No. 93-1841

In The

Supreme Court of the United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

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

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF

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SUMMARY OF ARGUMENT

Adarand challenges the constitutionality of the Federal Construction Procurement Program,[1] both on its face and as applied. Adarand has standing because the race-based presumption contained in federal law caused Adarand to lose a subcontract upon which Adarand was the low bidder. Adarand's claim of injury and the remedy this Court is capable of granting are neither "remote" nor "highly contingent."

The Federal Construction Procurement Program is race-based, not disadvantage-based. Only those persons who are members of the statutorily-listed racial minorities are entitled to automatic certification as Disadvantaged Business Enterprises (DBEs). The social and economic status of those members of the statutorily-listed racial minorities are not factors in their certification as DBEs, unless that certification is challenged by third parties. Furthermore, Respondents failed to carry their burden of producing evidence that it was "disadvantage" and not the racial presumption that caused Gonzales Construction Company to be certified as a DBE.

Administrative convenience is not a compelling governmental interest for the use of a race-based presumption. The Subcontracting Compensation Clause (SCC) operates as an unconstitutional inducement in the award of the subcontract on the basis of race.

The Federal Construction Procurement Program is not narrowly tailored. The program is overinclusive because it applies to all members of the statutorily-listed minorities regardless of the social and economic status of those individuals. The program is also underinclusive.

Stare decisis requires the application of strict scrutiny to the Federal Construction Procurement Program.

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[1] "The Federal Construction Procurement Program" is Adarand's shorthand method of referring to the challenged program which is authorized by § 502 of the Small Business Act, 15 U.S.C. § 644(g) and funded by § 106(a)(8) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. 100-17, 101 Stat. 132 (1987). (Petitioner's Brief at 5.)

ARGUMENT

I. ADARAND CHALLENGES THE CONSTITUTIONALITY OF THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM BOTH ON ITS FACE AND AS APPLIED.

Respondents' characterization of Adarand's challenge as a "facial challenge" is in error.[2] Adarand's challenge to the constitutionality of the program is both a facial and an "as applied" challenge.

A facial challenge is one where the challenge does not seek "specific relief for injury allegedly flowing from specific applications of the program." *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980). In the case at bar Adarand seeks "specific relief" for the loss of the contract that was awarded to Gonzales Construction Company (Gonzales), even though Adarand was the low bidder on that contract.[3]

II. ADARAND HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM.

Respondents argue that Adarand does not have standing to bring this action for two reasons. First, Respondents argue that "Petitioner has completely failed to show that the [race-based] presumption affected the award of the subcontract in

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[2] Respondent's Brief at 4, 22 and 25.

[3] "[The Federal Construction Procurement Program] affect[s] [Adarand]'s ability to bid on projects which are funded in whole or in part by federal monies. [The Federal Construction Procurement Program] encourage[s] and effectively compel[s] prime contractors to use DBEs or MBEs for the specialty subcontract work that [Adarand] performs. Because of the programs which have been implemented under [the Federal Construction Procurement Program], DBEs or MBEs are awarded contracts that Plaintiff would have received in the past because it submitted the lowest bid for the work." (R. Colo. # 24, Exhibit F, Pls. Answers to Defs. Interro. Number 15.)

this case to another bidder. . . . " (Respondents' Brief at 27.) Second, Respondents argue that "petitioner has also failed to allege or prove that the future relief it seeks would affect its business opportunities." (Respondents' Brief at 27-28.) In other words, "[t]he asserted future harm upon which petitioner's claim is based is, however, both remote and highly contingent." (Respondents' Brief at 29.)

Respondents admit that the Federal Construction Procurement Program, including the SCC, has a race-based presumption. That race-based presumption plays a role in the award of contracts under the Federal Construction Procurement Program. Regarding the question of standing, it doesn't matter if the role of the race-based presumption is described as "procedural rather than a substantive." (Respondents' Brief at 25.) Nor is that description of the race-based presumption relevant to the standard of review that must be applied.

Respondents do not dispute that, as a result of the operation of the SCC, Adarand was denied a contract on which it was the low bidder. Nor do Respondents dispute that Adarand's cause of action is based on the Equal Protection Component of the Due Process Clause of the Fifth Amendment. Rather Respondents argue that Adarand does not have standing to challenge the racial presumption since, among Respondents' other allegations, Adarand failed to show that the DBE status of Gonzales was as a result of race and not disadvantage. (Respondents' Brief at 27-29.) Respondents seek thereby to address an issue that must be considered on the "merits" – that is, what is the appropriate standard of review – as a question of "standing" in order to deny this Court jurisdiction to decide the merits. This attempt fails.

There is a difference between the "merits" – that is, the "test" to be applied – and "standing:"

> [The] test goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected . . . by the . . . constitutional guarantee in question.

Data Processing Service v. Camp, 397 U.S. 150, 153 (1970). There is no question that the "interest sought to be protected by" Adarand is guaranteed by the Due Process Clause of the Fifth Amendment. Therefore, Adarand has standing pursuant to the Fifth Amendment to have this Court decide, *inter alia*, the appropriate standard of review to be applied to the Federal Construction Procurement Program.

A. ADARAND'S CLAIM OF INJURY BY THE OPERATION OF THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM IS NEITHER "REMOTE" NOR "HIGHLY CONTINGENT."

Adarand's claim of injury arising from the equal protection violation is neither "remote" nor "highly contingent." Randy Pech, General Manager of Adarand, testified that Adarand bids on every job that involves guardrail work in Colorado and is qualified to do guardrail work in Kansas.[4] (Appendix A, 5-A.) (The Pech Deposition was made a part of the record by Respondents in their Brief in Support of Motion for Summary Judgment R. Colo. # 19 at 4.) *See* also footnote 3. A decision that the Federal Construction Procurement Program is unconstitutional will allow Adarand to compete on an equal footing for each contract that CFLHD offers in Colorado. The number of contracts for which Adarand will thus be able to compete is not insubstantial since the CFLHD let 78 contracts that involved guardrail work between 1983 and 1990. The availability of even one contract a year in which Adarand can complete on equal footing is not "remote" or "contingent." Adarand has standing to challenge the Federal Construction Procurement Program.

Furthermore, in *Fla. Gen. Contractors v. Jacksonville*, this Court resolved any question regarding Adarand's standing to bring this challenge:

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[4] Guardrail work is one of the smaller items in a highway construction contract that is frequently subcontracted. (Appendix A, 9-A.)

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit . . . . And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract. . . . *To establish standing, therefore, a party challenging a set-aside program . . . need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.*

Fla. Gen. Contractors v. Jacksonville, 508 U.S. ___, 124 L.Ed.2d 586, 597-598 (1993). (Emphasis added.)

Adarand has demonstrated, by uncontroverted evidence, that "it is able and ready to bid on contracts and that [the] discriminatory policy [of the Federal Construction Procurement Program] prevents it from doing so on an equal basis." *Id.* Furthermore, Adarand has demonstrated that it lost a contract as a result of the operation of that federal race-based program. Adarand has standing. (J.A. 30-31.)

B. THE PRESUMPTION THAT RESPONDENTS ADMIT IS RACE-BASED WAS THE SOLE REASON FOR THE AWARD OF THE SUBCONTRACT TO GONZALES.

The evidence before this Court is that the subcontract for which Adarand submitted the lowest bid was awarded to Gonzales exclusively on the basis of race. Gonzales qualifies as a DBE because of the minority status of its owner and operator. Gonzales is owned and operated by a male who is a member of a racial minority accorded a preference under the Federal Construction Procurement Program. (Appendix A, 3-A, Colo # 24, Exhibit F, Pls. Answers to Defs. Interro.

Number 9, Attach. 1, first page.) The use of race by the federal government is the issue in this case since the use of race by the federal government was the reason for the harm suffered by Adarand. Adarand's injury will be remedied by a favorable decision in this case. Thus, Adarand has standing.

III. THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM IS BASED ON RACE AND NOT DISADVANTAGE.

A. SINCE RACE IS THE ONLY FACTOR THAT RESULTS IN "CERTIFICATION," INDIVIDUALS WHO ARE MEMBERS OF A LISTED RACIAL GROUP ARE TREATED DIFFERENTLY THAN INDIVIDUALS WHO ARE NOT MEMBERS OF THE LISTED RACIAL GROUPS.

Respondents disingenuously describe the Federal Construction Procurement Program by asserting erroneously that "[t]he Subcontracting Compensation Clause program is thus a program based on *disadvantage*, not on race." (Respondents' Brief at 26.) (Emphasis in original.)[5]

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[5] Respondents do not cite any authority – neither statute nor regulation – for the proposition that a minority must prove discrimination to participate in the program. Furthermore, Respondents fail to identify any evidence in the record that a minority must prove discrimination before that individual is certified as a DBE. In fact, just the opposite is true.

The regulations that control a state's ability to certify DBEs are found at 49 C.F.R. Part 23. As explained in Petitioner's Brief on the merits, the regulations at 49 C.F.R. Part 23 are applicable to the CFLHD since they control how DBEs are certified by states. The CFLHD does not certify DBEs, rather it accepts the decision of state agencies as to what entities are DBEs.

Respondents are simply wrong.[6] The decision that an individual qualifies as a DBE is based solely upon the race of

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Review of the regulations illustrates that the program under which the SCC is used is based solely on race and not upon "disadvantage," contrary to the assertions of Respondents. The regulations under which states certify DBEs are found in 49 C.F.R. Part 23, Subpart D, Appendix A. The section of Appendix A that explains 49 C.F.R. § 23.62 *Definitions* specifically provides: "In order to be an *eligible disadvantaged business*, a firm *must meet the criteria of § 23.53 of this regulation* and must be certified as 49 CFR part 23 provides." 49 C.F.R. Pt. 23, Subpt. D, App. A (analysis of Section 23.62). (Emphasis added.)

Section 23.53 is entitled "Eligibility standards" and provides:

> The following standards shall be used by recipients in determining whether a firm is owned and controlled by one or more *minorities* or women (sic) is and shall therefore eligible to be certified as an MBE.

49 C.F.R. § 23.53. (Emphasis added.)

[6] "The proposal in the NPRM to make the presumption of social and economic disadvantage rebuttable caused some confusion among recipients who commented. They asked whether this meant that they had to investigate the social and economic status of each business owner that sought certification for programs covered by Subpart D. . . .

This section is intended to answer these questions. First, the basic meaning of a presumption of social and economic disadvantage is the recipient *assumes* that a member of the designated groups is socially and economically disadvantaged. In making certification decisions, the recipient relies on this presumption, and does not investigate the social or economic status of individuals who fall into one of the presumptive groups.

However, saying that the presumption is rebuttable means that a third party may challenge the actual social and/or economic disadvantage of a business owner who has received or is seeking certification for his firm from recipient. . . . [W]hile a challenge is in progress, the presumption of social and economic disadvantage remains in effect." 49 C.F.R. Pt. 23, Subpt. D, App. A, at page 216 (10-1-92 Edition). (Emphasis in original.)

The SBA regulations are similar. "(1) In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged: Black Americans; Hispanic Americans. . . .

(2) An individual seeking socially disadvantaged status as a member of a designated group may be required to demonstrate that he/she holds himself/herself out and is identified as a member of a designated group if

the individual.[7] The only individuals whose applications for certification as DBEs are reviewed on what Respondents call a "case-by-case basis" are non-minorities, including "disabled Vietnam veterans, Appalachian white males, [or] Hasidic Jews."[8] Members of the statutorily-listed racial groups[9] are "presumed" to be "socially and economically disadvantaged and are automatically certified, unless a third party challenges that certification.[10]

Contrary to the assertion of Respondents, minority applicants for DBE certification are not reviewed on a case-by-case basis. However, non-minority applicants, if any, are.

SBA has reason to question such individual's status." 13 C.F.R. § 124.105(b). Therefore, the only case-by-case investigation the SBA undertakes – and then only if its has "reason to question" an entity's status – is to establish the minority status of the owner and operator, not whether the entity's owner and operator is disadvantaged.

[7] "In making certification decisions, the recipient relies on this presumption, and does not investigate the social or economic status of individuals who fall into one of the presumptive groups." (49 C.F.R. Pt. 23, Subpt. D, App. A, at page 216 (10-1-92 Edition).)

[8] *See* Respondents' Brief at 16-17 where Respondents argue that these individuals can be certified as disadvantaged. Yet, members of the statutorily-listed racial minority groups need only provide evidence of their race, no other evidence is required. (15 U.S.C. § 637(d)(3)(C).) Under federal statute and regulation, membership in one of the statutorily-listed racial groups qualifies that individual "presumptively" as a DBE. (49 C.F.R. Pt. 23, Subpt. D, App. A, at page 216 (10-1-92 Edition).

[9] "The contractor shall 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).

[10] Respondents state: "Small business owners who establish their social disadvantage must also demonstrate to the Administration that they are economically disadvantaged. . . . " (Respondents' Brief at 14.) This description is simply wrong. If an applicant is a member of the listed racial groups, the certifying agency does not investigate either the social or economic status of the applicant. *See* note 7.

Clearly, the Federal Construction Procurement Program is race-based and not disadvantage-based.

B. FEDERAL STATUTE ESTABLISHES A PRESUMPTION THAT LISTED MINORITIES ARE TO BE CERTIFIED AS DBES.

Respondents argue that Adarand failed to prove that Gonzales was certified as a DBE as a result of the presumption contained in the federal statute. (Respondents' Brief at 28.) Yet, the federal statute and the implementing regulations themselves prove that the presumption was the sole basis upon which certification was granted to Gonzales.

In defining "socially and economically disadvantaged" individuals, the regulations specifically state:

> Recipients [like the state of Colorado which would certify DBEs in Colorado] *shall* make a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged. Recipients also *may* determine, on a case-by-case basis, that individuals who are not members of one of the following groups are socially and economically disadvantaged. (a) Black Americans . . . Hispanic Americans . . . Native Americans . . . Asian-Pacific Americans . . . and Asian-Indian Americans. . . .

49 C.F.R. § 23.62. (Emphasis added.)

Colorado is a "recipient," as defined by the regulations and is required to presume that certain racial groups are "disadvantaged" and entitled to DBE status. Thus, the decision to certify Gonzales as a DBE was based upon the race of the owner and operator of Gonzales and upon no other basis. Since the decision to certify Gonzales as a DBE was based on race and Adarand has claimed a violation of its constitutionally protected right of equal protection, this case is properly before the Court.

C. RACE WAS THE SOLE FACTOR USED TO AWARD THE SUBCONTRACT TO GONZALES RATHER THAN TO ADARAND.

Respondents argue that Adarand has failed to prove that the decision to certify Gonzales as a DBE was made on the basis of race. (Respondents' Brief at 28.) In essence, Respondents would require Adarand to prove that government officials charged with duties under the Federal Contract Procurement Program obeyed the law. There is no such requirement. Government officials must obey the law which includes regulations issued pursuant to the law. *Service v. Dulles*, 354 U.S. 363, 388 (1957). It is the duty of federal officials to comply with the statutory presumption and to award members of the enumerated racial groups DBE status. Officials are presumed to have obeyed that law.[11]

1. RESPONDENTS HAVE THE BURDEN OF PROVING THAT THE RACE OF THE OWNER AND OPERATOR OF GONZALES WAS NOT THE BASIS FOR ITS CERTIFICATION AS A DBE.

Respondents argue that Adarand failed to prove that Gonzales' certification as a DBE was based on the race of its owner and operator. (Respondents' Brief at 28.) Adarand has no such burden. *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 125 L.Ed.2d 407, 416 (1993). The federal law and its implementing regulations require that all members of listed racial groups be "presumed" "socially and economically disadvantaged" and certified as DBEs. Gonzales was certified as a DBE due to the operation of federal law and regulation. That fact is both undisputed and undisputable. Adarand is not required to prove that if the federal government had inquired into the social and economic status of Gonzales, it would have

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[11] "Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it . . . ." *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987).

discovered that Gonzales was not "socially and economically disadvantaged." That places a hypothetical upon a hypothetical.[12]

Moreover, Respondents ignore the legal significance of a presumption imposed by this Court in the context of a claim of racial discrimination.

> [T]he McDonnell Douglas presumption places upon the defendant the burden of . . . 'producing evidence' that the adverse employment actions were taken 'for a legitimate, nondiscriminatory reason.' (Citing authority.) '[T]he defendant must clearly set forth, through the introduction of admissible evidence,' reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action.

St. Mary's Honor Center v. Hicks, 125 L.Ed.2d at 416. (Emphasis in original.) In other words, the presumption that it was the race of Gonzales that was the reason for its certification as a DBE continues until Respondents produce "admissible evidence" that meets or rebuts that presumption.

It is the statutory presumption of disadvantage based on race contained in federal statute that allows Gonzales to participate in the Federal Construction Procurement Program as a DBE. Adarand not only alleged in its complaint that Gonzales is a DBE (R. Colo. # 1, at 9), but presented evidence that Gonzales is a "qualified DBE." (J.A. at 30.) Adarand presented evidence that it was the minority status of Gonzales' owner and operator and the resultant award of DBE certification that caused Adarand to lose the West Dolores subcontract. (Appendix A, 3-A, R. Colo # 24, Exhibit F, Pls. Answers to Defs. Interro. Number 9, Attach. 1, first page.)

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[12] This assertion by Respondents illustrates another burdensome aspect of the Federal Contracts Procurement Program, that is, the fact that the burden is on third parties, not the federal government, to determine that entities are qualified for the special treatment accorded under the program. *See* Petitioner's Brief at 24, n.21.

Once Adarand proves that race is a possible basis for the decision to certify Gonzales as a DBE, the burden of producing evidence shifts to Respondents.[13] Respondents then have the burden of producing evidence showing that the decision to grant Gonzales DBE status was not based upon race, but was based upon actual social and economic disadvantage suffered by its owner and operator. *St. Mary's Honor Center v. Hicks*, 125 L.Ed.2d at 416.

Yet, Respondents produced no evidence that Gonzales' certification as a qualified DBE was "for a legitimate, nondiscriminatory reason." *Id.* Since the presumption was not rebutted by Respondents, it continues in force. Respondents have failed to carry their burden of producing evidence that the race-based presumption was not the basis for Gonzales' certification as a DBE. (FRE 301)

2. ADARAND PRESENTED UNREFUTED EVIDENCE THAT THE RACE OF THE OWNER AND OPERATOR OF GONZALES CAUSED ADARAND'S INJURY.

Adarand presented unrefuted evidence that Gonzales was certified as a DBE because of the operation of the presumption contained in federal law and regulations. Randy Pech, General Manager of Adarand Constructors, Inc, in his answers to interrogatories, signed under oath, testified that

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[13] *Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252, 270, n.21 (1977) ("Proof that the decision by the Village was motivated *in part by racially discriminatory purpose* would. . . . *have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.* If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose.") (Emphasis added.)

Clearly race is not just one of the bases for certification of Gonzales as a DBE, it is the only basis. Federal statute and regulations require that if an entity's owner and operator is a member of one of the listed racial groups, it is to be certified as a DBE. The certifying entity is to look no further. (49 C.F.R. Pt. 23, Subpt. D, App. A, at page 216 (10-1-92 Edition).)

"Gonzales Construction was awarded this job because of *his minority status*." (Appendix A, 3-A, R. Colo # 24, Exhibit F, Pls. Answers to Defs. Interro. Number 9, Attach. 1, first page.) (Emphasis added.)[14] "[T]his job" refers to the West Dolores Project that is the subject of this action. This is conclusive and unrebutted evidence that Gonzales is a DBE because of "his minority status." It is also conclusive and unrebutted evidence that Gonzales is owned and/or operated by a male.

Furthermore, three federal officials testified that they knew of no DBEs in Colorado that were certified on any basis other than the statutory presumption.[15] Since Gonzales is a

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[14] Furthermore, Mr. Pech stated that "[c]ontracts are awarded based on race because of the definitions given for Disadvantaged Business Enterprises that *includes only those groups that have certain racial backgrounds*. The Subcontracting procedures favor those business enterprises that qualify under the program – only those businesses that are owned and operated by a minority are so qualified." (R. Colo # 24, Exhibit F, Pls. Answers to Defs. Interro. Number 23.) (Emphasis added.) Respondents offered no evidence in rebuttal. This evidence remains uncontroverted.

[15] Jerry Budwig, Division Engineer of the CFLHD and one of the Defendants in this case, testified:

Q: Do you know of anyone other than women that's a DBE in the state of Colorado that does not fit the description of presumed disadvantaged?

A: No.

(Appendix A, 7-A.) (A portion of Mr. Budwig's Deposition is located at App. 45-48.)

Craig Actis, Contract Development Engineer for the CFLHD, testified:

Q: Do you know of any DBEs in the state of Colorado currently that are not presumptively disadvantaged other than women?

A: DBEs as certified by who?

Q: By the state – well, certified by Central Federal [Lands Highway Division]?

A: We don't certify DBEs.

Q: Okay. Who certifies them?

A: We accept certification from the state or the Small Business Administration, generally.

Colorado business, operating out of Dolores, Colorado,[16] and is certified by Colorado as a DBE, it is clear from all of the evidence below, including the testimony of federal officials, that the certification of Gonzales was based upon the racial presumption, a presumption that Respondents failed to even attempt to rebut.

IV. ADMINISTRATIVE CONVENIENCE IS NOT A COMPELLING GOVERNMENTAL INTEREST THAT JUSTIFIES THE USE OF RACE AS A BASIS FOR THE AWARD OF CONTRACTS UNDER THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM.

Respondents assert that the use of race in the Federal Construction Procurement Program "plays a procedural rather than a substantive role in the contracting program." (Respondents' Brief at 25.) Therefore, argue Respondents, the presumption facilitates administrative convenience. Even if this were true and it is not, and even if it were a distinction with a real difference, and it is not, this Court has held that "administrative convenience" cannot be a compelling governmental interest to justify the use of race as a basis for decision

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Q: With either one of those groups, do you know of any DBEs that don't meet that presumptively disadvantaged requirement?

A: No, I don't.

(Appendix A, 13A-14A) (The Actis Deposition was made a part of the record by Respondents in their Brief in Support of Motion for Summary Judgment.) (R. Colo. # 19 at 8.)

James L. Robinson, Contract Administration Engineer for the CFLHD, testified:

Q: Do you know of any certified DBEs that are not presumptively disadvantaged?

A: I'm not aware of any.

(Appendix A, 8-A and 11-A.) (A portion of Mr. Robinson's Deposition is located at App. 49-50.)

[16] (Appendix A, 2-A and 3-A, R. Colo. # 24, Exhibit F, Pls. Answers to Defs. Interro. Number 9, Attach. 1, first page.)

making. *City of Richmond v. Croson*, 488 U.S. 469, 508 (1989).

Moreover, Respondents seek to convince this Court that the racial presumption does not exist:

> A member of a racial minority group who has not himself or herself been the victim of racial prejudice is thus not to be treated as disadvantaged under the challenged program.

(Respondents' Brief at 25.) Respondents are wrong. There are no criteria under federal law and regulation that require a showing by an individual, who is a member of one of the statutorily-listed racial groups, that he has suffered personally from racial discrimination before he can be certified as a DBE. In fact, just the opposite is true. All that is required is that an applicant for DBE status be a member of one of the statutorily-listed racial groups. (49 C.F.R. Pt. 23, Subpt. D, App. A, at page 216 (10-1-92 Edition).)

There would be no reason to use a racial presumption if the Federal Construction Procurement Program was based on disadvantage rather than race.[17] The fact that the presumption exists proves that Respondents are in error when they describe the manner in which the Federal Construction Procurement Program operates. The Federal Construction Procurement Program is clearly based on race and not on disadvantage.

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[17] Respondents argue that only an individual who is an actual "victim of racial prejudice" is entitled to participate in the program. (Respondents' Brief at 25.) Paraphrasing Justice Scalia, "[n]othing prevents [the federal government] from according a contracting preference to identified victims of discrimination. . . . [however, under such a program] neither the beneficiaries nor those disadvantaged by the preference would be identified *on the basis of their race*. In other words, far from justifying racial classification, identification of actual victims of discrimination makes it less supportable than ever, because more obviously unneeded." *Croson*, 488 U.S. at 526-527 (Scalia concurring.) (Emphasis in original.) In other words, if Respondents' description of the program is correct, and it is not, there is no need nor justification for a racial presumption or preference.

V. THE SCC OPERATED AS AN UNCONSTITUTIONAL INDUCEMENT FOR THE PRIME CONTRACTOR TO SUBCONTRACT WITH A DBE RATHER THAN TO ACCEPT A LOWER BID FROM ADARAND.

Respondents argue that the SCC is "designed to offset the financial disincentives that would otherwise exist in employing and assisting disadvantaged businesses as subcontractors by covering the additional expenses associated with such employment." (Respondents' Brief at 17.) Although that may be the language that is used in the SCC, the unrefuted evidence in this case is to the contrary. The facts of this case show that the SCC operated as an unconstitutional inducement that caused the prime contractor to subcontract with a DBE rather than accept a lower bid from Adarand.[18] For example, all prime "contractors agreed that the SCC has caused them to accept DBE quotes when receiving lower quotes from non-DBEs, or when they could do the work for less by using their own forces." (R. Colo. # 24, Exhibit B, page 10).

Respondents assert that another reason to award the funds provided by the SCC is for the additional expenses the prime contractors incur in reporting on the additional work required of the prime contractors to obtain, train or otherwise

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[18] "[T]he primary reason that MOUNTAIN GRAVEL & CONSTRUCTION COMPANY gave the subcontract for the guardrail to Gonzales Construction, a qualified DBE, is because Gonzales Construction is a DBE and MOUNTAIN GRAVEL & CONSTRUCTION COMPANY felt economically compelled to award its subcontract to a DBE because MOUNTAIN GRAVEL & CONSTRUCTION COMPANY was entitled to a bonus of approximately $10,000.00 for awarding the subcontract to Gonzales Construction, a qualified DBE.

[B]ut for the requirements of the Federal Highway contracts which encourage prime constractors (sic) to use DBEs, MOUNTAIN GRAVEL & CONSTRUCTION COMPANY would have accepted the low bid submitted by ADARAND CONSTRUCTORS, INC., and awarded the subcontract to ADARAND CONSTRUCTORS, INC." (J.A. 30-31.)

assist the DBE that obtained the subcontract. (J.A. 25.) Yet, the CFLHD has never required those reports from the prime contractors and, therefore, has no information that the funds are necessary to cover additional reporting expenses, if any.[19]

Respondents argue that the funds awarded by the SCC cover the additional expenses incurred by the prime contractor in "locating" DBEs. (Respondents' Brief at 17.) Yet, the evidence is that "[a]ll of the [prime] contractors interviewed were not experiencing difficulty locating DBEs as subcontractors" (R. Colo. # 24, Exhibit B, page 10) and "[m]ost of the DBEs *find* the prime contractors and don't wait for them to come to them" (R. Colo. # 24, Exhibit B, page 11). (Emphasis added). There is no additional expense for the prime contractor to locate DBEs if the DBEs are coming to the prime contractors.

Other purported purposes for the funds provided under the SCC are to "train[ ]," "assist," and "supply[ ] all facilities and services" for the DBEs. (Respondents' Brief at 17.) Yet, the evidence is that "[a]ll of the DBE subcontractors interviewed . . . . are proficient in their specialty and didn't require assistance." (R. Colo. # 24, Exhibit B, page 11).

The CFLHD, which adopted the SCC provision, may not assume that certain races require financial or other assistance. *See* for example *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, at 277 (1986) ("Evidentiary support for the conclusion that remedial action is warranted [is] crucial.") There must be evidence that the disparity in treatment based on race is required. Respondents have provided no evidence that it costs more for a prime contractor to deal with a minority-owned business than it does to deal with a business owned by a white male. The only evidence, as indicated above, is that it does not cost more to deal with DBEs.

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[19] The CFLHD has never requested nor reviewed the reports required of the prime contractors so as to document any efforts in which they engaged to locate, train, utilize, assist, and develop DBEs under the SCC. (R. Colo. # 21, Statement of Facts, number 33, Appendix A, 9A-10A.)

Furthermore, the CFLHD's assumption, in the adoption of the SCC, that all DBEs require assistance is an impermissible stereotype. "Imposing a common burden [or benefit] on such a disparate class merely because each member of the class is of the same race stems from reliance *on a stereotype rather than fact or reason.*" *Croson* 488 U.S. at 516 (Stevens concurring.) (Emphasis added.) Or as stated by Justice O'Connor: "a searching judicial inquiry" is necessary to ensure that the program is not "motivated by illegitimate notions of racial inferiority." *Id.* at 493. Not only does the SCC fail strict scrutiny, but it fails intermediate scrutiny since it implies "judgment concerning the abilities of owners of different races." *Metro Broadcasting v. FCC*, 497 U.S. 547, 602 (1990). Respondents' rational for the unconstitutional inducement provided by the SCC cannot withstand constitutional challenge.

VI. THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM IS NOT NARROWLY TAILORED.

Respondents' argument that the program at issue "is narrowly tailored" is unsupported by the law upon which the program is based and the facts of this case. (Respondents' Brief at 43-49.) Respondents' entire argument is based on their assertion that the program is not overinclusive because not all minorities are certified as DBEs and the program is not underinclusive because white males are treated the same as minorities under the program. Neither of these assertions is true.

The program is overinclusive because an entity owned and operated by a statutorily-listed minority need only show that its owner and operator is a member of one of the statutorily-listed minority groups to be certified as a DBE. The social and economic status of the owner and operator is an issue only if a third party challenges the entity's DBE certification. (49 C.F.R. Pt. 23, Subpt. D, App. A, at page 216 (10-1-92 Edition) for state certified businesses and 13 C.F.R. § 124.105(b)(2) for those certified by the SBA.)

Furthermore, the program is underinclusive because an entity owned and operated by a white male must not only prove that he is economically and socially "disadvantaged," he must also prove that he is identified with a group that has suffered discrimination.[20] Thus, the program is not narrowly tailored and clearly fails to survive constitutional scrutiny.

VII. THE PRINCIPLE OF *STARE DECISIS* REQUIRES THE APPLICATION OF STRICT SCRUTINY IN THIS CASE.

Respondents argue that "[t]his Court should not depart from the fundamental constitutional principle of *Fullilove* that Congress has unique powers to enact race-based remedies." (Respondents' Brief at 49.) Yet, adherence to *stare decisis* requires the application of precedents that utilize "strict scrutiny" when race is a part of government decision making.[21] *See, United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); and *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (J. Powell, concurring).

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[20] "Socially disadvantaged individuals are those who have been subjected to *racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.*" 15 U.S.C. § 637(a)(5). (Emphasis added.)

[21] "When a fragmented court decides a case and no single rationale explaining the result enjoys assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.' " *Marks v. United States*, 430 U.S. 188, 193 (1977). Furthermore, "*reexamination of constitutional decisions is appropriate* when those decisions has generated uncertainty and failed to provide clear guidance, because 'correction through legislative action is practically impossible.' " *Planned Parenthood v. Casey*, 505 U.S. ___, 120 L.Ed.2d 674, 763 (1992) (CJ Rehnquist concurring in the judgment in part and dissenting in part.) (Emphasis added.) The *Fullilove* decision suffers from both of these deficiencies.

Respondents' reliance on *Fullilove* ignores this Court's caveat that the program upheld there – in a facial challenge – was a "short term measure." *Fullilove*, 448 U.S. at 457. Respondents also ignore the fact that the Federal Construction Procurement Program is at least 15 years old with no end in sight.[22] As a result, the Federal Construction Procurement Program violates this Court's holding that a race-based program may not be "ageless in [its] reach into the past, and timeless in [its] ability to affect the future." *Wygant*, 476 U.S. at 275. Respondents use of *stare decisis* and application of *Fullilove* is unavailing.

CONCLUSION

The District Court erred in granting Respondents' Motion for Summary Judgment and denying Adarand's Motion for Summary Judgment. The United States Court of Appeals for the Tenth Circuit erred in affirming the decision of the District Court. As has been shown by Petitioner's Brief and this Reply, Adarand is entitled to reversal of those decisions and entry of judgment in its favor.

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[22] Mr. Budwig: "I'm not aware that [the government's DBE program's] end is in sight." (App. 47.)