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, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITIONER

MICHAEL E. KENNEDY
Special Counsel
ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.
1957 E Street, N.W.
Washington, D.C. 20006
(202) 383-2735

* Counsel of Record

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810
Counsel for Amicus Curiae the Associated General Contractors of America, Inc.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Associated General Contractors of America, Inc. (AGC) is a nonprofit trade association founded in 1918 to represent and serve the national interests of general construction contractors and other firms associated with the construction industry. AGC has 101 state and local chapters, with at least one chapter serving the general contractors and related firms in each state, and one chapter in Puerto Rico.

AGC has approximately 8,000 regular members and 24,000 associate members. These firms engage in the construction of both residential and non-residential buildings, including multi-family housing projects, office build-

ings, factories, warehouses, and shopping centers. These firms also engage in the construction of highways, bridges, tunnels, airports, dams and other water conservation projects, water works and waste treatment facilities, and defense facilities. AGC members also prepare sites for residential development and install public utilities.

AGC's regular members are prime contractors capable of assuming overall responsibility for the satisfactory completion of a project using their own employees to perform at least part of the work. Most of AGC's associate members are subcontractors. Other associate members are material suppliers and professionals serving the construction industry.

AGC has long supported the many federal and state measures that require open competitive bidding for public construction contracts. These measures typically require interested contractors to submit sealed bids by a specified date and time. They require the government agency to open all bids publicly. And they require the government agency to award the contract to the lowest responsive and responsible bidder.

As the courts have recognized, the purpose of open competitive bidding "is to give all persons equal rights to compete for Government contracts; to prevent unjust favoritism or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition." *United States* v. *Brookridge Farm*, 111 F.2d 461, 463 (10th Cir. 1940). AGC shares that objective, and therefore continues to support open competitive bidding for public construction contracts.

Discrimination on the basis of race or ethnicity is inconsistent with open competitive bidding, and AGC vigorously opposes such discrimination. In addition, in recognition of historical wrongs, AGC has helped and will continue to help its chapters offer business training

and other assistance to minority firms. AGC's Alabama Branch is, for example, a co-sponsor of the Birmingham Construction Industry Authority, a progressive public/private effort to increase the level of minority business participation in all construction, including private construction. AGC has also tried to help public officials address the practical issues raised by various procurement programs. Without addressing constitutional or other legal issues, AGC in 1982 advised the Federal Highway Administration that the contract clause at issue in this case "appear[ed] to be more realistic than others [then] being specified by various agencies, in that it recognize[d], to some extent, that contractors do indeed incur additional costs when they are contractually required to seek out, develop and train minority firms." Federal Highway Administration Committee Report to the Highway Division (Oct. 4, 1982).

AGC has appeared as amicus curiae in several of this Court's recent cases, including *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990), and *Building and Construction Trades Council* v. *Associated Builders & Contractors*, 113 S. Ct. 1190 (1993).[1]

SUMMARY OF ARGUMENT

I. Racial preferences in the award of construction contracts by the Federal Government should be subject to strict scrutiny under the equal protection component of the Due Process Clause of the Fifth Amendment. This Court has held that such scrutiny must be applied to racial preferences in the award of construction contracts by state and local governments, *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), and there is no reason to apply core principles of equal protection analysis differently to racial preferences in this context depending upon which level of government imposes them.

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[1] This brief is filed pursuant to S. Ct. Rule 37.3 with the consent of the parties. The consent letters have been filed with the Clerk.

The Tenth Circuit below erred in reaching a contrary conclusion on the basis of this Court's opinion in *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990). While *Metro Broadcasting* did depart from prior precedent and apply a lesser level of scrutiny to certain racial preferences adopted by the Federal Government, it did so in a different context in light of the unique features of the particular preference programs at issue in that case. Those preferences were not justified as a means of benefiting racial or ethnic minorities, but instead as a means of securing the broader benefit to all of diversity of views over the broadcast spectrum—a goal thought to be achieved through diversifying ownership of broadcast stations. No such objective is at issue here; there is and could be no suggestion that the racial identity of the owner of a guardrail construction firm affects how the firm installs the guardrail. In such a case the traditional strict scrutiny test—requiring proof that a racial classification is narrowly tailored to achieve a compelling governmental objective—should be applied.

II. The only interest sufficiently compelling to satisfy strict scrutiny in the context of the award of construction contracts is the need to remedy identified past discrimination. But mere governmental assertions of a remedial objective do not suffice; effective judicial review requires an evidentiary record justifying the racial preference.

A. Statistical evidence submitted to meet this requirement is probative of discrimination only to the extent it (1) identifies and relates to the relevant market; (2) considers only qualified and available firms within that market; (3) controls for such race-neutral, market-relevant variables as firm size and experience; (4) separately analyzes each minority group granted preferential treatment; and (5) identifies the discriminatory practices at fault in the relevant market. Analyses that fail to meet these standards are dubious guides to the existence or extent of discrimination, and should not be relied upon

by courts in considering whether the government's asserted remedial objective satisfies strict scrutiny.

B. Once the objective of remedying identified past discrimination is established, strict scrutiny requires that the challenged racial classification be narrowly tailored to achieve that objective. Narrow tailoring in the present context requires that government (1) carefully consider race-neutral alternatives before embracing the extreme remedy of racial preferences, (2) link any numerical objectives to the capacity of qualified minority firms in the relevant market, (3) limit the duration of preferences that take race into account, and (4) accord preferential status only to those groups as to which past discrimination has been adequately proven. Racial preferences that are not limited in these respects sweep more broadly than the evil sought to be cured, and go beyond remediation to impermissible racial discrimination.

III. The government's use of the Subcontracting Compensation Clause in this case cannot survive strict scrutiny. To cite only the most glaring constitutional deficiency, the government has established no evidentiary record of past discrimination in the relevant market, let alone made a finding specific to each distinct industry and each benefited minority group. Without more, this defect made the award of summary judgment in favor of the government improper.

ARGUMENT

I. THE PREFERENCE AT ISSUE HERE IS SUBJECT TO STRICT SCRUTINY AND MAY BE SUSTAINED ONLY IF NARROWLY TAILORED TO ACHIEVE A COMPELLING GOVERNMENTAL INTEREST

This Court has long held that "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). *See Shaw* v. *Reno*, 113 S. Ct. 2816, 2824 (1993) ("Express racial classifications are immediately suspect"). The reason for searching review of governmental classifications based on race is evident and often stated. "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.' They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Id.* (citations omitted) (quoting *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)). What is more, "[t]hey 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*, 113 S. Ct. at 2832.

This constitutional suspicion, however, has not resulted in automatic invalidation of all government actions that draw distinctions on the basis of race. Thus, for example, the Court has held that "race-conscious remedial action may be necessary" in order "to eliminate every vestige of racial segregation and discrimination in the schools." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion) (citing *North Carolina St. Bd. of Educ.* v. *Swann*, 402 U.S. 43, 46 (1971)). Similarly, "[w]here federal anti-discrimination laws have been violated, an equitable remedy may in the appropriate case include a racial or ethnic factor." *Fullilove* v. *Klutznick*, 448 U.S. 448, 483 (1980) (opinion of Burger,

C.J.) (citing *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976)).

The burden of this Court's decisions over the past sixteen years—at least since the decision and various opinions in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978)—has been to identify and articulate the appropriate basis for determining which racial preferences survive the constitutional suspicion that attaches to all such preferences and which do not.[2] The test for determining the validity of racial preferences adopted by state and local governments was definitively settled five years ago, when in *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), a majority of the Court joined opinions holding that such preferences must be subject to the "strict scrutiny" test. *See id.* at 493 (opinion of O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.); *id.* at 520 (Scalia, J., concurring in the judgment) ("I agree * * * with Justice O'Connor's conclusion that strict scrutiny must be applied to all governmental classification by race"). The verbal formulation of this test, at least, is clear: Under strict scrutiny, a racial preference will pass constitutional muster only if it is "narrowly tailored" to achieve a "compelling governmental interest." *See, e.g., Shaw* v. *Reno*, 113 S. Ct. at 2825; *Wygant*, 476 U.S. at 277-278 (plurality opinion).

Croson also resolved (again, in the context of preferences by state and local governments) the question whether preferences which "operate[] against a group that historically has not been subject to governmental discrimination," *Wygant*, 476 U.S. at 273 (plurality opinion), are subject to a different standard of review than those that burden members of groups previously subject to discrimi-

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[2] *See Fullilove*, 448 U.S. at 516 (opinion of Powell, J.) ("Distinguishing the rights of all citizens to be free from racial classifications from the rights of some citizens to be made whole is a perplexing, but necessary, judicial task").

natory action by the government. The opinions of Justice O'Connor and Justice Scalia (which together were joined by a majority of the Court) both plainly rejected the application of a different standard for so-called "benign" racial preferences. *See Croson*, 488 U.S. at 494 (opinion of O'Connor, J.) ("the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification"); *id.* at 520 (Scalia, J., concurring in the judgment) (strict scrutiny applies "whether or not [the] asserted purpose is 'remedial' or 'benign' "). As Justice Powell had observed in his pivotal opinion in *Bakke*, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." 438 U.S. at 289-290.

In considering the racial preference at issue in this case, however, the Tenth Circuit below refused to apply strict scrutiny. It held instead that a different standard was mandated because the "race-conscious program" at issue here was "implemented pursuant to a congressional command." 16 F.3d at 1543. Relying on its decision in *Ellis* v. *Skinner*, 961 F.2d 912 (10th Cir.), *cert. denied*, 113 S. Ct. 374 (1992), and this Court's decisions in *Fullilove* and *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990), the Tenth Circuit held that the racial preference should receive only "intermediate scrutiny," and be upheld if it served important governmental objectives within the power of Congress and was substantially related to achievement of those objectives. 16 F.3d at 1544.

For the reasons explained below, the Tenth Circuit erred in applying intermediate scrutiny to the racial preference at issue here. To be sure, the decision of this Court in *Metro Broadcasting* did apply what has come to be known as the "intermediate" level of constitutional scrutiny to what it labeled a "benign race-conscious measure[] mandated by Congress." 497 U.S. at 564. Significant differences in the context in which the respec-

tive racial preferences operate, however, undercut the basis identified in *Metro Broadcasting* for departure from the usual rule that racial preferences are subject to the most searching inquiry. This Court should reject the approach of the Tenth Circuit and subject the preference at issue here to strict scrutiny.

The Federal Government, no less than the States, is bound to provide all citizens equal protection of the laws. Although there is no express Equal Protection Clause applicable to the actions of the Federal Government, this Court has held since at least the decision in *Bolling* (the companion to *Brown* v. *Board of Education*, 347 U.S. 483 (1954)), that "[i]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it imposes on the States. 347 U.S. at 500. Thus, the Court was able to explain in 1975 that its "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger* v. *Weisenfeld*, 420 U.S. 636, 638 n.2 (1975).[3] Even when the Court admitted the possibility that the protections afforded by the Fifth and Fourteenth Amendments may "not always [be] coextensive," it recognized that "both amendments require the same type of analysis." *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976).

For many years, it was generally understood that strict scrutiny was the "type of analysis" to which all racial preferences—including those adopted by the Federal Gov-

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[3] *See also United States* v. *Paradise*, 480 U.S. 149, 166 n.16 (1987) (opinion of Brennan, J.) (the "reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth"); *id.* at 196 (O'Connor, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.); *Buckley* v. *Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); *Johnson* v. *Robison*, 415 U.S. 361, 364-365 n.4 (1974).

ernment—were subject. Indeed, the Court first articulated the test now known as strict scrutiny 50 years ago in cases considering the validity of actions of the Federal Government. *See, e.g., Korematsu* v. *United States*, 323 U.S. 214, 216 (1944) ("all legal restrictions which curtail the civil rights of a single racial group are immediately suspect * * * courts must subject them to the most rigid scrutiny").

Nevertheless, beginning with this Court's decision in *Fullilove*, the Court began to consider the effect on the standard of review of the positive grant of authority to Congress in Section 5 of the Fourteenth Amendment to "enforce, by appropriate legislation," the substantive provisions of that Amendment. At issue in *Fullilove* was the constitutionality of a ten percent minority set-aside established by an Act of Congress. Although the Court upheld the set-aside, the various opinions of the Court did not definitively resolve the question of what standard should be applied to congressional actions adopted as a remedy for past discrimination.

As Justice O'Connor would later observe in *Croson*, "[t]he principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ 'strict scrutiny' or any other traditional standard of equal protection review." 488 U.S. at 487. Rather, the opinion (joined by Justices White and Powell) avoided the application of any particular level of scrutiny in favor of a "careful judicial examination" to assure that the congressional enactment was "narrowly tailored" to accomplish the plainly constitutional "objective of remedying the present effects of past discrimination." *Fullilove*, 448 U.S. at 480. *See id.* at 491 ("Any preference based on racial or ethnic criteria must necessarily receive a most searching examination"). Justice Powell's understanding of the opinion that he joined was explained in his separate opinion; he clearly believed that strict scrutiny should be applied to the

racial preference at issue. *See id.* at 496.[4] The third opinion supporting the judgment, written by Justice Marshall and joined by Justices Brennan and Blackmun, upheld the set-aside under intermediate scrutiny, *id.* at 519, while the dissent of Justice Stewart, joined by then-Justice Rehnquist, would have applied strict scrutiny to invalidate the program, *id.* at 523, and Justice Stevens' separate dissent asserted that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Id.* at 537. *Fullilove*, therefore, plainly did not resolve the question of what standard should be applied to racial preferences enacted by Congress.

The Court next considered the issue in *Croson*. Justice O'Connor's plurality opinion, joined in this respect by the Chief Justice and Justice White, discussed the decision in *Fullilove* in response to the argument that it excused the City of Richmond from the obligation to make specific findings of past discrimination to support race-conscious action. *See* 488 U.S. at 486-493. What this argument ignored, Justice O'Connor explained, "is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Id.* at 490. Thus, "our treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here." *Id.* at 491. Because it did not involve congressional action, however, *Croson* did not speak to the question of what standard should be applied to such action. Instead, it simply recognized what the Fourteenth Amendment makes plain by terms: that Congress was granted special powers—not similarly granted to the States—to enforce the guarantee of equal protection.

Congressionally-authorized racial preferences were next before the Court in *Metro Broadcasting*. Together with

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[4] *See also Wygant*, 476 U.S. at 273-274 (opinion of Powell, J.) (describing test articulated in Chief Justice Burger's opinion in *Fullilove* in terms of strict scrutiny).

its companion case, *Metro Broadcasting* considered the validity under equal protection principles of two minority preference policies adopted by the Federal Communications Commission. Under these policies, the Commission awarded "preference to minority owners in comparative license proceedings," 497 U.S. at 558, and permitted certain licenses to be transferred only to minority-controlled firms. The Commission adopted these policies as part of its effort to ensure "[a]dequate representation of minority viewpoints in programming," which it believed "serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience" and "enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment." *Id.* at 556 (quoting *Statement of Policy on Minority Ownership of Broadcasting Facilities,* 68 F.C.C.2d 979, 980-981 (1978)).

The Court upheld the FCC's policies. First considering the standard of review, Justice Brennan's opinion for the Court noted that "[i]t is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress." 497 U.S. at 563. Citing the various opinions in *Fullilove,* the opinion announced that it would apply to the FCC's policies—which it considered "benign race-conscious measures mandated by Congress"—the standard of intermediate scrutiny articulated by the three members of the *Fullilove* Court who joined in Justice Marshall's concurrence. *Id.* at 564-565.

Although *Metro Broadcasting* plainly involved "race-conscious measures mandated by Congress," the Court did not expressly discuss what, in its view, made those race-conscious measures "benign" and thus justified intermediate scrutiny. The Court did not rely simply on the fact that the policy benefited those who belong to groups that had been the victims of either specific or more general societal discrimination. As the Court noted, "Congress

and the Commission do not justify the minority ownership policies strictly as remedies for victims of discrimination." *Id.* at 566. Rather, "Congress and the FCC have selected the minority ownership policies primarily to promote program diversity." *Id.* It was that interest, the Court explained at length, that justified the racially-conscious policies that had been adopted by the FCC.

The interest in "broadcast diversity," the Court noted, could be compared to other interests where the racial identity of the party could legitimately be considered in administering government programs. "Just as a 'diverse student body' contributing to a '"robust exchange of ideas"' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated, * * * the diversity of views and information on the airwaves serves important First Amendment values." *Id.* at 568 (quoting *Bakke,* 438 U.S. at 311-313 (opinion of Powell, J.)). The Court observed that the "benefits of such diversity are not limited to the members of minority groups who gain access to the broadcasting industry by virtue of the ownership policies; rather, the benefits redound to all members of the listening and viewing audience." 497 U.S. at 568. As Justice Stevens explained in his separate concurrence, the case fell "within the extremely narrow category of governmental decisions for which racial or ethnic heritage may provide a rational basis for differential treatment. The public interest in broadcast diversity—like the interest in an integrated police force, diversity in the composition of a public school faculty, or diversity in the student body of a professional school—is in my view unquestionably legitimate." *Id.* at 601-602 (footnotes omitted).

The racial preferences considered in *Metro Broadcasting,* therefore, were justified not because they promoted a particular racial or ethnic mix of broadcast station ownership as an end in itself, but because of the belief that diverse ownership would advance a distinct societal in-

terest—diversity of viewpoint on the broadcast spectrum—that would be unmet in the absence of racially-conscious policies. As Justice Stevens recognized, the decision thus turned on the crucial role of the broader community interests served by race-conscious policies. Society, not just the minorities who gain employment, benefits from policies promoting racially-diverse faculties in its institutions of higher learning. Similarly, society reaps ongoing benefits from encouraging diverse ownership of broadcast facilities, for, the Court found in *Metro Broadcasting,* "as more minorities gain ownership and policymaking roles in media, varying perspectives will be more fairly represented on the airwaves." *Id.* at 582.

The policy at issue here, however, while perhaps advancing the economic interests of minority contractors, advances no additional distinct societal interest that would be unmet in the absence of racial preferences. Unlike the students who benefit from attending a school with a racially-diverse faculty, or the consumers of broadcast services who are exposed to a diversity of viewpoints, drivers along the completed highway care not about—indeed, will be unaware of—the racial identity of the contractor who built the guardrails. The assumption indulged by this Court in *Metro Broadcasting* was that the racial identity of the owner of a broadcast station would affect the nature of the broadcast product. *See id.* at 569-584. No similar assumption is plausible in this case, nor has the government suggested that the racial identity of a guardrail contractor will have any effect on the guardrail the contractor constructs. The racial preference at issue in this case, therefore, is accompanied by none of the indicia of "benignity" that the Court emphasized in *Metro Broadcasting.*

It is not enough to contend that society as a whole is benefited by a construction industry with a particular racial or ethnic mix of owners. However desirable such an outcome may be, "[p]referring members of any one

group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 307 (opinion of Powell, J.). Such preferences should not be labeled benign, and subject under *Metro Broadcasting* to intermediate scrutiny, in the absence of a societal benefit from the racial preference apart and distinct from the benefit bestowed on the favored class. That definition of a "benign" benefit would reflect "only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." *Metro Broadcasting*, 497 U.S. at 610 (O'Connor, J., dissenting).

Rather, in the absence of the sort of rationale that supported *Metro Broadcasting*—present only in an "extremely narrow category of cases," *Metro Broadcasting*, 497 U.S. at 601 (Stevens, J., concurring)—the Court should continue to subject federal racial preferences, like those of state and local governments, to strict scrutiny. Otherwise, the judgments of this Court and other courts on this most perplexing issue will be reduced to little more than a labeling exercise: if a judge can affix the label "benign" to congressional preferences deemed worthwhile, those preferences will then be subject to only intermediate scrutiny.[5]

But the extreme danger to society from the use of racial preferences demands that review of such preferences be more than a formality. As Justice O'Connor has explained: "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no

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[5] It is worth noting that those Justices who have applied intermediate scrutiny to racial preferences have almost-universally found the preferences to be constitutional. *See, e.g., Metro Broadcasting, supra; Croson*, 488 U.S. at 528 (Marshall, J., dissenting); *Wygant*, 476 U.S. at 301-302 (Marshall, J., dissenting); *Bakke*, 438 U.S. at 324 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.).

way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simply racial politics." *Croson,* 488 U.S. at 493 (O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.). That "searching judicial inquiry" is called strict scrutiny, and "one of the purposes 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." *Id.* This Court should insist upon proof that the racial preferences at issue here are narrowly tailored to serve compelling governmental interests.

II. THE RACIAL PREFERENCE FOR MINORITY CONSTRUCTION SUBCONTRACTORS SURVIVES STRICT SCRUTINY ONLY IF BASED ON CREDIBLE EVIDENCE OF DISCRIMINATION AGAINST THE PREFERRED CLASS OF FIRMS AND NARROWLY TAILORED TO REMEDY THAT DISCRIMINATION

This Court's cases establish that racial favoritism in the award of government construction contracts can survive strict scrutiny only if based on credible evidence of a compelling interest in providing a remedy for identified past discrimination. *See Croson,* 488 U.S. at 491-492; *Fullilove,* 448 U.S. at 480-484. It is plainly not enough for the legislative or executive branches of government simply to declare that a racial preference is remedial. *See Croson,* 488 U.S. at 500; *O'Donnell Constr. Co.* v. *District of Columbia,* 963 F.2d 420, 425 (D.C. Cir. 1992) ("undocumented legislative declarations of remedial purposes count for naught"). Rather, an evidentiary record justifying the particular racial preference at issue is necessary. In the absence of such a record, the judiciary cannot fulfill its obligation to undertake an independent and meaningful review of the need for the preference, or assess whether it has been narrowly tailored to serve its remedial purpose.

"Evidentiary support for the conclusion that remedial action is warranted [is] crucial," because "the trial court must make a factual determination" that the government entity "had a strong basis in evidence for its conclusion that remedial action was necessary." *Wygant,* 476 U.S. at 277 (plurality opinion). For "unless such a determination is made, an appellate court reviewing a challenge * * * to remedial action cannot determine whether the race-based action is justified as a remedy for prior discrimination." *Id.* at 278. *See Croson,* 488 U.S. at 510 ("Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects."); *see also Fullilove,* 448 U.S. at 498 (Powell, J., concurring) ("the governmental body must make findings that demonstrate the existence of illegal discrimination"). *Cf. Turner Broadcasting System, Inc.* v. *FCC,* 114 S. Ct. 2445, 2470 (1994) ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' ") (citation omitted).

A. The Record Evidence Must Demonstrate Discrimination Against The Preferred Class Of Firms

In *Croson,* this Court expressly rejected the City of Richmond's claim that it could infer discrimination in the award of city construction contracts from a disparity between the percentage of prime contracts awarded to minority enterprises and the percentage of minorities comprising the population of Richmond. *See* 488 U.S. at 501. At the same time, however, *Croson* stated in dictum that a prima facie case of discrimination might be based upon better statistical proof. *Id.* at 501, 509. In the several years since *Croson,* a number of States and localities have attempted to demonstrate a compelling interest in implementing racial preferences in their construction contracting by documenting disparities between the percentage of government contract dollars going to minority-owned construction contractors and the percentage of such businesses

among all construction contractors in a particular area.[6] *See, e.g., Concrete Works of Colorado, Inc.* v. *Denver,* No. 93-1095 (10th Cir. Sept. 23, 1994), Slip Op. at 26-38; *Contractors Ass'n of Eastern Pennsylvania, Inc.* v. *City of Philadelphia,* 6 F.3d 990, 1003-08 (3d Cir. 1993); *Associated General Contractors, Inc.* v. *Coalition for Economic Equality,* 950 F.2d 1401, 1414-15 (9th Cir. 1991), *cert. denied,* 112 S. Ct. 1670 (1992); *Cone Corp.* v. *Hillsborough County,* 908 F.2d 908, 914-916 (11th Cir.), *cert. denied,* 498 U.S. 983 (1990).[7] All too often, however, the statistical evidence currently being offered in support of racial preferences contains serious methodological and conceptual flaws.[8]

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[6] Such efforts are designed to generate what is known as a "disparity ratio." "A disparity ratio is usually defined as utilization of the minority group divided by the percentage of firms owned by the minority group. If 10% of the construction firms in a geographic region are owned by minorities and they receive 10% of the construction business, the disparity ratio would equal 1, indicating no disparity. If the ratio is less than 1 there is evidence of disparity." John Lunn, *Markets, Discrimination, and Affirmative Action,* in Racial Preferences in Government Contracting 58 (Roger Clegg ed. 1993).

[7] Courts properly have recognized that the use of some valid statistical evidence is necessary to prove the kind of discrimination that would justify the adoption of a race-based contracting scheme. "While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan." *Coral Constr. Co.* v. *King County,* 941 F.2d 910, 919 (9th Cir. 1991), *cert. denied,* 112 S. Ct. 875 (1992). *Accord Concrete Works,* Slip Op. at 14; *Contractors Ass'n,* 6 F.3d at 1003; *O'Donnell Constr. Co.,* 963 F.2d at 427. Accordingly, a racial contracting preference "cannot stand without a proper statistical foundation." *Coral Constr. Co.,* 941 F.2d at 919.

[8] For an explanation of the shortcomings of the studies conducted in Milwaukee, Denver, Dade County, Baltimore, and San Francisco, *see* George R. LaNoue & John Sullivan, *"But For" Discrimination: How Many Minority Businesses Would There Be?,* 24 Colum. Hum. Rts. L. Rev. 93, 102-126 (1992); George R. LaNoue, *The Disparity Study Shield: Baltimore and San Francisco,* in Racial Preferences in Government Contracting, *supra,* at 74-76.

In our view, a statistical disparity can be invoked to justify racial preferences in government construction contracting only if it actually supports an inference of racial discrimination against the preferred class of firms. At a minimum, the statistical evidence must: (1) relate to a defined and relevant market; (2) compare comparably qualified and available minority and non-minority firms within that market; (3) control for such race-neutral, market-relevant variables as firm size and experience; (4) calculate the disparity ratio for each minority group granted preferential treatment; and (5) identify, alone or in conjunction with anecdotal evidence, the discriminatory practices at fault in the relevant market. These requirements are in keeping with *Croson*'s admonition that, before government can act to remedy past discrimination, it must "identif[y] that discrimination with the particularity" required by the Constitution. 488 U.S. at 492.

To begin with, the statistical evidence must relate to an identified and relevant market. A disparity ratio based, for example, on the value of contracts that a city has awarded to minority firms based within the city might well exaggerate the likelihood of discrimination, because the data would exclude all contracts awarded to minority firms based outside the city. The geographical boundaries of a particular market are not necessarily identical to the jurisdictional boundaries of a particular government. *See Coral Constr. Co.*, 941 F.2d at 917 ("The world of contracting does not conform itself neatly to jurisdictional boundaries."); *Concrete Works*, Slip Op. at 13, 14 (recognizing that the relevant local market "is not necessarily confined by jurisdictional boundaries" because "contracts are often awarded to firms situated in adjacent areas").

The size and contours of a particular market will, of course, vary with the nature and value of the work to be done. Very large projects, exceeding $100 million, will attract bidders from all parts of the country, and from

other countries. Very small projects, under $100,000, may not attract bidders more than 50 miles away.

The relevant market also depends on the nature of the work involved. Statistical data on the "construction industry" or "government contracting" paints with too broad a brush. Rather, courts should insist that the government identify and separately examine the distinct segments of the construction industry to which the government would apply racial preferences. There are vast differences between the many different activities—from painting, to plumbing, to highway or bridge construction—that collectively make up the "construction industry." There are equal if not greater differences between prime or general contracting and construction subcontracting. These and many other distinct categories of construction activity vary greatly with respect to the knowledge, skills, and abilities required to perform the work; the equipment, financing, insurance, and bonding required; and—as the census data reproduced in the appendix to this brief confirm (App. 1a-3a, *infra*)—the number and size of the firms; the average value of a project; and the relative amount of revenues derived from private contracts, federal contracts, and state contracts.

Because of these differences, the existence of discrimination within each construction market, and the extent to which discrimination can be demonstrated with statistical evidence, will vary. *See* App. 4a-5a, *infra* (widely varying percentages of minority firms in different categories of construction activity). This fact makes it inappropriate for the government to impose an industry-wide preference scheme on the basis of evidence of discrimination in the construction industry generally. That there is statistical evidence of discrimination in the construction industry generally provides no guidance as to whether there is discrimination against, say, electrical subcontractors. To lump all construction firms together for analytical purposes can no more prove discrimination in

a particular market than would a comparison of one market to another. *Cf. Wards Cove Packing Co.* v. *Atonio,* 490 U.S. 641, 650-651 (1989). Accordingly, disparity analyses must be performed for each truly distinct category of construction activity. Just as the government cannot enact a racial preference because of open-ended notions of "societal discrimination," *see Wygant,* 476 U.S. at 274-276; *Bakke,* 438 U.S. at 307-310 (opinion of Powell, J.), it cannot impose racial classifications upon all of the distinct segments of the "construction industry" on the basis of aggregate data that may well obscure more than it reveals.

Second, having identified a proper market, a disparity analysis cannot simply compare the percentage of the total dollar volume of work performed by minority firms in the market with the percentage of minority firms in that market. Rather, the analysis must consider only those firms—minority and non-minority—similarly qualified and available to perform the contracts at issue. *See Croson,* 488 U.S. at 509 (the relevant pool is "the number of qualified minority contractors willing and able to perform a particular service"). It is well-established that statistics purporting to show employment discrimination must consider only those individuals qualified and available for work. *See, e.g., Wards Cove Packing Co.,* 490 U.S. at 650-651; *Johnson* v. *Transportation Agency,* 480 U.S. 616, 632 (1987); *Hazelwood Sch. Dist.* v. *United States,* 433 U.S. 299, 308 & n.13 (1977). In *Contractors Ass'n, supra,* Philadelphia proffered evidence that minority firms constituted 6.4 percent of all businesses licensed to operate in the city but received only .09 percent of the city's contract dollars over a three-year period. The Third Circuit rightly held that "[t]hese statistics do not satisfy *Croson* because they do not indicate what proportion of the 6.4 percent of minority-owned businesses were available or qualified to perform City construction contracts." 6 F.3d at 1003.

Third, the evidence must account for race-neutral, market-related factors such as the size and experience of different firms. Larger, more experienced firms naturally will tend to receive more contract dollars than smaller, newer firms. Smaller firms cannot bid on the largest projects. New firms face uphill competition against firms with established reputations. *See, e.g.*, John Lunn, *Markets, Discrimination, and Affirmative Action,* in Racial Preferences in Government Contracting, *supra,* at 57-58. Yet minority firms tend to be smaller and newer. *See* George R. LaNoue, *The Disparity Study Shield,* in Racial Preferences in Government Contracting, *supra,* at 109; George R. LaNoue & John Sullivan, *"But For" Discrimination, supra,* at 113-114. A study that does not account for variations in size and experience can easily suggest discrimination on the basis of race when in fact it does not exist. *See Concrete Works,* Slip Op. at 34 & n.22; *O'Donnell Constr. Co.,* 963 F.2d at 426-427.

Fourth, disparity ratios should be calculated for each minority group to which preferential treatment is accorded. That there is statistically significant evidence of discrimination against several minority groups taken collectively says nothing about the extent of the discrimination faced by each group individually. Under *Croson,* only those groups as to which there is proof of discrimination can be given a preference in contracting. *See* 488 U.S. at 506. *See also Contractors Ass'n,* 6 F.3d at 1007 ("Consistent with strict scrutiny, we must examine the data for each minority group contained in the Ordinance.").

Fifth, the government's evidence must identify the specific industry practices that are discriminatory. Discrimination in government contracting can potentially occur at a number of distinct points of interaction: between the government and the architect or engineer; between the government and the prime contractor; between the prime contractor and the subcontractor; and between either the prime or subcontractor and the bonding companies, bank-

ers, insurers, suppliers, and often the unions with whom they must deal. Evidence that fails to identify where, how, and by whom the discrimination occurs cannot lend itself to the crafting of a narrowly tailored remedy.

The law of employment discrimination is instructive in this regard. It is insufficient for a plaintiff in a Title VII case to prove statistical disparity in the employer's work force. Rather, the plaintiff "must begin by identifying the specific employment practice that is challenged." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988). *See also Wards Cove Packing Co.*, 490 U.S. at 656-657 ("Our disparate-impact cases have always focused on the impact of *particular* hiring practices on employment opportunities for minorities. * * * [A] Title VII plaintiff does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is a racial *imbalance* in the work force.") (emphases in original). The rule in a case involving an equal protection challenge to a race-based contracting preference should be no different, for prime contract set-asides and subcontracting requirements are not appropriate remedies for discrimination in financial, insurance, or bonding markets.

In sum, the government's evidence must be probative of discrimination, and not merely consistent with the hypothesis or assumption that discrimination has occurred. "Disparity" is not synonymous with "discrimination." The statistical evidence proferred in *Croson* was rejected because that evidence neither affirmed nor refuted the existence of discrimination in Richmond's construction contracting. The same will be true of any evidence that does not identify and relate to the relevant market, or make appropriate comparisons that control for legitimate nonracial factors, such as expertise, interest, size, and experience. Nor does it satisfy strict scrutiny to affirm the existence of discrimination but fail to identify the source of that discrimination with sufficient precision to craft a narrowly tailored remedy.

B. The Racial Preference Must Be Narrowly Tailored To Remedy The Identified Discrimination

The second prong of the strict scrutiny test requires that a race-based classification be narrowly tailored to the achievement of its remedial objective. The purpose of this judicial inquiry is to ensure that the classification sweep no more broadly than necessary in light of the particular reasons justifying its adoption.

First, the government must consider race-neutral alternatives before adopting a race-conscious scheme. *See Croson,* 488 U.S. at 507; *United States* v. *Paradise,* 480 U.S. at 171. *See also Metro Broadcasting,* 497 U.S. at 584 (minority ownership preferences adopted "only after long study and painstaking consideration of all available alternatives"). In this context, such alternatives could include educational and capital assistance to all small and new construction firms, disaggregation of large contracts to expand opportunities for such firms, scrutiny of bonding or insurance requirements to guarantee that there are no unnecessary hurdles disproportionately hindering such firms, or contracting out more projects that could suitably be performed by such firms. Any plan that has as its avowed primary goal the advancement of small or disadvantaged businesses—and not just minority firms—ought to bear a heavy burden of showing that such enterprises could not be aided without the use of race-conscious schemes, as minority firms have no monopoly on small or disadvantaged status.

Second, any quota or "goal" for minority participation in a particular market must be related to the aggregate capacity of qualified and interested minorities in the relevant market. *See Paradise,* 480 U.S. at 179. Such objectives cannot be premised on the "completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Croson,* 488 U.S. at 507, citing *Sheet Metal Workers* v. *EEOC,* 478 U.S. 421, 494 (1986) (O'Con-

nor, J., concurring in part and dissenting in part). Furthermore, plans setting quotas or goals should contain waiver provisions in case the numerical objectives are impracticable in a particular place or time, and cannot be achieved despite good faith efforts. *See Fullilove*, 448 U.S. at 481-482.

Third, a racial preference in government construction contracting ought to be limited in duration, as would be appropriate of any measure justified as a *remedy* for an identified problem. *See Fullilove*, 448 U.S. at 510-511 (Powell, J., concurring). The fact that the federal program at issue in *Fullilove* was a temporary measure was essential to its constitutionality. *See id.* at 513 (opinion of Burger, C.J.) ("The * * * set aside is not a permanent part of federal contracting requirements."). *Cf. Croson*, 488 U.S. at 478 (five-year plan). Of course, a legislative body cannot simply adopt an endless succession of "temporary" programs. *See O'Donnell Constr. Co.*, 963 F.2d at 428 ("Although the District's original legislation was to expire in three years * * * the Council reenacted the law in 1980 and deleted the sunset provision. Fifteen years have passed since the District put its minority contracting program into effect. The District has not suggested that an end is in sight.").[9]

Fourth, the plan may accord preferential treatment only to those groups as to which discrimination has been adequately proven. *See Croson*, 488 U.S. at 506 ("The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in

[9] At some point, every racial preference in government construction contracting changes the statistical outcome of the contracting process. At that point, it may be difficult to know whether the preference has remedied discrimination or is simply masking it. After sufficient experience under a preference regime, the government may be unable to carry its burden of demonstrating a compelling interest in continuation of the program. *See, e.g., Associated General Contractors of Connecticut* v. *City of New Haven*, 791 F. Supp. 941 (D. Conn. 1992).

the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination."); *Wygant*, 476 U.S. at 284 n.13. The government must be able to explain why the groups included within a racial scheme were so chosen.

III. THE FEDERAL GOVERNMENT'S USE OF THE SUBCONTRACTING COMPENSATION CLAUSE DOES NOT SURVIVE STRICT SCRUTINY

The Central Federal Lands Highway Division (CFLHD) —a subagency organized under the Department of Transportation with jurisdiction over 13 western States—includes Subcontracting Compensation Clauses (SCCs) within its prime contracts to induce prime contractors to award subcontracts to minority-owned firms. Under the SCC program, prime contractors are eligible for a financial bonus of up to 2 percent of the total amount of the prime contract for subcontracting at least 10 percent of the required work to minority firms.[10]

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[10] The government repeatedly argues that the provisions of the SCC are "not race-based, but turn on disadvantage." Gov't Br. in Opp. to Cert. 16; *see also id.* at 5-6, 11-12, 18-19. This argument is disingenuous in the extreme. Minority firms are legally "presumed" to be disadvantaged under the SCC program. A race-based presumption of this sort, no less than an explicit racial set-aside, triggers the need for strict scrutiny under the Constitution:

> [Wisconsin] argues that *Croson* does not govern here because the discrimination is not racial in character, the favored class being defined not as minority business enterprises but as disadvantaged business enterprises. * * * All this is fine but ignores the fact that the state *presumes* a black, but not an Appalachian or any other sort of white male, to be disadvantaged. The presumption is, it is true, rebuttable. But it seems to us * * * that a racial presumption is a form of race 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. [*Milwaukee County Pavers Ass'n* v. *Fiedler*, 922 F.2d 419, 421 (7th Cir.) (emphasis in original), *cert. denied*, 500 U.S. 954 (1991).]

The racial contracting preference at issue in this case cannot survive strict scrutiny. To begin with the most glaring constitutional defect of the SCC program: the federal government has made no specific finding of past discrimination in the federal contracting process in the relevant market in which the SCC program is used, much less a finding specific to each minority group. The government instead relies upon the general findings made by Congress in connection with the Small Business Act. *See* Gov't Br. in Opp. to Cert. 15 (citing 15 U.S.C. 631(f)). Central among those findings was Congress' conclusion that some "persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control." 15 U.S.C. 631(f)(1)(B). Yet this is just the sort of "generalized assertion that there has been past discrimination" that *Croson* roundly condemns. 488 U.S. at 498; *see also id.* at 500 (conclusory statements that discrimination exists "are of little probative value in establishing identified discrimination" in a particular area and industry). Furthermore, this finding, to the extent that it is probative, predicates the need for action upon general *societal* discrimination. Yet "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant*, 476 U.S. at 276; *see also Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

Nor is the scope of the racial preference at issue here tied to any legitimate remedial goal. The SCC program is designed to encourage prime contractors to award at least 10 percent of their subcontracting work to minority firms. The 10 percent figure, however, is not linked to identified discrimination in any discernible way. Rather, the apparent basis for that figure is the SBA's mandate that minority-owned firms be given the "maximum practicable opportunity," 15 U.S.C. 644(g)(1), to participate in federal procurement. The goal of maximizing the participation of minorities in contracting cannot, however,

justify a racial classification for it has "no logical stopping point" and would permit racial favoritism "long past the point required by any legitimate remedial purpose." *Wygant*, 476 U.S. at 275. The government's failure to link the SCC program to identified discrimination therefore belies any claim that the program is strictly remedial.

Accordingly, because there is no strong basis in evidence for the conclusion that the SCC program is necessary to remedy identified past discrimination, it was clearly inappropriate for the courts below to award summary judgment to the government.

CONCLUSION

For the foregoing reasons, and those in petitioner's briefs, the judgment below should be reversed.

Respectfully submitted,

MICHAEL E. KENNEDY
Special Counsel
ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.
1957 E Street, N.W.
Washington, D.C. 20006
(202) 383-2735

* Counsel of Record

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810
Counsel for Amicus Curiae the Associated General Contractors of America, Inc.