that in order to carry out their mandate to establish annual goals for DBE participation and to "annually expand participation by small business concerns from each industry category in procurement contracts of the agency," agency heads are to consider awarding contracts for which bidding is restricted to § 8(a) contractors.

makes repeated reference to a requirement that DBEs be given the "maximum practicable opportunity" to participate in the performance of federal contracts. *See, e.g.*, 15 U.S.C. § 644(g)(1). Indeed, no matter how successful an agency has been in opening up contracting opportunities to socially and economically disadvantaged individuals, the agency is under a continuing duty to do better the next year by expanding such opportunities in "each industry category in procurement contracts of the agency." 15 U.S.C. § 644(g)(2). Use of such open-ended language is a clear indication that Congress has made no effort to narrowly tailor its racial preferences for the purpose of ensuring that they do no more than remedy the present effects of past discrimination.[13] Accordingly, the Federal Construction Procurement Program cannot pass muster under the Fifth Amendment's Due Process Clause.

STURAA. In contrast to the SBA's vagueness on the issue of whether racial preferences are warranted, STURAA is unambiguous in endorsing such preferences. Section 106(c)(2)(B) of STURAA expressly incorporate the racial presumptions of § 8(d)(3)(C) of the SBA and goes on to adopt a similar presumption for women:

> For purposes of this subsection, . . . The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the [SBA] (15 U.S.C. § 637(d)) and relevant subcontracting regulations promulgated pursuant thereto; except that women shall be presumed to be socially and economically

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[13] Indeed, there is considerable evidence that Congress and the Small Business Administration were not solely concerned with remedying present effects of past discrimination when they adopted the racial preferences at issue. *See, e.g.*, 15 U.S.C. § 631(f)(1)(A) ("the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons *and improve the functioning of our national economy*") (emphasis added).

> disadvantaged individuals for purposes of this subsection.

STURAA further provides that "not less than 10 percent of the amounts authorized to be appropriated" under the act "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." STURAA, § 106(c)(1).

While STURAA does not suffer from vagueness problems, its language suggests an almost flippant attitude on the part of Congress regarding racial and sex preferences. The law includes no findings regarding the need for such preferences. The findings of past discrimination against DBEs contained in the SBA cannot be "borrowed" by STURAA in order to justify STURAA's racial preferences, because Congress used the SBA findings to justify a DBE participation "goal" of only 5% for all federal contracting, while STURAA imposes a mandatory floor of 10% DBE participation in all STURAA-funded projects -- without any effort being made to explain why the SBA goal needs to be doubled. Moreover, STURAA's requirement that DBE participation be "at least" 10% (thereby implicitly endorsing agency efforts to achieve higher participation rates, such as CFLHD's assigned goal of 12-15%) suggests that Congress has not sought to determine just how many race-conscious remedial steps are warranted as part of any effort to overcome past discrimination against DBEs.

Moreover, STURAA's inclusion of a presumption that women are "socially and economically disadvantaged" -- also without the benefit of findings -- is another sign of absence of serious deliberations by Congress prior to including racial preferences in the Federal Construction Procurement Program. Rather, the inclusion of a presumption favoring women has all the earmarks of pork-barrel politics, with Members of Congress who support "women's issues" arranging for the inclusion of a presumption in STURAA in return for support of other appropriations items in STURAA.

Despite an obvious need for detailed rules spelling out how STURAA is to applied (due to the absence of detail in the statute), DOT has not seen fit to issue regulations detailing STURAA's application to cases such as this one, in which DOT is entering into a direct procurement contract.[14] Accordingly, CFLHD has been left to its own devices regarding how it must implement its STURAA obligations to impose racial presumptions. The failure of DOT to issue implementing regulations regarding direct-procurement STURAA contracts,[15] despite Congress's mandate that racial classifications be employed in all such contracts, is further evidence of a constitutionally-fatal casualness in the use of such presumptions.

Part of CFLHD's response was to adopt the SCC Program which is at issue in this case. Respondents tout the SCC Program as a program that "does not impose a goal" for DBE participation, and that "operates as a carrot rather than a stick, [and thus] is even more flexible than the waivable MBE goal upheld in *Fullilove*." Respondents' Brief in Opposition to Petition for Certiorari at 17-18. *Amici* strenuously disagree. The SCC Program is the

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[14] DOT has issued regulations that provide guidance regarding DBEs for the vastly more common type of STURAA-expenditure situation in which federal funds are provided to state and local governments, which in turn enter into procurement contracts. *See* 49 C.F.R. Part 23, Subpart D. However, those regulations state on their face that they are inapplicable to direct procurements entered into by DOT; rather, they are only applicable to "DOT-assisted contracts" in which STURAA fund recipients (not DOT itself) enter into procurement contracts. *See* 49 C.F.R. § 23.63.

[15] Such procurement amounts to at least $55 million per year. *See* STURAA § 106(a)(10). The Small Business Administration's regulations with respect to the implementation of racial preferences imposed under the SBA -- 13 C.F.R. Part 124 -- provide some guidance regarding the proper treatment of DBEs in the STURAA contracting process; but they cannot address all issues arising under STURAA, which (unlike the SBA, at least prior to adoption of the Federal Acquisition Streamlining Act of 1994, Pub. Law 103-355, in October 1994) includes a presumption favoring women and a 10% floor for DBE participation.

most inflexible type of race-based preference program, because the government agency abdicates all control over the race-based decision-making and thus is not in a position to prevent decisions from being made on the basis of race when individual circumstances might suggest that race-based decision-making is inappropriate. For example, CFLHD was in no position to prevent Gonzales from being selected over Adarand for the guardrail subcontract on the basis of race,[16] no matter how unfair Adarand could have demonstrated such a selection to be. A program cannot be deemed "flexible" within the meaning of *Croson* and *Fullilove* unless the flexibility is in the hands of the program administrator who could, for example, determine that a program's remedial purposes have been fully served and thus that further race-based decision-making is unwarranted. The failure of Congress, DOT, and CFLHD to consider the need for such flexibility is further evidence of deficiency in the procedures by which the federal government decided to set up the Federal Construction Procurement Program.

Amici are also struck by the absence of any procedure by which the federal government can determine that its remedial purposes have been fully served. We note, for example, that an April 1992 GAO report, "Construction Contracts: Individual Sureties Had No Defaults on Fiscal Year 1991 Contracts" (GAO/ GGD-92-69), determined that minority contractors were awarded 19% of federal construction projects in 1991. Yet, even though those figures might suggest to some that members of racial

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[16] One of principal justifications for DBE programs cited by program proponents has been that prime contractors are reluctant to do business with DBEs unless given extra incentives for doing so. Yet, Mountain Gravel selected Gonzales over Adarand for the guardrail subcontract solely because the net cost to Mountain Gravel (after taking into account the bonus payment from CFLHD) would be reduced slightly by using Gonzales. Accordingly, this case suggests that prime contractors are now willing to voluntarily do business with DBEs. Such evidence provides an additional reason for Congress to re-examine its commitment to wholesale racial classifications in the government contracting area.

minority groups no longer face unique obstacles in obtaining federal construction projects, Congress has failed to set up a procedure whereby it can consider whether those figures warrant eliminating racial presumptions from the SBA and STURAA.

Instead, the trend appears to be moving in the opposite direction: Congress and the Small Business Administration are constantly expanding the list of racial and ethnic groups entitled to a presumption of social and economic disadvantage. Moreover, a recent article that analyzed Small Business Administration decisions regarding the addition of groups to the SBA § 8(a) list of groups entitled to a presumption of disadvantage revealed a disturbing trend. Decisions regarding whether to add groups to the list are being made on the basis of skin color (with lighter-skinned groups -- such as Hasidic Jews and Iranians -- being denied the presumption, and darker-skinned groups -- such as Tongans and Sri Lankans -- being granted the presumption), not on the basis of the complex sociological factors set forth in the Small Business Administration's implementing regulation, 13 C.F.R. § 124.105(d). *See* G. LaNoue and J. Sullivan, "Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to Affirmative Action," Journal of Policy History (Fall 1994).

In sum, there is no evidence that Congress has given racial preferences the kind of mature reflection that a fundamental constitutional issue of this kind obviously merits. Rather, Congress now appears to treat the use of racial preferences as just another device for ensuring the continuation of pork-barrel politics. In light of that record, Congress's haphazard resort to racial preferences cannot fairly be characterized as a "narrowly tailored" response to perceived present effects of past discrimination, because the use of these racial preferences "simply raises too many serious questions that Congress failed to answer or even to address in a responsible way." *Fullilove*, 448 S. Ct. 552 (Stevens, J., dissenting).

CONCLUSION

Amici curiae Washington Legal Foundation and Equal Opportunity Foundation respectfully request that the Court reverse the decision of the United States Court of Appeals for the Tenth Circuit and order the entry of summary judgment in Petitioner's favor.

Respectfully submitted,

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