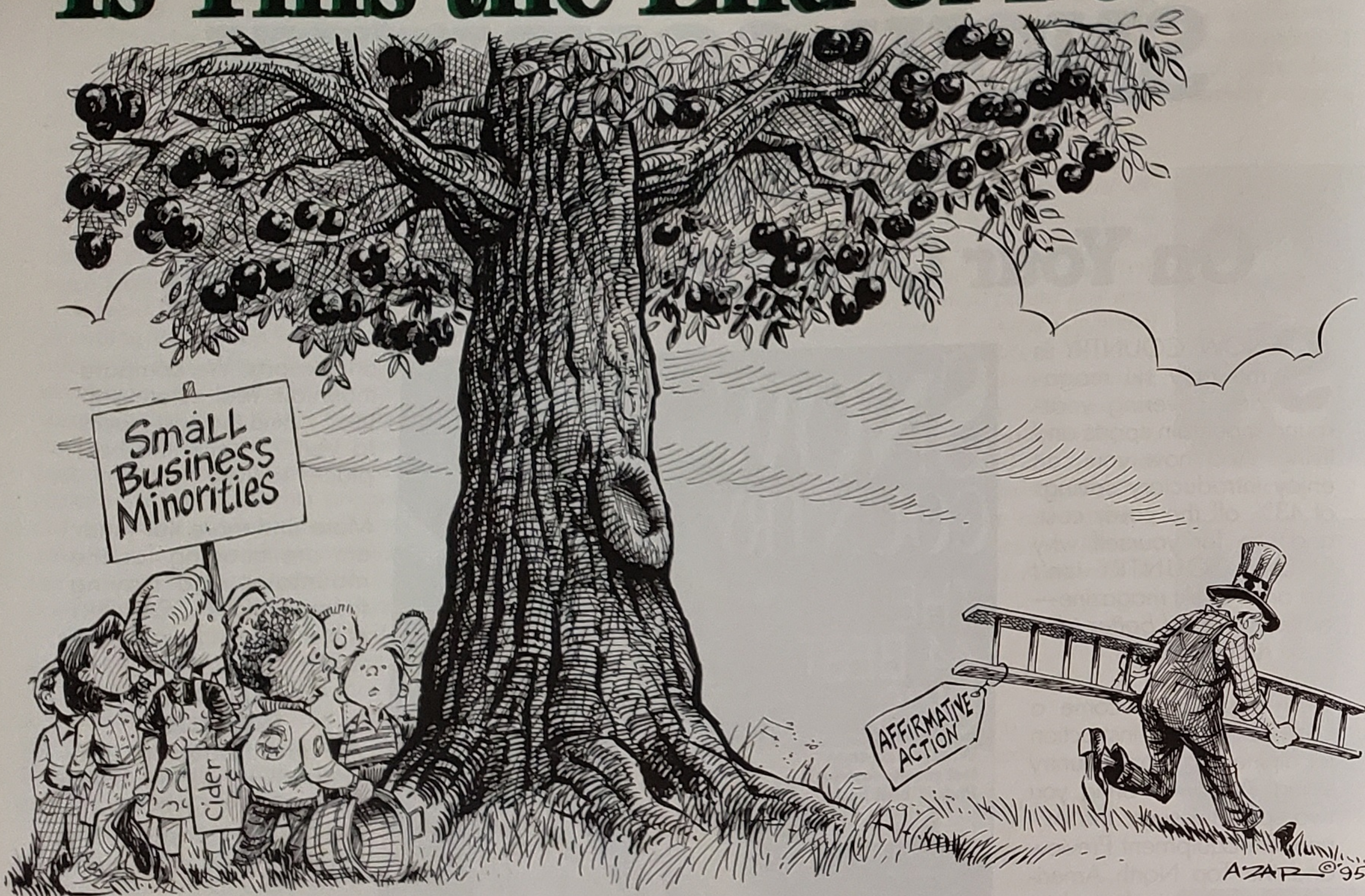


# Is This the End of Federal



**O**n January 17, 1995, the U.S. Supreme Court heard oral arguments in a case that could determine the fate of federal minority business preference programs. In *Adarand Constructors, Inc. v. Peña*,<sup>1</sup> the Court will determine the level of scrutiny to give federal procurement affirmative action programs under the equal protection clause of the Fourteenth Amendment as applied to the federal government through the due process clause of the Fifth Amendment.<sup>2</sup> Specifically, the Court will address the constitutionality, and fate of, the Central Federal Lands Highway Division (CFLHD) subcontracting compensation clause, the Small Business Act's minority rebuttable presumption clause, and, ultimately, the Small Business Act's disadvantaged business program.<sup>3</sup> In doing so, the Court will either abrogate minority preferences in federal contracting, significantly decrease their scope, or firmly establish their validity.

## Federal Minority Contracting and the Rebuttable Presumption

Congress enacted the Small Business Act of 1958 to aid and assist small business concerns,<sup>4</sup> and it created the Small Business Administration (SBA) to implement programs furthering the act's purpose.<sup>5</sup> While the act was not initially used to promote social goals, in the late 1960's, the SBA began implementing policies designed to in-

# Minority Contracting?

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crease the number of minorities participating in its small business concern programs. President Nixon significantly expanded the SBA's minority programs in 1971 by directing federal agencies, in conjunction with the SBA, to include minority business enterprises, comprised of socially and economically disadvantaged individuals, in small business contracting opportunities.<sup>6</sup>

Section 502 of the Small Business Act, enacted to remedy minimal minority participation in federal contracting, establishes a government-wide disadvantaged business participation goal of 5 percent of the total value of all contracts awarded.<sup>7</sup> Since 1971, the principal means used by agencies to meet the 5 percent disadvantaged business participation goal has been the SBA's 8(a) disadvantaged business program.

A contractor may participate in the SBA's 8(a) disadvantaged business program if it can demonstrate, among other things, that the business is at least 51 percent owned and controlled by a U.S. citizen who qualifies as socially and economically disadvantaged under the SBA's guidelines.<sup>8</sup> The SBA defines socially disadvantaged individuals as individuals "who have been subjected to racial or ethnic prejudice because of their identities as members of groups without regard to their individual qualities."<sup>9</sup> The SBA defines economically disadvantaged individuals as socially disadvantaged individuals who can demonstrate that their "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged. . . ."<sup>10</sup>

African Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Subcontinent Asian Americans receive a rebuttable presumption of social disadvantage under the SBA 8(a) program.<sup>11</sup> By contrast, members of non-designated groups must establish social disadvantage without the benefit of a rebuttable presumption.<sup>12</sup> Thus, although the SBA has not expressly limited the 8(a) disadvantaged business program to minority contractors, the program is comprised almost exclusively of minority businesses.<sup>13</sup>

Federal agencies also use a number of other contracting mechanisms to meet their participation goals. For example, some agencies "set aside" entire procurements solely to award to minority contractors.<sup>14</sup> Other agencies

use incentive contracts which reward a prime contractor for subcontracting with minority businesses.<sup>15</sup> In making such subcontracting awards, agencies generally require that prime contractors grant minority owned companies a presumption of social disadvantage.<sup>16</sup> CFLHD's Subcontracting Compensation Clause (SCC) program, expressly challenged in *Adarand*, is an example of an incentive program. The SCC program expressly incorporates the Small Business Act's definition of small disadvantaged businesses and expressly requires that prime contractors follow it.<sup>17</sup>

Between 1968 and 1992, minority business contractors were awarded more than \$39 billion in government contracts through the 8(a) disadvantaged business program and related federal minority business preference programs.<sup>18</sup> In 1992 alone, 727 minority individuals and 547 minority firms received \$4.02 billion in federal government contract dollars through the 8(a) disadvantaged business program and related federal minority business preference programs.

## The Challenger: Adarand Constructors, Inc.

In 1989, CFLHD awarded a federal highway construction project to the Mountain Gravel & Construction Company (Mountain Gravel). Part of the project included a rail construction subcontracting opportunity. Mountain Gravel solicited bids from qualified subcontractors, including Adarand Constructors, Inc. (Adarand), a non-minority contractor, and Gonzales Construction Company (Gonzales), an SBA certified 8(a) firm. Despite the fact that Adarand submitted the lowest bid, Mountain Gravel awarded the subcontract to Gonzales. Under the CFLHD contract, Mountain Gravel received \$10,000 as a bonus for subcontracting with a minority business. Mountain Gravel's federal contract, which CFLHD issued under the SCC program, included the rebuttable presumption clause.

Adarand filed suit in the U.S. District Court for the District of Colorado claiming, *inter alia*, violation of its right to equal protection as applied to the federal government through the Fifth Amendment. Adarand claimed that it had been racially discriminated against due to its non-minority ownership and that this racial discrimination violated the Constitution. Adarand lost on summary judgment and appealed to the U.S. Court of Appeals for the Tenth Circuit.

## Article in Brief

- > Reviews minority programs under the Small Business Act of 1958 and the rebuttable presumption.
- > Discusses the argument set forth in *Adarand Constructors, Inc. v. Peña* that challenges Congress' authority to enact race-based legislation that seeks to cure broad societal discrimination.
- > Analyzes how this case could ultimately denote the apex of the "conservative" Rehnquist Court.

The Tenth Circuit examined the leading cases on affirmative action business programs, notably *Fullilove v. Klutznick*,<sup>19</sup> *City of Richmond v. J.A. Croson, Co.*,<sup>20</sup> and *Metro Broadcasting, Inc. v. Federal Communications Commission*,<sup>21</sup> and determined that, although courts must strictly scrutinize state governments when they enact affirmative action business programs, the federal government need only satisfy a lesser standard of intermediate scrutiny.<sup>22</sup> The Tenth Circuit upheld the summary judgment because the SCC program, and the rebuttable presumption included therein, withstood the lesser standard of intermediate scrutiny.

Adarand petitioned for a writ of *certiorari* to the U.S. Supreme Court and, to the surprise of some, the Court granted the petition. Currently, the SCC program, the Small Business Act's rebuttable presumption clause, and, ultimately, the act's 8(a) disadvantaged business program stand on the brink of extinction.

**The Challenge: Adarand Constructors, Inc. v. Pena**

Adarand challenges Congress' authority to enact race-based legislation that seeks to cure broad societal discrimination. Further, Adarand argues that each government entity awarding federal contracts must inquire into its own particular past discrimination against the individual contractor prior to awarding any preference according to City of Richmond v. J.A. Croson, Co.,<sup>23</sup> which requires such an inquiry for state programs.

The Supreme Court has refused to hear any challenge to Congress' power to enact race-based legislation in federal procurements for 14 years. Fourteen years ago, in *Fullilove v. Klutznick*,<sup>24</sup> the Court ruled that Congress possessed the power to enact a law requiring that at least 10 percent of federal funds granted for local public projects go to minority business enterprises.

In *Fullilove*, several associations of contractors and subcontractors sought a preliminary injunction to prevent implementation of the Public Works Employment Act of 1977. The associations challenged the "minority business enterprise" section of the Public Works Employment Act which required that, in the absence of a waiver, states and localities use at least 10 percent of all federal funds granted for public projects to procure services or supplies from minority business enterprises. The Court upheld the provision in a six-to-three vote. A majority of the Court in *Fullilove* did not apply strict scrutiny in its analysis. Three members of the Court asked "whether the use of limited racial and ethnic criteria [was] a constitutionally permissible means for achieving the congressional objectives,"<sup>25</sup> and concluded that the classifications at issue did not violate the equal protection clause.

Three other members of the Court upheld the benign racial classifications at issue because they "serve[d] important governmental objectives and [were] substantially related to those objectives."<sup>26</sup> This faction of the Court found that Congress had a sound basis for concluding that minority business enterprises, though qualified, have received a disproportionately small amount of public contract work because of past discrimination. This faction further held that Congress reasonably determined that race-conscious means remained necessary to break down the discrimination barrier.

Five years ago, the Court, with three new conservative justices, struck down a local set-aside program as unconstitutional because it did not require the local agency to determine that the minority business enterprise in question suffered from past racial discrimination.<sup>27</sup> In *City of Richmond v. J.A. Croson, Co.*, Justice Sandra Day O'Connor, writing for the Court, explained:

First, there does not appear to have been any consideration for the use of race-neutral means to increase minority business participation in city contracting.

Second, the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing.

[T]here is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors.<sup>28</sup>

In *City of Richmond*, J.A. Croson Co. challenged the City of Richmond's minority contracting preference plan, which required prime contractors to whom the city awarded construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more minority owned business enterprises (MBEs). The plan defined MBEs as "business[es] at least fifty-one (51) percent of which [are] owned and controlled . . . by minority group members."<sup>29</sup> The plan defined minority group members as "[c]itizens of the United States who are Blacks, Spanish-speaking, Oriental, Indians, Eskimos, or Aleuts."<sup>30</sup> The city enacted the plan to remedy past discrimination and increase minority business participation in construction projects.

The Court held that the plan violated the equal protection clause of the Fourteenth Amendment. The Court applied the strict scrutiny standard, generally applicable to race-based classifications, and determined that the plan neither served a compelling government interest nor offered a narrowly tailored remedy to prior discrimination. The city presented no direct evidence of any race discrimination on its part in awarding contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors. Similarly, the city remained unable to demonstrate that the statute was "narrowly tailored":

[T]here does not appear to have been any consideration of race-neutral means to increase minority business participation in city contracting . . . [and] the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the "completely unrealistic" assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.<sup>31</sup>

The Court reconciled the perceived conflict between the *City of Richmond* and *Fullilove* holdings in *Metro Broadcasting, Inc. v. Federal Communications Commission*.<sup>32</sup> In *Metro Broadcasting*, Justice Brennan, writing for the Court, explained that the Court will defer to congressional

programs based on findings of societal discrimination by using the intermediate scrutiny standard, but will use the strict scrutiny standard to review non-congressional programs.

In *Metro Broadcasting*, the Court considered two challenges to minority preference programs established by the Federal Communications Commission (FCC) at the direction of Congress. First, the Court considered the constitutional propriety of the "enhancement" awarded by the FCC for minority ownership and participation when considering mutually exclusive license applications for new radio and television stations. Second, the Court considered the FCC's distress-sale policy which allowed a licensee whose qualifications have been questioned to transfer its license to a minority enterprise before a hearing on the matter. Congress specifically mandated the programs to promote programming diversity in the mass communication industry.

A divided Court held, five to four, that the FCC's minority preference policies did not violate the equal protection component of the Fifth Amendment. The majority opinion held that benign race-conscious measures mandated by Congress remain constitutionally permissible to the extent that they serve "important governmental objectives and are substantially related to achievement of those objectives."<sup>33</sup> The Court found that the FCC programs served the important government sanctioned objective of broadcast diversity and that the FCC programs remained substantially related to the achievement of that objective.

**The Adarand Court**

Today, five years after its decision in *Metro Broadcasting*, the Court prepares to re-examine Congress' authority to implement race-based minority contracting programs. The risk that the Court will strike down the SCC program and the Small Business Act's rebuttable presumption clause is significant. For the Court to uphold the SCC program and the act's rebuttable presumption clause, five of the Court's nine justices must vote in their favor. However, the five justices who voted in favor of the federal minority preference program at issue in *Fullilove* are now gone, replaced, for the most part, by more conservative justices. The table below shows the voting patterns and changes in the Court since *Fullilove*.

Justice	Fullilove	Richmond	Metro Broadcasting	Adarand
Burger . . . . .	uphold . . . . .	retired . . . . .	retired . . . . .	retired . . . . .
White . . . . .	uphold . . . . .	strike . . . . .	uphold . . . . .	retired . . . . .
Powell . . . . .	uphold . . . . .	retired . . . . .	retired . . . . .	retired . . . . .
Marshall . . . . .	uphold . . . . .	uphold . . . . .	uphold . . . . .	retired . . . . .
Brennan . . . . .	uphold . . . . .	uphold . . . . .	uphold . . . . .	retired . . . . .
Blackmun . . . . .	uphold . . . . .	uphold . . . . .	uphold . . . . .	retired . . . . .
Stewart . . . . .	strike . . . . .	retired . . . . .	retired . . . . .	retired . . . . .
Stevens . . . . .	strike . . . . .	strike . . . . .	uphold . . . . .	?
Rehnquist . . . . .	strike . . . . .	strike . . . . .	strike . . . . .	?
O'Connor . . . . .	strike . . . . .	strike . . . . .	strike . . . . .	?
Kennedy . . . . .	strike . . . . .	strike . . . . .	strike . . . . .	?
Scalia . . . . .	strike . . . . .	strike . . . . .	strike . . . . .	?
Thomas . . . . .				?
Souter . . . . .				?
Ginsburg . . . . .				?
Breyer . . . . .				?

Assuming consistency in the voting patterns present in *City of Richmond* and *Metro Broadcasting* and analyzing the new additions to the Court, the most probable vote in *Adarand* remains a six-to-three decision striking down the SCC program and the act's rebuttable presumption clause—with Chief Justice Rehnquist and Justices O'Connor, Stevens, Kennedy, Scalia, and Thomas voting to strike down the SCC program and the act's rebuttable presumption clause and Justices Souter, Ginsburg, and Breyer voting to uphold.<sup>34</sup>

Chief Justice Rehnquist and Justices Scalia, Kennedy, Thomas, and O'Connor almost certainly will vote to strike the SCC program and the act's rebuttable presumption clause as unconstitutional. Chief Justice Rehnquist and Justices Scalia and Kennedy have consistently voted against race-based contracting programs.<sup>35</sup> Justice O'Connor also has voted against race-based programs in her two recorded decisions on the subject, *City of Richmond*<sup>36</sup> and *Metro Broadcasting*.<sup>37</sup> Similarly, Justice Thomas has repeatedly criticized race-based affirmative action programs.<sup>38</sup> During his Senate confirmation hearings, Justice Thomas stated:

You want to be fair. At the same time you want to affirmatively include. And there's a real tension there. . . . The line that I drew was a line that said *we shouldn't have preferences, or goals, or timetables, or quotas*. I drew that line personally as a policy matter, argued that, advocated that, for reasons that I thought were important.<sup>39</sup>

By contrast, Justices Souter, Ginsburg, and Breyer have ruled in favor of, or advocated for, race-based affirmative action programs. Justice Breyer consistently upheld affirmative action programs as the Chief Judge of the U.S. Court of Appeals for the First Circuit, most recently in 1991 in *Stuart v. Roache*.<sup>40</sup> Justice Ginsburg recently voted in *Jacobs v. Barr* to uphold Congress' power to enact minority benefit programs as a Judge on the U.S. Court of Appeals for the District of Columbia.<sup>41</sup>

Although it has been suggested that Justice Souter opposes affirmative action programs,<sup>42</sup> he never has ruled on a federal minority business benefit program. In his dissent in *Shaw v. Reno*,<sup>43</sup> he supported a state's right to realign voting districts to remedy past discrimination. However, in supporting voting district realignment, Justice Souter distinguished voting district realignment legislation from legislation in government contracting. Thus, while *Shaw* may suggest that Justice Souter maintains lenient views toward legislation remedying past discrimination, he apparently remains uncommitted to any firm position on federal minority contracting preferences.<sup>44</sup>

Justice Stevens appears to be a "swing" vote because he voted to uphold the minority program in *Metro Broadcasting*.<sup>45</sup> In that case, Justice Stevens explained that the FCC licensing program at issue was a "rare situation" in which race classes are legitimate. However, he voted to strike the minority programs at issue in *Fullilove* and *City of Richmond*. Justice Stevens' voting pattern raises questions regarding his support for race-based affirmative action programs.

**The Fall of the Act's Minority Business Program**

In all likelihood, the Court will strike the SCC program

and the Small Business Act's rebuttable presumption—that all African Americans, Hispanic Americans, etc., qualify as socially disadvantaged. If the Supreme Court applies strict scrutiny and strikes the SCC program and the act's rebuttable presumption, the decision, as a practical matter, will end the use of race-based preferences in federal contracting.

The ripple effect of the Court's decision in *City of Richmond* illustrates the devastating effect that application of strict scrutiny will have on federal minority contracting programs. The Court's 1989 ruling applying strict scrutiny to state and local level minority contracting preference programs resulted in successful challenges to 200 state and local minority contractor programs.<sup>46</sup> Even if the Court in *Adarand* narrowly limits its ruling against the SCC program and the act's rebuttable presumption clause, a similar onslaught of challenges to the remaining federal minority contracting provisions and programs likely will ensue. Federal minority contracting programs will perish with little hope of revival in the near future.<sup>47</sup>

### Strange Results

Assuming the Court applies strict scrutiny and strikes the act's rebuttable presumption clause, the Court will face an interesting dilemma. Women-owned business enterprises (WBEs), in addition to MBEs, receive a presumption under the Small Business Act.<sup>48</sup> While race-based classifications typically have been subjected to strict scrutiny, gender-based classifications typically have received the lesser, intermediate scrutiny.<sup>49</sup>

The holdings in *Fullilove*, *City of Richmond*, and *Metro Broadcasting* deal with race-based, not gender-based, classifications. The Court has not faced a challenge to the act's WBE presumption provisions. In *Adarand*, the justices are not presented with a challenge to the WBE provisions, a point noted with particularity by the Tenth Circuit.<sup>50</sup> Precedent suggests that if the WBE provisions were challenged, they would receive, and pass muster under, intermediate scrutiny.<sup>51</sup> Thus, should the Supreme Court require strict scrutiny of federal race-based benefit programs, only WBEs will, practically speaking, continue to receive a rebuttable presumption under the Small Business Act.<sup>52</sup>

### Conclusion

Federal contracting minority preference programs stand on the brink of extinction. The Supreme Court will likely diverge from precedent and apply strict scrutiny to the SCC program and the Small Business Act's rebuttable presumption clause, in which case, they likely will fail. The remaining federal minority contracting preferences will face a similar fate.

In *The Brethren*, Bob Woodward explained, to the apparent ire of the sitting justices, how President Nixon's appointees had affected the Court. Woodward argued that the appointment of conservative justices to the Court had changed the "liberal" Warren Court to the "moderate" Burger Court. The eventual decision in *Adarand* may illuminate the effect Presidents Reagan and Bush have had on the Court through the appointments of Justices O'Connor, Kennedy, Scalia, Souter, and Thomas, and, ultimately, denote the apex of the "conservative" Rehnquist Court. ■

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### Endnotes

<sup>1</sup>Adarand Constructors, Inc. v. Pena, 16 F.3d 1537 (10th Cir. 1994), cert. granted, 63 U.S.L.W. 3255 (U.S. Sept. 26, 1994) (No. 93-1841).

<sup>2</sup>See *Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying equal protection clause of the Fourteenth Amendment to the federal government through the Fifth Amendment due process clause).

<sup>3</sup>The *Adarand* decision involves a narrow challenge to the constitutionality of the minority preference clause utilized in 15 U.S.C. § 644(g). *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994). Section 644(g) incorporates, by reference, 15 U.S.C. § 637(d)(3)(C), which grants a presumption of social and economic disadvantage to members of enumerated racial and ethnic groups. *Adarand's* challenge thus endangers the Small Business Act's entire disadvantaged business program by implication.

<sup>4</sup>See 15 U.S.C. § 631 (1994).

<sup>5</sup>See 15 U.S.C. § 633 (1994).

<sup>6</sup>See Exec. Order No. 11625, 36 Fed. Reg. 119,967 (1971).

<sup>7</sup>Section 502 of the Small Business Act provides, in pertinent part:

The President shall annually establish Government-wide goals for procurement contracts awarded to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals . . . . The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year. . . .

15 U.S.C. § 644(g)(1) (1994).

<sup>8</sup>13 C.F.R. §§ 124.101-124.109 (1994). A company must also demonstrate a potential for success and withstand a character review before it can participate in the 8(a) program. 13 C.F.R. §§ 124.107, 124.108 (1994).

<sup>9</sup>13 C.F.R. § 124.105 (1994).

<sup>10</sup>13 C.F.R. § 124.106 (1994).

<sup>11</sup>13 C.F.R. § 124.105(b) (1994).

<sup>12</sup>48 C.F.R. § 124.105(c) (1994).

<sup>13</sup>SBA statistics reveal that businesses owned by designated minorities, e.g., African Americans, Hispanic Americans, etc., comprise over 99 percent of the 8(a) disadvantaged business program's participants. A Report to the United States Congress on Minority Small Business and Capital Ownership Development, Fiscal Year 1992, Executive Summary, 1 (on file with author) [hereinafter *Minority Small Business Report*].

<sup>14</sup>15 U.S.C. § 644 (1994).

<sup>15</sup>15 U.S.C. § 637(d) (1994); see 48 C.F.R. §§ 19.708(C)(1), 52.219-10 (1994).

<sup>16</sup>15 U.S.C. § 637(d)(3)(C) (1994).

<sup>17</sup>*Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994). Specifically, CFLHD derived the eligibility criteria for the SCC program from the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c), 101 Stat. 132, 145 (STURAA). STURAA, in turn, incorporated the Small Business Act's definition of socially and economically disadvantaged individuals. STURAA also entitles women to a presumption of social disadvantage.

<sup>18</sup>*Minority Small Business Report*, supra note 13.

<sup>19</sup>448 U.S. 448 (1980).

<sup>20</sup>488 U.S. 469 (1989).

<sup>21</sup>497 U.S. 547 (1990).

<sup>22</sup>*Adarand*, 16 F.3d at 1545. The strict scrutiny standard requires that courts strike down legislation if not "necessary" to achieve a "compelling" or "overriding" government purpose. *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989). Under the intermediate scrutiny standard, a court must uphold legislation so long as it is "substantially related" to an "important" government purpose. *Id.* See also, *infra*, note 33 (discussing the practical reality of strict versus intermediate level scrutiny).

<sup>23</sup>*City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989).

<sup>24</sup>*Fullilove v. Klutznick*, 448 U.S. 448 (1980).

<sup>25</sup>*Id.* at 473 (opinion of Burger, C.J.) (emphasis in original).

<sup>26</sup>*Id.* at 519-20 (Marshall, J., concurring in judgment).

<sup>27</sup>*City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989).

<sup>28</sup>*Id.* at 507-508 (1989).

<sup>29</sup>*Id.* (citing Ordinance No. 83-69-59, codified in Richmond, Va., City Code § 12-156(a) (1985)).

<sup>30</sup>*Id.*

<sup>31</sup>*Id.* at 507 (citations omitted). The Court also noted that the City of Richmond's minority population remained predominately African-American. *Id.* at 506. Thus, the Court could not find the set-aside narrowly tailored because of the gross overinclusiveness of other minorities in the preference programs, e.g., Aleuts. *Id.* at 506.

<sup>32</sup>*Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547 (1990).

<sup>33</sup>This "intermediate scrutiny" test remains substantially less exacting than the "strict scrutiny" test typically applied to race based classifications. Compare *Metro Broadcasting*, 497 U.S. 547 (1990) (upholding program under intermediate scrutiny) with *City of Richmond*, 488 U.S. 469 (1989) (striking ordinance under strict scrutiny); cf. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed., 1978) ("When expressed as a standard for judicial review, strict scrutiny is, in Professor Gunther's formulation, 'strict' in theory and usually 'fatal' in fact.") (citing Gunther, *The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changed Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

<sup>34</sup>The government has contested *Adarand's* standing to challenge the SCC program and the act's rebuttable presumption clause. However, a decision dismissing *Adarand's* appeal for lack of standing remains unlikely.

<sup>35</sup>See *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547 (1990); *City of Richmond v. J.A. Croson*,

*Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

<sup>36</sup>488 U.S. at 470-511.

<sup>37</sup>*Metro Broadcasting, Inc. v. Federal Comm'n*, 497 U.S. 547 (1990). In recent opinions on other areas of constitutional law, Justice O'Connor has developed a line of legal reasoning focusing on the "undue burden" of a particular program. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 931 (1992) (using undue burden analysis when reviewing due process challenge under *Roe v. Wade*). In fact, in *Metro Broadcasting*, she seized upon a comment made by Justice Brennan and explained that the government had failed to show that the program was not an "undue burden" to non-minority licensees. 497 U.S. at 630-31. The undue burden standard asks whether a particular program imposes an undue burden on a discrete class of individuals, i.e., does the minority set-aside program in question impose an "undue burden" on non-minority subcontractors. *Planned Parenthood*, 112 S. Ct. at 2808. Some commentators have suggested that Justice O'Connor's vote may be swayed through an undue burden analysis.

Commentators have also suggested that the doctrine of *stare decisis* may alter Justice O'Connor's vote. An argument exists that *stare decisis* requires the application of *Metro Broadcasting's* intermediate scrutiny rather than strict scrutiny. However, only four justices truly applied intermediate scrutiny in *Metro Broadcasting*. See *Metro Broadcasting*, 497 U.S. at 602 (Stevens, J. concurring). Justice O'Connor cited the importance of the doctrine of *stare decisis* in *Planned Parenthood*. See *Planned Parenthood*, 112 S. Ct. at 2808-11.

<sup>38</sup>See *Hearings on the Confirmation of Clarence Thomas of the Senate Judiciary Comm.*, 102d Cong., 2d Sess. (Sept. 11, 1991) (statement of Clarence Thomas).

<sup>39</sup>*Id.* (emphasis added).

<sup>40</sup>951 F.2d 446 (1st Cir. 1991).

<sup>41</sup>959 F.2d 313 (D.C. Cir. 1992).

<sup>42</sup>See *Hearings on the Confirmation of David Souter of the Senate Judiciary Comm.*, 101st Cong., 2d Sess. (Sept. 18, 1990) (statement of Joseph Rauh, Jr., general counsel of the Leadership Conference for Civil Rights).

<sup>43</sup>*Shaw v. Reno*, 113 S. Ct. 2816 (1993) (J. Souter dissenting).

<sup>44</sup>"Souter has undergone 'the quickest change of any justice, at least in modern times. . . . Although Souter was 'quite conservative' during his first term on the bench, he just turned around 'very, very quickly. . . .'" *Constitutional Law Scholars Assess Impact of Supreme Court's 1993-94 Term*, 63 U.S.L.W. 2229, 2230 (Oct. 18, 1994) (quoting Professor Jesse H. Choper, University of California at Berkeley Law School).

<sup>45</sup>497 U.S. 547 (1990).

<sup>46</sup>The recent influx of conservative representatives virtually ensures that the 104th Congress will not act to revive any federal minority contracting program.

<sup>47</sup>Paul M. Barret, *Minority Contractors Find Gains Are Eroded By Courtroom Attacks*, WALL STREET J., Dec. 7, 1994, at A1.

<sup>48</sup>15 U.S.C. §§ 637, 644 (1994); see also Exec. Order 12138 (May 18, 1979); 48 C.F.R. subpt. 19.9 (1994).

<sup>49</sup>See *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979); *Califano v. Webster*, 430 U.S. 313 (1977). See also *Craig v. Boren*, 429 U.S. 190 (1976); cf. *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

<sup>50</sup>*Adarand*, 16 F.3d at 1543.

<sup>51</sup>*Califano v. Webster*, 430 U.S. 313 (1977); *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

<sup>52</sup>The Act's general provisions which benefit all small businesses—if challenged—would receive, and pass muster, under the low-level, rational basis, scrutiny applicable to economic classifications. See, e.g., *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).