No. 00-730

In the Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.

Petitioner,

v.

NORMAN Y. MINETA,
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
SOCIAL SCIENCE AND COMPARATIVE LAW
SCHOLARS IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE

This brief is filed on behalf of five university professors who have written on the subjects of racial inequality and affirmative action from social science and comparative law perspectives.[1] It is not filed on behalf of either petitioner or respondent and does not take a position as to whether the decision of the Court of Appeals in this case should be affirmed or reversed.[2]

SUMMARY OF ARGUMENT

When this Court held in 1995 that strict scrutiny should be applied to this case, Justice O'Connor provided the following much-quoted and discussed explanation: "The unhappy persistence of both the practice and the lingering effects of

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[1] The members of the *amicus* group are Joshua Aronson, Assistant Professor, Department of Applied Psychology, New York University; Clark D. Cunningham, Professor of Law, Washington University in St. Louis; Marc Galanter, John & Rylla Bosshard Professor of Law and S. Asian Studies, University of Wisconsin-Madison and LSE Centennial Professor, London School of Economics; Glenn C. Loury, University Professor, Professor of Economics, and Director of the Institute on Race and Social Division, Boston University; and John David Skrentny, Associate Professor of Sociology, University of California-San Diego. This brief has been authored entirely by Clark D. Cunningham, counsel of record for *amicus curiae*, in consultation with the members of the *amicus* group. No one other than the members of the *amicus* group has made a monetary contribution to the preparation or submission of this brief. More information about the members of the amicus group and their scholarship is available on the Rethinking Equality in the Global Society Web Site: http://law.wustl.edu/Equality ("Equality Web Site").

[2] The preface to John David Skrentny's book *The Ironies of Affirmative Action* describes the same purpose which motivates these scholars to submit this brief: "Readers may justifiably expect this book to have a political agenda, either for or against affirmative action, since almost everything written about that controversial policy has such an agenda. This book, however, has no political agenda, unless one considers the desire to question fundamental assumptions on both sides and move tired debates forward ... If social scientists can find ideas that will help ... interested individuals on both sides of the issue ... better understand or rethink their positions on affirmative action, the book will have succeeded." *The Ironies of Affirmative Action: Politics, Culture & Justice in America ix* (1996).

racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand Constructors v Pena*, 515 U.S. 200, 237 (1995). Looking at the Department of Transportation (DOT) program for Disadvantaged Business Enterprises (DBEs) from a comparative law perspective and with insights from the social sciences suggests that it may be helpful to separate the problems of "present practice" and "lingering effects." This brief will ***not*** address the question of whether the record in this case shows that the DBE program is justified by a compelling interest to correct **present practices** of discrimination. Rather, this brief seeks to clarify how **lingering effects** can be a compelling interest even if it is assumed that there are no relevant present practices of discrimination. Racialized categories based on assumptions about conscious discrimination may be less relevant where the compelling interest is lingering effects, thus creating a need for an empirical basis to determine which groups are presently disadvantaged by the lingering effects of past discrimination and to support a system for periodic review of that determination. An affirmative action program thus designed with the benefit of social science methods should pass strict scrutiny.

ARGUMENT

A. Social Science Insights about the Lingering Effects of Discrimination

In his recent W.E.B. Du Bois lectures at Harvard University[3] economist Glenn C. Loury reached the following conclusion: "As an empirical judgment, I hold that reward bias -- unequal returns to equally productive contributors based on

[3] To be published as *The Anatomy of Racial Inequality* by Harvard University Press (forthcoming February 2002). Galley proofs of the book will be filed with the parties and the Court as soon as they are available indicating page references to quotations in this brief. The text of the DuBois lectures is currently available on the website of the Boston University Institute on Race and Social Division at http://www.bu.edu/IRSD/articles.htm

race, is now less important in accounting for the disparate social outcomes that history has bequeathed us than is developmental bias -- unequal chances to realize one's productive potential based on race." Loury's reference to "development bias" is based on his distinction, now widely accepted among economists and sociologists,[4] between "human capital" and "social capital." Human capital refers to an individual's own characteristics that are valued by the labor market; social capital refers to value an individual receives from membership in a community, such as access to information networks, mentoring and reciprocal favors. "*Whom* you know affects *what* you come to know and what you can *do* with what you know."[5] Thus potential human capital can be augmented or stunted depending on available social capital. Economic models developed by Loury and others demonstrate how labor market discrimination, even several generations in the past, when combined with ongoing segregated social structure can perpetuate indefinitely huge differences in social capital between ethnic communities.[6] These models have been corroborated by historians like Thomas Sugrue, whose research produced the following conclusions:

> "[H]iring practices drew from and reinforced communal, religious and ethnic networks. ... In northern cities,

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[4] See, e.g., Glenn C. Loury, *A Dynamic Theory of Racial Income Differences*, in *Women, Minorities and Employment Discrimination* 153 (P.A. Wallace ed.1977); James S. Coleman, *Foundations of Social Theory* (1990); Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 22 Annual Review of Sociology 1 (1998); Gary S. Becker & Kevin M. Murphy, *Social Economics* (2000).

[5] Glenn C. Loury, *Economic Discrimination: Getting to the Core of the Problem*, in *One by One from the Inside Out: Essays and Reviews on Race and Responsibility in America* 93, 103 (1995).

[6] See, e.g., Loury, supra note 4; Glenn C. Loury, *Intergenerational Transfers and the Distribution of Income*, 49 Econometrica 843 (1981); George Borgas, *Ethnic Capital and Intergenerational Mobility*, 107 Quarterly Journal of Economics 123 (1992); David M. Cutler & Edward L. Glaeser, *Are Ghettoes Good or Bad?*, 112 Quarterly Journal of Economics 827 (1997).

> building trades became a niche of *whiteness*, drawing their membership from ethnically diverse European American communities. Kinship still mattered, but union references also came from neighborhood friendship networks, schoolmates, and connections formed in churches and parochial schools. All of these networks shared one element: they did not include African Americans."[7]

In considering the ways in which racial discrimination can have "lingering effects," it may be helpful to consider another distinction offered by Loury, between "discrimination in contract" and "discrimination in contact":

> " The phrase 'discrimination in contract' is meant to invoke the unequal treatment of otherwise like persons based on race in the execution of formal transactions – the buying and selling of goods and services, for instance, or the interactions with organized bureaucracies, public and private. Discrimination in contract, in other words, is a standard means by which reward bias against blacks has been perpetrated. By contrast, "discrimination in contact" refers to the unequal treatment of persons on the basis of race in the associations and relationships formed between individuals in social life, including the choice of social intimates, neighbors, friends, heroes and villains. It involves discrimination in the informal, private spheres of life. ... Given that individuals socialized in the United States understand themselves partly in racial terms, and that they must in any liberal political order be endowed with autonomy regarding the choice of their most intimate

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[7] *Breaking Through: The Troubled Origins of Affirmative Action in the Workplace* in *Color Lines: Affirmative Action, Immigration, and Civil Rights Options* 31, 41-42 (John David Skrentny, ed. 2001). See also Melvin Oliver & Thomas Shapiro, *Black Wealth, White Wealth* (1995) (relating vast black/white wealth gap to lingering effects of discrimination, particularly in housing markets); John Donohue & James Heckman, *Continuous versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 Journal of Economic Literature 1603 (1991).

> associations, it is inevitable that the selective patterns of social intercourse that lead to discrimination in contact will arise."

This distinction is illustrated, in the context of this case, by the following statement quoted in the 1996 statement published by the U.S. Department of Justice, *The Compelling Interest for Affirmative Action in Federal Procurement*: "low bidding Hispanic contractor told that he was not given subcontract because the prime contractor 'did not know him' and that the prime 'had problems with minority subs in the past'." 61 Fed.Reg. 26042, 26059 n 100 (1996), (quoting BBC Research and Consulting, *Regional Disparity Study: City of Las Vegas* IX-12 (1992)). The latter reason is obviously "discrimination in contract." But what if the first reason (I don't know you) was the only reason for rejecting the lowest bid? The prime contractor is not legally obligated to accept the lowest bid and indeed may be acting prudently in contracting with a higher bidder who is known to him. Personal familiarity is probably the best source of information about reliability and capacity to perform the work well and on time.

In Loury's earlier economic analyses, legally-permissible social segregation was relevant to "lingering effects" primarily because it perpetuated the inequitable distribution of social capital caused by racial discrimination imposed on prior generations. The unsuccessful bidder in the example above may not have personally known any other prime contractor nor have known other people who knew them. The bidder's own social network would thus have provided no useful social capital. Not only would there be no prime contractors within that person's circle of friends and relatives but the usual methods of forming new trusting affinities outside that circle -- such as in-law relationships, church membership, neighbors, parents of your children's friends -- would be blocked by legal patterns of social segregation. Creating an incentive for the prime contractor to do business with this bidder not only acknowledges the present harm caused by past discrimination

but also helps to eliminate its lingering effects by infusing social capital into the bidder's community. If the bidder does a good job on time, not only does the bidder become someone "known" to the prime contractor, but he also becomes "someone who knows someone" within his community.

In his recent DuBois lectures, however, Loury also links "discrimination in contact" with a form of "lingering effect" that is distinct from, although related to, unequal social capital. With specific reference to the current situation of African Americans, he proposes that continuing patterns of social segregation be understood not "as some form of anti-black enmity" but rather in terms of "subtle dynamics ... of racially based social cognition" that he terms "stigma":

> "My use of the term 'racial stigma' alludes to [the] lingering residue in post-slavery American political culture of the dishonor engendered by racial slavery. It is crucial to understand that this is not mainly an issue of the *personal attitudes* of individual Americans. To reject my argument here with the claim that, 'stigma cannot be so important because attitude surveys show a continued decline in expressed racism among Americans over the decades,' is to thoroughly misunderstand me. I am discussing *social meanings*, not *attitudes* ... Discrimination is about how people are treated; stigma is about who they are understood to be."

Research by Claude Steele, Joshua Aronson and a number of other psychologists provides evidence that racial stigma is indeed a very real lingering effect that continues to harm in ways that cannot be attributed to the present practice of intentional discrimination. Steele initially hypothesized that if a person fears that low performance in a particular testing situation will confirm a stigmatic stereotype, this felt "threat," which may have its influence below the level of conscious awareness, is likely to depress the test performance.[8] Steele

[8] Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 American Psychologist 613 (1997). See also Claude M. Steele, *Thin Ice: Stereotype Threat and Black College*

and Aronson have since accumulated an extensive set of experimental results that support this hypothesis, showing dramatically depressed scores for stigmatized group members that cannot be attributed to bias on the part of test designer nor to inferior skills of the test taker.[9]

Although Steele and Aronson's research is most directly relevant to affirmative action in higher education, Loury has suggested ways in which stereotypes and stigma rooted in past discrimination can have lingering effects on the market economy in a similar ironic way by modifying black behavior so as to confirm the stereotype. Ian Ayres, who is both an economist and a legal scholar, has reported the results of empirical research on retail car negotiations showing that black male testers received final offer mark-ups that were twice as high as those given white male testers. *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 Harv. L. Rev. 817 (1991). Although the behavior of the car retailers

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Students, 284 Atlantic Monthly 44 (Aug. 1999) (available on the Web at http://www.theatlantic.com/issues/99aug/9908stereotype.htm)

[9] In one experiment white and black students at Stanford University were given 27 especially difficult questions from the verbal sections of past Graduate Record Exams. In the "diagnostic" test group, students were told that their abilities were being measured while in the "non-diagnostic" group, they were told the purpose of the experiment was "to examine the psychology of problem solving." The performance of black and white students in the non-diagnostic group, adjusted for each individual's pre-existing SAT verbal score, was identical (12 correct answers). However, in the diagnostic group the black students performed worse (8 correct answers) while the white students performed at the same level (12 correct answers). Claude M. Steele & Joshua Aronson, *Stereotype Vulnerability and African-American Intellectual Performance*, *Readings about the Social Animal* 409, 412 (Joshua Aronson ed., 7th ed., 1995). See also Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 Journal of Personality and Social Psychology, 797 (1995). Other researchers have replicated their results and the stereotype threat theory is now widely accepted within the field of psychology. See, e.g., M. Inzlicht & T. Be-Zeev, *A threatening intellectual environment. Why females are susceptible to experiencing problems solving deficits in the presence of males*, Psychological Science, 11, 5, 365.371 (2000).

may indeed have been motivated by conscious racial bigotry, Loury proposes the following model that could also explain these results:

> "Suppose automobile dealers think black buyers have higher reservation prices than whites – prices above which they will simply walk away rather than haggle further. On this belief, dealers will be tougher when bargaining with blacks, more reluctant to offer low prices, more eager to foist on them expensive accessories, etc. Now, given that such race-based dealer behavior is common, blacks would come to expect tough dealer bargaining as the norm when one shops for cars. As such, a black buyer who contemplates walking away would have to anticipate less favorable alternative opportunities and higher search costs than would a white buyer who entertains that option. And so, the typical black buyer might find it rational to accept a price rather than continue searching elsewhere, even though the typical white might reject that same price. Yet, this racial difference in typical buyer behavior is precisely what justified the view among dealers that a customer's race would predict bargaining behavior. Thus, even if there are no intrinsic differences in bargaining ability between the two populations, an equilibrium can emerge where the dealers' rule of thumb, "be tougher with blacks," is all too clearly justified by the facts."

This model predicts a particularly insidious form of lingering effect. Outright racial bigotry in an earlier generation of car dealers, based on the stereotype of blacks as naive and foolish consumers, would condition black consumer expectations and bargaining behavior. A current generation of car dealers, who considered themselves free from bigotry, would engage in a "race-neutral" practice of hard bargaining and "learn" from repeated interactions that they can safely demand higher prices from black consumers, thus reinforcing the stereotype born in

bigotry and maintaining a racial inequity in the market for automobiles.

The disparity between test scores among the students studied by Steele and Aronson and between car prices offered to the testers in Ayres' study simply cannot be adequately explained without reference to race. The disparity should not be attributed to innate racial differences in test-taking ability or consumer sophistication. Yet, this racial disparity can be explained without assuming bigotry on the part of either the test givers or car retailers.

Such social science findings as discussed above, that show how racial discrimination practiced by past generations can have powerful continuing effects in the present, make clear the importance of including "lingering effects" along with "present practice" in the definition of compelling interest set forth by this Court in the 1995 *Adarand* decision. Loury poses the following question in his DuBois lectures: "[S]houldn't somebody learn what is going on and intervene to short-circuit the feedback loop producing this inequality?" Obviously the federal government is uniquely situated to attempt such intervention. In the particular context of the DBE program, DOT is in the position of what Loury terms a "monopolistic observer":

> " A competitive situation is one where there are a large number of observing agents, each encountering subjects from an even larger, common population, each taking actions in relation to these subjects but knowing that, due to their relatively insignificant size, no action they can take will affect the population's characteristics. A monopolistic situation is one where a single observing agent (or a quite small number) acts on a population of subjects. ... [I]f a small employer ... learned or was told about such feedback effects, there would be nothing to be done because, in a competitive situation, an individual's action has so little impact on the overall observing

> environment.[10] ... [On the other hand, a monopolistic observer might] see the racially disparate outcome as being anomalous or surprising ... [and] therefore find it to be *in his own self-interest* to experiment, so as to learn about the structure that is generating his observations."

As a monopolistic purchaser of construction work on a huge scale, the DOT is in a key position to acquire information about lingering effects of racial discrimination and experiment with ways to alter market and social mechanisms that perpetuate those effects. As Loury points out, 'if agents do not learn about mechanisms within their control that reproduce inequality through time, the results could be tragic ..." This account is consistent with DOT's own explanation for continuing the DBE program after re-evaluating it in light of the 1995 *Adarand* decision: "The most significant evidence demonstrating the need of a goal-oriented program is the evidence cited of the fall-off in DBE participation in state contracting when goal-oriented programs end, compared to participation rates in the Federal DBE program." *Participation by Disadvantaged Business Enterprises in Department of Transportation Programs: Final Rule*, 64 Fed. Reg. 5096, 5102 (Feb. 2, 1999) (Supplementary Information: Background). The DOT quoted extensively from Congressional debates in 1998 over the Transportation Equity Act for the 21st Century (TEA-21) which contained a provision retaining the DBE program. In particular the DOT cited the following statement by Senator Robb:

> "Where DBE programs at the State level have been eliminated, participation by qualified women and qualified minorities has plummeted. There is no way to

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[10] For example, in Loury's model, a retail car dealer who was troubled about a pattern of higher prices paid by black consumers for the same vehicles could not alter black consumer behavior simply by changing his own bargaining practices, by offering black consumers the same deal as white consumers. Such an idealistic car dealer would simply end up making less money than the other dealers in the community who continued to assume correctly that black purchasers would accept higher prices.

> know whether this discrimination is intentional or subconscious, but the effect is the same. This experience demonstrates the sad but inescapable truth that, when it comes to providing economic opportunity to women and minorities, passivity equals inequality." Id. at 5101, citing 144 Cong. Rec. S1422. (1998).

Of course it is possible that the virtual disappearance of DBE subcontractors in the absence of affirmative action incentives for prime contractors might have been in part due to DBE inability to submit the lowest bids or, as discussed above, bids viewed as most likely to be performed per specifications and on time. Prime contractors who accept the lowest bids, or prefer bidders they know personally, are not obviously engaging in "reward bias" discrimination, but the inability of DBE contractors to win a competitive bidding process might nonetheless be the product of the "lingering effect" of "development bias." The most significant point made by Senator Robb is that government should not be a passive participant in an unregulated market for highway construction work even if the government is not yet able to trace all the complex and subtle causes of the situation.[11] As this Court said in the 1995 *Adarand* decision, "government is not disqualified from acting in response" to such a situation.

In redesigning the DBE program -- proceeding in response to the 1995 *Adarand* decision through the process of legislative

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[11] The DOT cites a statement by Senator Baucus that DBE participation in the state-funded portion of the highway program in Michigan fell to zero in a nine month period after the state terminated its DBE program, while the federal DBE program in Michigan was able to maintain 12.7 percent participation, id. citing 144 Cong. Rec. S 1404, and a follow-up statement by Senator Kerry, "[I]s that just the economy of our country speaking, an economy at one moment that is capable of having 12 percent and at another moment, when they lose the incentive to do so, to drop down to zero [?] .... You could not have a more compelling interest if you tried" id. citing 144 Cong. Rec. S1409-10. The Congressional debates described similar drastic drops in DBE participation when affirmative action programs in state or local government procurement ended in California, Florida, Louisiana, Missouri, Nebraska, and Pennsylvania. Id.

deliberation and administrative rule-making -- the federal government seems to be trying to "experiment" in just the ways a monopolistic agent should act, according to Loury, and is recruiting state governments as partners in this endeavor. States who engage in DOT-funded highway construction are required to compile and analyze data to estimate the level of DBE participation in such construction to be expected "absent the effects of discrimination"[12] including a possible adjustment to "account for the continuing effects of past discrimination." 49 C.F.R. § 26.45(b) and (d)(3). Each state must then submit to DOT an annual overall state-wide goal that reflects this "discrimination-free" estimate of DBE participation. The state must then endeavor to meet this state-wide goal through "race-neutral" means and is only permitted to set contract-specific goals for DBE participation if the race-neutral approach is not expected to meet the overall state goal. The current DBE program thus attempts to determine empirically in each state whether there are lingering effects of discrimination affecting the market in highway construction work and whether affirmative action is needed to prevent perpetuation of those effects. The critical question is whether the "racial presumptions" central to the DBE program are narrowly tailored to this endeavor.

B. THE USE OF RACIAL PRESUMPTIONS IN THE DBE PROGRAM

The Department of Transportation's program for Disadvantaged Business Enterprises was developed in response to a Congressional mandate that "not less than 10%" of federal highway funds be expended "with small business concerns owned and controlled by socially and economically disadvantaged individuals."[13] The DBE program is thus built

[12] This estimate takes into account discrimination in the private market. See Ian Ayres & Frederick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 Columbia L. Rev. 1577 (1998).

[13] The most current source of this mandate is Section 1101(b) of the Transportation Equity Act for the 21st Century, Public Law 105-178, signed

on the concept of "social and economic disadvantage" which came from two pre-existing programs of the Small Business Administration: (1) the Minority Small Business and Capital Ownership Development (BD) program authorized by Section 8(a) of the Small Business Act, and (2) the Small Disadvantaged Business (SDB) program for federal contracts authorized by Section 8(d) of the Small Business Act. Originally this case challenged the constitutionality of the SDB program because Adarand Constructors lost its bid to be a subcontractor on a federal construction contract. It appears from the Court's definition of the questions presented on certiorari that the case now also addresses the constitutionality of the DBE program, even though the DBE program relates to state highway construction contracts, funded by DOT, rather than the kind of direct federal contract that give rise to this litigation. Even though the constitutionality of the BD program is not directly at issue in this case, the SDB and DBE programs cannot be fully understood except by reference to the BD program.

1. Racial Presumptions in the SBA Business Development (BD) Program

Unlike the SDB and DBE programs, the BD program is not limited to government-funded contracts; however, many (but not all) of its definitions and procedures for determining "social and economic disadvantage" are incorporated by reference into the SDB and DBE programs. The statutory provision creating the BD program -- unlike the provisions underlying the SDB and DBE programs -- does not create a presumption of disadvantage based on membership in a specified racial group. Racial identity is mentioned in the BD statutory provision only as a possible direct cause of social disadvantage, and indirect cause of economic disadvantage:

> "Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural

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into law on June 9, 1998, to be found at 112 Statutes at Large 113-115 (1998).

> bias because of their identity as a member of a group without regard to their individual qualities. Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired 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) (5), (6)(A)

The SBA regulations that implement the BD program do, however, create a presumption of social disadvantage based on membership in one of five designated groups: Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Subcontinent Asian Americans. 13 C.F.R. § 124.103 (b). Membership in one of these groups does not give rise to a presumption of economic disadvantage, which is instead determined by reviewing an applicant's "personal narrative" describing his or her economic disadvantage, supported by personal financial information. 13 C.F.R. § 124.104.

The SBA also has authority to designate additional groups that are "socially disadvantaged." 13 C.F.R. § 124.103(d)(2) allows "representatives of an identifiable group whose members believe that the group has suffered chronic racial or ethnic prejudice or cultural bias" to petition the SBA to be included as a "presumptively socially disadvantaged group."[14]

2. Racial Presumptions in the SBA Small Disadvantaged Business (SDB) Program

In contrast to the BD program, the statutory provision authorizing the SDB program for federal contracts does contain a presumption of disadvantage, which applies to both social and economic disadvantage. Section 8(d) of Small Business Act

[14] Under the DOT regulations, if the SBA adds a new group to its "rebuttable presumption" list, that group then is also added for purposes of the DBE program.

requires that most federal contracts include a clause requiring the contractor to give small business concerns owned by socially and economically disadvantaged individuals "the maximum practicable opportunity" to participate in subcontracts. The required clause further directs the contractor to "presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act." 15 U.S.C § 637(d)(3)(C).

Although this statutory language remains in place, the decision of the Court of Appeals which is the subject of this certiorari petition concluded that current federal regulations implementing the SDB federal contracting program have eliminated "the race-based presumption of economic disadvantage." *Adarand Constructors v Slater*, 228 F.3d 1147, 1185 (10th Cir. 2000). The Court of Appeals cited two different chapters of the Code of Federal Regulations in support of this conclusion: Chapters 48 and 13. Chapter 48 contains the Federal Acquisition Regulation. The three sections of Chapter 48 cited by the Court of Appeals all simply refer to Chapter 13, part 124, subpart B, which contains SBA regulations, indicating that the procuring federal agencies are relying on the SBA for the definition of "small disadvantaged business" and certification of eligible SDBs pursuant to that definition. The Court of Appeals then cited only one section from the SBA regulations on the SDB program, which answers the question, "What is a Small Disadvantaged Business (SDB)?":

> "(a) *Reliance on 8(a) criteria*. In determining whether a firm qualifies as an SDB, the criteria of social and economic disadvantage and other eligibility requirements established in subpart A of this part apply, including the requirements of ownership and control and disadvantaged status, **unless otherwise provided in this subpart**." 13 C.F.R. § 124.1002(a) (2001) (emphasis added).

Because "subpart A of this part" refers to the BD regulations (the 8(a) program), the Court of Appeals apparently interpreted this reference as eliminating "the discrepancy between individualized determination of economic disadvantage characterizing the 8(a) program and the non-individualized presumption of economic disadvantage characterizing the 8(d) [i.e. SDB] program." 228 F.3d at 1185. However, the Court of Appeals did not pay sufficient attention to the "unless otherwise provided" qualification at the end of the subsection. In a later section of the SDB regulation entitled "Disadvantaged determination," the SBA clearly states:

> "Those individuals claiming disadvantaged status that are members of the same designated groups that are presumed to be socially disadvantaged for purposes of SBA's 8(a) BD program (see 124.103(b)) are presumed to be socially **and economically** disadvantaged for purposes of SDB certification." 13 C.F.R. § 124.1008(e)(1) (2001) (emphasis added).

Because SBA regulations for the BD program designate "Black Americans, Hispanic Americans, Native Americans, [and] Asian Pacific Americans" as groups presumed to be socially disadvantaged, 13 C.F.R. § 124.103(b), members of such groups **are** presumed to be also economically disadvantaged for purposes of the SDB federal contract program, thus making the SDB implementing regulations consistent with Section 8(d) of the Small Business Act.

The misinterpretation of the SDB regulations by the Court of Appeals is a critical error, because the Court of Appeals explicitly stated that SDB program would **not** be narrowly tailored "insofar as it obviates an individualized inquiry into economic disadvantage." 228 F.3d at 1184. It thus appears that the Court of Appeals would have ruled in favor of petitioner Adarand Constructors had the court correctly interpreted the SDB regulations.

3. Racial Presumptions in the DOT Disadvantaged Business Enterprises (DBE) Program

The statutory provisions that have authorized the DBE program do not appear in the compiled U.S. Code and are only to be found attached to successive appropriation bills, the most recent being Section 1101(b) of Pub. L. No. 105-178, 112 Stat. 113 (1998). This provision, like its predecessors, does not explicitly contain a racial presumption but instead states that the

> "term 'socially and economically disadvantaged individuals' has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C § 637(d)) [i.e. the SBA's SDB federal contract program] and relevant subcontracting regulations promulgated pursuant thereto"

The statute does direct the Secretary of Transportation to "establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection." 112 Stat. 114. The DBE regulations this Court discussed at length in its 2000 *Adarand* decision, *Adarand Constructors v Slater*, 120 S.Ct. 722, 725-26, were promulgated pursuant to this directive. Although the DBE regulations relate to state highway construction contracts (that received DOT funds), the regulations are nonetheless relevant to the specific facts of this case, even though it originally involved a federal highway construction contract. As this Court pointed out, "DOT does not itself conduct certifications [of DBE status], but relies on certifications from two main sources: the Small Business Administration ... and state highway agencies, which certify them for purposes of federally assisted highway projects." 120 S.Ct. at 723. Adarand Constructors lost out in its bid for a guardrail subcontract to a company that had been certified under the DBE regulations by the state department of transportation. Id. at 724.

The racial presumption of both social and economic disadvantage appears independently in the DOT regulations along with a list of presumptively disadvantaged groups that parallels the list in the SBA's regulations but also specifically defines the terms "Black Americans" and "Hispanic Americans." 49 C.F.R. § 26.5 Thus even if the Court of Appeals correctly interpreted the SBA's regulations for the SDB federal contracting program as eliminating the racial presumption of economic disadvantage, this presumption still survives in the DBE regulations and is thus relevant to this case -- even if Adarand Constructors' claims are construed narrowly to apply only to direct federal highway contracts such as the one giving rise to this litigation.

C. THE NEED FOR SOCIAL SCIENCE METHODS TO ACHIEVE NARROW TAILORING

Although the phrase "narrow tailoring" appears both in cases involving judicially created remedies and affirmative action programs developed by the other branches of government, the phrase seems to have somewhat different meanings in these two different contexts. When reviewing a trial judge's injunction intended to desegregate public schools or remedy employment discrimination, "narrow tailoring" draws upon historic principles of equity law. Because a judge sitting in equity has potentially vast discretionary powers, a reviewing court will look closely at whether the injunctive relief is "narrowly tailored" to the evidentiary record as to injury. In this context, narrow tailoring operates as a constraint only on judicial power.

When reviewing an affirmative action plan created by a legislature or executive agency, "narrow tailoring" cannot mean that the legislature or agency is treated either as a plaintiff with a burden of proof to carry or as a trial court whose power is limited to remedying specific injuries proven by the parties before it. Instead, when reviewing legislative and agency action, narrow tailoring instead seems more focused on

"smoking out" true motives rather than assuring that all relevant facts have been established and used to design the most limited effective remedy:

> "[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative 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." *Croson*, 488 U.S. at 493, quoted in *Adarand* 515 U.S. at 226.

The narrow tailoring test when applied to the other branches is particularly intended to reveal whether "classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." Id. Thus in the *Croson* case the inclusion of "Aleuts" was problematic not so much because Aleuts might receive an undeserved benefit but because this "random inclusion ... suggests that perhaps the city's purpose was not in fact to remedy past discrimination." 488 U.S. at 506.

In 1994 George R. LaNoue and John C. Sullivan began their analysis of the SBA's decisions about which groups should be entitled to affirmative action with these words: "[I]n affirmative-action terms, minorities have become almost universally defined as blacks, Hispanics, Asians, and Pacific Islanders, Native Americans, Eskimos, and Aleuts. But why? The Supreme Court keeps challenging governments for an answer, without a definitive response." *Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to Affirmative Action*, 6 Journal of Policy History 439-40 (1994). Their statement remains true today; even the record in this case is remarkably silent on this question. Adarand Constructors contends that the phrase "socially and economically disadvantaged" is really just a proxy for racial categories. After an exhaustive review of SBA

records obtained pursuant to the Freedom of Information Act, LaNoue and Sullivan came to a similar conclusion:

> "Examining this record, it is difficult to discern any consistent application of the agency's published procedural or substantive standards. ...[T]he relative economic disadvantage of groups is quantifiable and the data were often available from census records. The SBA never used the data and never analyzed them when petitioners [seeking to be added to the list of presumptively disadvantaged groups] introduced them, but instead employed a hodgepodge of rationales that appear to be largely pretexts for its decisions. ...On the other hand, when the agency did expand eligibility ... it did so without any independent examination of the actual social or economic status of those groups in America." Id. at 461

According to LaNoue & Sullivan, the SBA's list of disadvantaged groups has its earliest origins in the list of "minority groups" that appeared in Standard Form 40, developed by President Kennedy's Committee on Equal Employment Opportunity, to be used solely for statistical reporting purposes in employment prior to the Civil Rights Act of 1964. Id. at 440-44. This list, and its successor incorporated into Reporting Form EEO-1, necessarily was based on racialized categories of appearance because employers who filled out these forms were instructed to avoid asking employees which group they belonged to, but were to rely on only visual identification.[15]

> "When affirmative-action concepts changed and the racial and ethnic categories used for reporting were transformed into requirements for proportional representation in the workforce and other areas, there was still virtually no

[15] John David Skrentny, *The Minority Rights Revolution* 29 (pre-publication draft 2001). Polish leaders were told that Poles could not be added to the reporting form because employers could not be expected to identify them visually. Id. at 439. (Based on correspondence between author and Herbert Hammerman, EEOC's Chief of Reports in the 1960s.)

> debate about which groups should be included. The concept of who was a minority was passed from program to program with very little reconsideration." LaNoue & Sullivan at 441.

The government's failure to re-assess its listing of "official minorities" can create an appearance of "random inclusion" that undermines the credibility of a program justified primarily in terms of remedying the lingering effects of past discrimination.

The problem is that although members of all five groups listed in the DBE program might share common vulnerability to current practices of racialized "reward bias," they differ greatly in terms of how their group membership might indicate "development bias." For several of the designated groups a very significant percentage are first or second generation immigrants. Also social science data indicate that the extent of contemporary social segregation differs considerably among the groups.[16] To the extent that eliminating "lingering effects" is the compelling interest for the DBE program, the undifferentiated aggregation of the five groups into a single presumption of disadvantage does create a risk of overinclusion. The development and implementation of state-wide goals might be particularly distorted by this problem. It appears that the regulations require that all existing DBEs, and all persons who might be potential DBE owners absent the lingering effects of discrimination, be counted as a single total for setting the goal and measuring progress toward achieving the goal. See 49 C.F.R. § 26.45(h). If the analysis set forth above is correct, persons from groups least affected by intergenerational effects of past discrimination and current patterns of social segregation may be more likely to be successful competitors in the market for highway construction. Automatically presuming such persons as disadvantaged might

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[16] See John David Skrentny, *Affirmative Action and New Demographic Realities*, The Chronicle of Higher Education B7 (February 16, 2001); *Urban Inequality: Evidence from Four Cities* (Alice O'Connor, Chris Tilly & Lawrence Bobo, eds.,2000).

not only expand the scope of the DBE program beyond that justified by the "lingering effects" rationale, but also creates the risk of not really addressing the "lingering effects" problem. It is possible that participation of DBEs from less disadvantaged groups might therefore comprise a high proportion of all DBE contracting in a state, disguising a continuing failure to assist persons whose group membership is actually more indicative of "lingering effects,"thus depriving the government of the kind of feedback information needed to learn how to break the tragic cycle that reproduces inequality over time.

Excessive reliance on racialized categories could also result in seriously disadvantaged groups being erroneously excluded. For example, it is frequently asserted that "Asian Americans" do not need affirmative action because socioeconomic indicators show that "they" are better off than the average American. The following table seems to support such assertions.

1980 Census Data[17]

	% college grads	% unemployed	Relative family income	Poverty rate
All Americans	16.2	6.5	1.0	9.6
Asian-Americans	34.3	4.6	1.19	10.3

However, when the racialized category of "Asian Americans" is broken down into national origin groups, one can see by comparing "All Americans" with lines 3-5 the error of such a "better off" generalization.

	% college grads	% unemployed	Relative family income	Poverty rate

[17] George R. LaNoue & John C. Sullivan, *Group Presumptions: Determining Group Eligibility for Federal Procurement Preferences*, 41 Santa Clara L. Rev. 103, 131 (2000), citing *Civil Rights Issues Facing Asian Americans in the 1990s* 12-13 (U.S. Civil Rights Commission 1992).

All Americans	16.2	6.5	1.0	9.6
Asian-Americans	34.3	4.6	1.19	10.3
Vietnamese	12.9	13.4	0.65	33.5
Laotian	5.9	15.3	0.26	67.2
Cambodian	7.7	10.6	0.45	46.9
Hmong	2.9	20.0	0.26	65.5

When an even more precise category --- ethnicity -- is used to separate the Hmong in line 6 from other Laotians, one can see even more severe indications of disadvantage (e.g. 2.9% college graduates, 20% unemployment -- the worst of any of the groups listed).

The goal of narrow tailoring might be well served if the SBA commissioned an independent group of experts to advise it on reevaluating group designation. John Skrentny has recently called for the creation of a commission "to measure equal opportunity, throwing out all of the old assumptions and asking fresh questions." The report produced by such a commission "should not infer patterns of discrimination solely from statistics of employment representation or compensation, but should also include the 'tester' studies favored by some civil-rights groups, whereby persons of varying races and ethnicities apply for jobs, housing, or loans at the same places, and the results are compared. Further, a truly comprehensive report would use interviews, and cull the results of past and new ethnographic studies of the role that discrimination may play in American life." *Affirmative Action and New Demographic Realities*, The Chronicle of Higher Education B7, B10 (February 16, 2001)

Unfortunately there are some dicta scattered through affirmative action case law that may discourage agencies like the SBA from undertaking such an empirical inquiry. For example, this Court in *Croson* expressed concern that

affirmative action programs based on past "societal discrimination" would become "lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." 488 U.S. at 505-6. The Court went on to quote in part from the following famous statement by Justice Powell in his *Bakke* opinion:

> "There is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. ... As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence ..." 438 U.S. at 295-97

It is important to note, though, that Justice Powell was speaking about "judicial competence." It is one thing for the judicial branch to say that it cannot "measure" the effects of past discrimination and quite another to assert that neither of the other branches is capable of doing so.

There is one major country in the world that has a longer history -- a much longer history -- than the U.S. of designing and evaluating affirmative action programs: India. India's experience shows without a doubt that it is possible to design a program to remedy the effects of past discrimination in which beneficiary groups are designated through an objective process based on empirical research. A comparative study of India also illustrates the crucial role played by the courts in causing such a process to develop and keeping it free of "illegitimate notions of inferiority" and political pandering to ethnic voting blocks. The suggestions at the end of this brief for modifying the DBE

program to maximize "narrow tailoring" are inspired in large part by studying India's approach to affirmative action.

D. THE USE OF SOCIAL SCIENCE METHODS IN INDIA TO TAILOR GROUP PREFERENCES TO LINGERING EFFECTS

Since the adoption of its Constitution in 1950, India has afforded an extensive program of affirmative action to a set of caste groups known as Scheduled Castes (the former "untouchables") and a set of tribal groups known as Scheduled Tribes, which together constitute about 22 percent of the total population. In addition, it has provided more selective affirmative action measures to a number of groups within Indian society, defined by the Constitution as "socially and educationally backward classes," who have suffered from a history of economic exploitation and social segregation comparable in some measure to that suffered by the untouchables.[18] The concept of "social and educational backwardness" can be seen as an Indian version of Loury's "developmental bias" and thus suggests a point of comparison with the idea of "social and economic disadvantage" in the DBE program.

From 1951 through 1990, individual Indian states were left on their own to develop criteria for providing preferential treatment in higher education and government employment to what came to be known as OBC's ("other backward classes"). A recurrent problem developed: the extension of affirmative action to caste groups apparently based on more on their political clout in a particular state than their actual need for preferential treatment relative to other groups, leading to

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[18] For a brief overview of India's approach to affirmative action, see Clark D. Cunningham, *Affirmative Action: India's Example*, 4 Civil Rights Journal 22 (1999) and Clark D. Cunningham & N.R. Madhava Menon, *Race, Class, Caste ...? Rethinking Affirmative Action*, 97 Michigan Law Review 1296 (1999) (both on Equality Web Site). The classic account is Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (1984).

repeated Supreme Court decisions ordering states to redesign their programs using more objective and transparent processes.[19] Dissatisfaction with the state-level approaches led to appointment of a Presidential Commission in 1980 (known as the "Mandal Commission" after the name of its Chairperson), which issued a comprehensive report and set of recommendations for national standards. The Mandal Commission conducted a national survey that started with generally recognized group categories (typically based on caste name or hereditary occupation) and tested each group using standardized criteria of "backwardness" (such as comparing the percentage of group members who married before the age of 17 or did not complete high school with other groups in the same state).

Implementation of the Mandal Report was announced by the Prime Minister in 1990 but delayed until the Supreme Court reviewed various constitutional challenges to its methodology and recommendations. In 1992 the Supreme Court approved most of the recommendations of the Mandal Report in *Indra Sawhney v Union of India (I)*, 1993 All India Reports (S.Ct.) 477. Two aspects of the Sawhney decision provide particularly interesting points of comparison with the case now before this Court. First, the Court approved the basic assumption of the Mandal Report that *neither* traditional caste categorization nor economic status, standing alone, was a sufficient basis for classifying a group as an OBC. Traditional caste categories can be used as a starting point for identifying OBCs but selection criteria must include empirical factors beyond conventional assumptions that certain castes are "backward." Second, the Court added a new criteria for affirmative action eligibility. The Court ruled that OBC membership only creates a rebuttable presumption that a person needs preferential treatment;

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[19] For a concise overview of this history see Clark D. Cunningham & N.R. Madhava Menon, *Seeking Equality in Multicultural Societies* (n.d. on Equality Web Site). For greater detail see Sunita Parikh, *The Politics of Preference: Democratic Institutions and Affirmative Action in the United States and India* (1997).

therefore, the state must also use an individualized economic means test to eliminate persons from affluent or professional families (termed "the creamy layer test"). This creamy layer test looks to the occupation and income of a person's parents, an approach consistent with Loury's economic theory that distinguishes between "human capital" and "social capital." The creamy layer test apparently assumes that if one's parent has achieved substantial occupational and financial success (perhaps despite suffering personal discrimination) the parent will pass on that social capital to the child, thus minimizing the "lingering effects" of discrimination. The creamy layer test thus responds to two different criticisms of affirmative action commonly voiced in the United States: (1) that many affirmative action beneficiaries come from privileged backgrounds and don't really need affirmative action and (2) that affirmative action benefits do not reach the "truly needy" because they are monopolized by more privileged members of the group. Each state in India was directed to add a "creamy layer" test to its programs to benefit OBCs.

In 1996 the Supreme Court of India struck down a definition of the "creamy layer" by two state governments that arbitrarily set the threshold for parental wealth and status so high as to make the test ineffective. *Ashoka Kumar Thakur v. State of Bihar*, 1996 All India Reports (S.Ct.) 75. In *Indra Sawhney (II)*, 2000 All India Reports (S.Ct.) 489**,** the Supreme Court of India had to contend with another state government that "declared" by state legislation there was no "creamy layer" among any of the backward classes in that state. The Supreme Court appointed its own commission to establish an interim creamy layer set of criteria for that state and then implemented the commission's recommendations. The Court pointedly observed that the state's refusal to implement a creamy layer test "appears to have been taken because the real backward [classes] have no voice in that decision-making process." Id. at 521.

Both the American DBE and the Indian OBC programs begin with a general, abstract category of "disadvantage" or "backwardness" and claim to be providing preferential treatment to specific ethnic groups only because they happen to fit into the category. Both programs insist that disadvantage can not be explained solely in economic terms; for both social disadvantage provides the rationale for using ethnicity to identify and delimit beneficiary groups. The requirement of an individualized determination of economic disadvantage under the SBA's BD program resembles India's "creamy layer test," although the Supreme Court of India requires that specific, objective economic criteria be set out, such a specific cut-off for parental income or extent of agricultural land owned. It is important to note that the Supreme Court of India does not itself decide whether any particular group is appropriately classified as eligible for affirmative action; rather, strict scrutiny in India focuses on the procedures and criteria used. Perhaps the key to the Indian approach is that criteria and procedures for deciding whether a group is sufficiently disadvantaged are announced in advance, and then applied on the basis of empirical research. This approach helps assure that classification is not "the product of rough compromise struck by contending groups within the democratic process," *Bakke*, 438 U.S. at 299 (opinion of Powell, J) or as this Court said in the 1995 *Adarand* decision, "simple racial politics," 515 U.S. at 226 (quoting *Croson*, 488 U.S. at 493 (plurality opinion of O'Connor, J.)).

CONCLUSION

Only one statutory provision prevents the SBA and DOT from engaging in more effective tailoring of the concept of "social and economic disadvantage" to the problem of remedying the lingering effects of past discrimination. That provision is the phrase requiring federal contractors to "presume that socially and economically disadvantaged

individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans" in Section 8(d) of the Small Business Act. If Congress simply removed the words "and economically," then the DOT would be free to amend its regulations to conform to the SBA's BD program that requires an individualized determination of economic disadvantage. This change alone (which the Court of Appeals believed has already taken place) would go a long way toward tailoring the DBE program more closely to the lingering effects problem. However, India's experience with implementing its comparable "creamy layer" test suggests that the DOT and SBA would be well advised to promulgate objective criteria of economic disadvantage susceptible to judicial review to avoid the appearance or reality of an illusory economic means test that leaves racialized categories essentially unchanged.

If Congress removed the entire mandatory presumption phrase from Section 8(d), then the SBA would be free to re-assess the list of disadvantaged groups using the kind of social science methods urged by John Skrentny and demonstrated by India's approach to affirmative action. Again, India's experience suggests that the SBA would be well-advised (and perhaps should be required) to "start fresh" and also to re-examine the list on a periodic basis, perhaps triggered by the ten-year census.

The following allegory about affirmative action, circulating in academic circles, has its origins in remarks made by Glenn Loury at a 1997 conference. Imagine a mad bomber with a stockpile of biological and radiation weapons. The bomber takes a state map where every county is marked. He colors some counties red, some green, some blue. Taking that map aloft, he drops biological weapons on the red counties, radiation weapons on the green counties, and all that he has left of both kinds on the blue counties. He then kills himself in a suicide crash. Although many residents of the targeted counties become ill almost immediately, the terrible extent of the harm he caused becomes suspected only as the years go by and

public health officials begin to notice patterns of cancer and birth defects. The situation is complicated not only by the varying pattern of bombing, but also by the passage of time as people move out of the targeted counties, carrying illness with them, and others move into the counties where the still potent effects of the bombing linger. Perhaps with massive data collection and sophisticated analysis, the government might eventually be able to reconstruct the pattern of bombing and precise weapons used on each county. But what if the bomber's map has been discovered in the rubble of his crashed plane? Of course the government should refer to the map in order to restore public health. And that is the goal of a well-designed affirmative action plan: to use a map that projects the complex patterns of past and continuing discrimination onto the current geography of our nation to guide the uncertain but essential task of restoring social and economic health for the victims of that discrimination.

In the allegory it is obvious that the long-lasting public health crisis will not go away by pretending that the map does not exist or by prohibiting officials from using it. If there was a judicial role in the story, it would be to make sure that government has, in fact, the right map, and is indeed using it in order to remedy the harm the bomber caused.

Respectfully submitted,
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