



## MEMORANDUM

To: Dennis Parker and Reggie Shuford, ACLU Racial Justice Program;  
john powell and Steve Menendian, Kirwan Institute for Race and Ethnicity  
at Ohio State University;  
Juhu Thukral, The Opportunity Agenda;  
Lenora Lapidus and Emily Martin, ACLU Women's Rights Project;  
Jamil Dakwar, ACLU Human Rights Program

From: Nusrat Choudhury, ACLU Racial Justice Program

Re: Expanding Opportunity Through the American Recovery and Reinvestment Act  
of 2009—The Legal Landscape

Date: May 4, 2009

---

The current economic downturn has disproportionately impacted groups that currently are or have traditionally been marginalized from the mainstream economy, including people of color and women.<sup>1</sup> The American Recovery and Reinvestment Act of 2009 (ARRA) promises to stimulate the economy in part through the disbursement of federal, state and local contracts for projects in areas including road and bridge construction, public transit improvements, high-speed rail investments, and water infrastructure development. Through the use of race and gender-sensitive approaches, the disbursement of ARRA funds holds the potential both to counteract the disparate impact of the economic downturn on racial minorities and women and to promote inclusion in the mainstream economy for groups that have been historically left out.

A significant portion of ARRA funds will be disbursed by state and local governments rather than federal agencies. It appears, however, that these entities fear that the employment of race and gender-sensitive approaches to ARRA projects will

---

<sup>1</sup> This memorandum is intended as general guidance only to the lawyers to whom it was addressed. It is not intended to and does not constitute specific legal advice to lawyers in their capacity representing clients, prospective clients or other individuals, nor is it intended to be and does not constitute specific legal advice to any other individuals. This memorandum does not and is not intended to establish an attorney-client relationship. Prior to using this information to provide legal advice to any client, you should verify the information set forth herein, including the application of the information set forth herein to your client's particular circumstances and the applicability of the information set forth herein in the applicable jurisdiction. Individuals and groups seeking legal advice for themselves with respect to the matters referenced in this memorandum should consult with counsel and should not rely on this memorandum. This memorandum is provided "as is" without warranty of any kind, and the American Civil Liberties Union assumes no liability for the use or interpretation of information set forth herein.

expose them to liability, particularly under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

As a first step towards advising state and local governments on how to use race and gender-sensitive approaches to promote opportunity for historically marginalized racial minority groups and women, this memorandum sets forth the current Supreme Court jurisprudence governing the ability of state and local governments to use racial classifications in government contracting. Although it is equally important to advise state and local governments on constitutionally permissible strategies to promote the inclusion of women in ARRA-funded projects, this memorandum addresses the legal landscape surrounding the government's use of racial classifications because the ACLU Racial Justice Program and the Kirwan Institute for Race and Ethnicity both focus on racial justice issues. Because racial classifications are subject to a higher degree of judicial scrutiny than sex and gender classifications, gender-based measures adopted by state and local governments will almost certainly pass constitutional muster where these entities have instituted race-based measures in a constitutionally permissible manner and corresponding gender-based measures are instituted according to similar means.<sup>2</sup>

Part I of this memorandum sets forth Supreme Court jurisprudence governing the application of strict scrutiny judicial review to race-based classifications by any level of government. Under this standard, such classifications are permitted “only if they are narrowly tailored measures that further compelling governmental interests.” *Adarand Constructors, Inc. v. Peña (Adarand I)*, 515 U.S. 200, 227 (1995). Part I explains how state and local governments may show that a remedial program using racial classifications meets the “compelling governmental interest” and “narrowly tailored” prongs of the strict scrutiny test.

Part II of this memorandum suggests two next steps in pursuing further research regarding how state and local governments may employ race-sensitive, or even race-based, approaches to the disbursement of ARRA funds. First, it highlights the importance of moving beyond Supreme Court authority to determine the law in each federal judicial circuit governing the constitutionality of using race as a factor in the disbursement of ARRA funds. Second, Part II recommends the identification of

---

<sup>2</sup> In considering a constitutional challenge to a Denver affirmative action ordinance that established participation goals for racial minorities and women on construction and professional design projects, the Court of Appeals for the Tenth Circuit observed that although intermediate scrutiny, rather than strict scrutiny applied to the gender-based measures, “[n]either this court nor the Supreme Court has developed a framework for analyzing equal protection challenges to gender-based remedial measures.” *Concrete Works of Colorado, Inc.*, 321 F.3d 950, 959 (10th Cir. 2003). In that case, the local government essentially argued that because the gender-based measures survived strict scrutiny, they necessarily withstood intermediate scrutiny. *Id.* The Tenth Circuit established that “[t]o meet its burden of demonstrating an important governmental interest, Denver must show that the gender-based measures were based on ‘reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.’” *Id.* (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982)). It concluded that “the evidentiary basis necessary to demonstrate Denver’s important governmental interest may be something less than the ‘strong basis in evidence’ required to justify race-based remedial measures.” *Id.* (citing *Eng’g Contractors Ass’n of S. Fla., Inc. v. Metro. Dade County*, 122 F.3d 895, 909 (11th Cir. 1997) and *Contractors Ass’n of E. Pa., Inc. v. City of Phila.*, 6 F.3d 990, 1010 (3rd Cir. 1993)).

statistical studies and other evidence that states and local governments have compiled to support the use of race-based classifications in existing contracting programs because such evidence may support the application of the same or similar race-based measures in the awarding of ARRA contracts.

Finally, Part III of this memorandum contemplates that state and local governments may craft strategies to disburse ARRA funds that are “race-neutral” and therefore are not subject to strict scrutiny judicial review, but that nevertheless are sensitive to race in that they seek to redress the disproportionate impact of the economic downturn on people of color and the historical exclusion of certain racial minority groups from certain sectors of the mainstream economy.

## **APPLICABLE LAW**

### **Equal Protection Jurisprudence**

#### **I) Standard of Review for the use of Racial Classifications by Government Entities**

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const., amend. 14, § 1. Because the Fourteenth Amendment “protect[s] *persons*, not *groups*,” all “governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.” *Adarand I*, 515 U.S. at 227 (emphasis in original; internal quotation marks and citation omitted). The equal protection obligations imposed on state and local governments by the Fourteenth Amendment are identical to those imposed on the federal government by the Fifth Amendment. *Id.* at 217 (collecting cases); *see also Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (“This Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.”) (collecting cases). All racial classifications imposed by government, whether federal, state or local, “must be analyzed by a reviewing court under strict scrutiny.” *Adarand I*, 515 U.S. at 227.<sup>3</sup> According to this standard, racial classifications by government authorities “are constitutional only if they are narrowly tailored to further compelling governmental interests.” *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

The Supreme Court has emphasized that strict scrutiny is not “strict in theory, but fatal in fact,” *Adarand I*, 515 U.S. at 237, and that “[a]lthough all governmental uses of

---

<sup>3</sup> As the Supreme Court clarified in *Grutter v. Bollinger*, 539 U.S. 306 (2003),

“[a]bsent searching judicial inquiry into the justification for such race-based measures,” we have no way to determine what “classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”

*Id.* at 326 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

race are subject to strict scrutiny, not all are invalidated by it,” *Grutter*, 539 U.S. at 326-37. When it affirmed that strict scrutiny applies even to government programs that use racial distinctions for a remedial purpose, the Supreme Court in *Adarand I* insisted that

strict scrutiny must take relevant differences into account. Indeed, as we explained, that is its fundamental purpose. Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.

*Id.* (internal quotation marks and citations omitted). Therefore, a reviewing court is able to consider the remedial goals and purposes of a government program that uses race-based classifications when determining whether the program withstands strict scrutiny review.

#### ***A) Compelling Governmental Interest***

Justice O’Connor’s opinion for the majority in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), struck down a municipal contracting program that required prime contractors to award at least thirty percent of the dollar amount of each contract to one or more Minority Business Enterprises (MBE’s). Part II of the opinion, which secured the support of only three justices, nevertheless concluded that a state or local government may use race-based classifications to remedy its own prior or present discrimination. Such classifications were permitted when the government authority had or was presently engaged in active discrimination in the award of contracts or had or was presently a “passive participant in a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 492 (plurality opinion). In these instances, a government authority could use racial distinctions “to eradicate the effects of private discrimination within its own legislative jurisdiction,” as long as such efforts “were exercised within the constraints of § 1 of the Fourteenth Amendment.” *Id.* at 491-92 (plurality opinion). A plurality of four justices even supported the proposition that “[n]othing we say today precludes a state or local government from taking action to rectify the effects of identified discrimination within its own jurisdiction.” *Id.* at 509 (plurality opinion).

It was not until *Shaw v. Hunt*, 517 U.S. 899 (1996), however, that this position gained the support of a majority of justices on the Supreme Court. In *Shaw*, the Court considered for a second time whether North Carolina’s congressional redistricting plan violated the Equal Protection Clause. *Id.* at 902. Although the five-justice majority struck down the plan on the ground that it was not narrowly tailored to serve a compelling state interest, it expressly held that “[a] State’s interest in remedying the effects of past or present racial discrimination may in the proper case justify a government’s use of racial distinctions,” and that this interest would “rise to the level of a compelling state interest” if two conditions were met. *Id.* at 902, 909 (1996) (citing *Croson*, 488 U.S. at 498-506).

First, the state or local government must seek to use the race-based distinction to remedy “identified discrimination.” *Shaw*, 517 U.S. at 909 (citing *Croson*, 488 U.S. at 499, 500, 505, 507, 509). In *Shaw*, the Supreme Court clarified that

[w]hile the States and their subdivisions may take remedial action when they possess evidence of past or present discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief. A generalized assertion of past discrimination in a particular industry or region is not adequate because it provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.

*Shaw*, 517 U.S. at 909 (internal quotations and citations omitted); *see also Croson*, 488 U.S. at 504 (“While States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.”). The Court concluded that “[a]ccordingly, an effort to alleviate the effects of societal discrimination is not a compelling interest.” *Shaw*, 517 U.S. at 910 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-75 (1986) (plurality opinion)).<sup>4</sup>

The second requirement for a state or local government’s interest in remedying the effects of past or present discrimination to constitute a “compelling state interest” justifying the use of racial classifications is that the government entity “must have had a ‘strong basis in evidence’ to conclude that remedial action was necessary” to address the identified discrimination “before it embarks on an affirmative-action program.” *Shaw*, 517 U.S. at 910 (citing *Wygant*, 476 U.S. at 277 (plurality opinion)) (emphasis in original).

In *Croson*, the Supreme Court provided detailed analysis of a record demonstrating that the plaintiffs failed both to “point[] to any identified discrimination” in the local construction industry and to establish a “strong basis in evidence” that remedial action was necessary. *Croson*, 488 U.S. 499-505. As a result, the Supreme Court concluded that the government failed to show that there was a compelling governmental interest in using racial classifications to remedy past discrimination.

---

<sup>4</sup> In *Wygant v. Jackson Board of Education*, a plurality of the Supreme Court concluded that remedying societal discrimination and promoting role models for students were not compelling governmental interests that could justify a program tying the layoff of minority teachers to the percentage of minority students enrolled in a school district. *Wygant*, 476 U.S. at 274-76. A plurality of the Court in *Croson* articulated the problem with the role model theory as follows:

First, the statistical disparity between students and teachers had no probative value in demonstrating the kind of prior discrimination in hiring or promotion that would justify race-based relief. Second, because the role model theory had no relation to some basis for believing a constitutional or statutory violation had occurred, it could be used to “justify” race-based decisionmaking essentially limitless in scope and duration.

*Croson*, 488 U.S. at 497-98 (internal citations omitted).

*Croson* concerned an ordinance enacted by the City of Richmond that required at least thirty percent of the dollar amount of each city construction contract to be subcontracted to MBE's in an effort to remedy "various forms of past discrimination that [were] allegedly responsible for the small number of minority businesses in the local contracting industry." *Id.* at 499. The city pointed to the following evidence to support its claim that the ordinance sought to further the compelling governmental interest of remedying past racial discrimination:

- (1) the ordinance declared itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received 0.67% of prime contracts from the city while minorities constituted 50% of the city's population; (4) there were very few minority contractors in local and state contractors' associations; and (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally.

*Id.*

A majority of the Supreme Court concluded that "[n]one of these 'findings,' singly or together" established a strong basis in evidence for the use of racial distinctions in the city contracting program. *Id.* at 500. In doing so, it made the following seven observations:

1. The city had proffered no evidence demonstrating or "approaching" a *prima facie* case of racial discrimination in violation of the Constitution or a statute "by anyone in the Richmond construction industry." *Id.* (emphasis in original). Four Justices noted that the city failed to show "evidence that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case." *Id.* at 510 (plurality opinion).
2. The city's statement that it enacted the ordinance with a remedial purpose did not justify the use of racial distinctions. "The mere recitation of a 'benign' or 'legitimate' purpose for a racial classification is entitled to little or no weight." *Id.* at 500.
3. Anecdotal statements by one individual that there was racial discrimination in the construction industry in the Pittsburgh area and by another that there was racial discrimination in the construction industry "in [the Richmond] area, and the State, and around the nation" were "of little probative value in establishing identified discrimination in the Richmond construction industry." *Id.*
4. The city's "[r]eliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the city" was "misplaced" because "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be

- the number of minorities qualified to undertake the particular task.” *Id.* at 501-02. As a result, the city was required to show that there was a statistical disparity between the quantity or percentage of MBE’s qualified to undertake prime or subcontracting work in public construction projects and the amount of public contracting dollars awarded to MBE’s in order to show that minority-owned businesses were so underrepresented as to give rise to a compelling governmental interest to remedy the effects of past or present discrimination. *Id.* at 503.
5. The low level of minority membership in local contractors’ associations failed to give rise to a *prima facie* case of discrimination and was, in fact, irrelevant without accompanying information about the number of local MBE’s eligible for membership in such associations. *Id.* However, the Supreme Court observed that “[i]f the statistical disparity between eligible MBE’s and MBE membership were great enough, an inference of discriminatory exclusion could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market.” *Id.*
  6. Congress’s finding that there was nationwide discrimination in the construction industry was of “extremely limited” probative value for demonstrating the existence of discrimination in Richmond, particularly in light of the establishment of a waiver procedure in the national program, which acknowledged that the existence of discrimination would vary from locality to locality. *Id.* at 504. The Supreme Court also noted that Congress made the finding that nationwide discrimination in the construction industry would permit federal funds to be distributed in a manner that reinforced prior patterns of discrimination—absent the enactment of a program employing racial classifications—pursuant to its powers under § 5 of the Fourteenth Amendment. *Id.* A majority of the Supreme Court concluded that to permit state and local governments to base their own use of racial distinctions on such findings would “render[] a nullity” the constraints of the Equal Protection Clause on state and local action. *Id.*
  7. The Richmond ordinance was overinclusive. It permitted access to the thirty percent set aside to Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons, racial groups for which there was “absolutely no evidence [in the record] of past discrimination.” *Id.* at 506. The Supreme Court noted that “[t]he random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city’s purpose was not in fact to remedy past discrimination.” *Id.*

As a result of these deficiencies, none of the five pieces of evidence presented by the city was found, either singly or combined, to identify racial discrimination in the Richmond construction industry or to establish a “strong basis in evidence” for the city to conclude that remedial action, including the use of racial distinctions, was necessary to remedy past racial discrimination.

A plurality of four justices in *Croson* provided further direction to state and local governments seeking to redress “the effects of identified discrimination” within their jurisdictions through the use of race-based measures. *Croson*, 488 U.S. at 509 (plurality opinion). The plurality identified five pieces of evidence that would support a finding that a governmental entity has demonstrated a “strong basis in evidence” for the conclusion that a remedial program employing racial distinctions is necessary to address present or past racial discrimination.

First, the plurality observed that the city could have proffered evidence of intentional discrimination by nonminority contractors seeking to exclude minority contractors. *Id.* It noted that an inference of discrimination could arise even with evidence of a “significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors.” *Id.* In such an “extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.” *Id.*

Second, the plurality noted that “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.” *Id.*

Third, the plurality emphasized that the city could and should have availed itself of “race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races,” which would have the added benefit of “increase[ing] the opportunities available to minority business without classifying individuals on the basis of race.” *Id.* at 510 (plurality opinion). The plurality noted that

[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. . . . The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.

*Id.* at 509-10 (plurality opinion).

Fourth, as suggested by the majority opinion, the city should have “ascertained how many minority enterprises are present in the local construction market” and “the level of their participation in city construction projects” in making the case that a remedial program including racial distinctions was necessary. *Id.* at 510 (plurality opinion).

Fifth, and finally, the plurality noted that “[e]vidence that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case,” would also support a finding of a “strong showing in evidence” for the conclusion that a race-based remedial program was necessary. *Id.*

### ***B) Narrow Tailoring***

Since *Croson* and *Adarand I*, the Supreme Court has not reviewed a lower court’s application of strict scrutiny to a government contracting program using racial classifications. Moreover, in *Adarand I*, the Supreme Court did not reach the issue of narrow tailoring because it found that the district court had applied the wrong standard of review and remanded the case for the lower court to apply strict scrutiny in the first instance. The Supreme Court noted, however, that “[w]hen a race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the ‘narrow tailoring’ test this Court has set out in previous cases.” *Adarand I*, 515 U.S. at 237. This statement established the Court’s earlier decision in *Croson*, 488 U.S. 469, as controlling authority on the factors that contribute to a court finding that a government entity has narrowly tailored a contracting program using race-based preferences or classifications so as to satisfy strict scrutiny.

Part IV of Justice O’Connor’s opinion in *Croson* secured the support of a five-justice majority and determined that the Richmond ordinance setting aside thirty percent of city contracting dollars for MBEs failed to meet the requirements of narrow tailoring. *Id.* at 507-08. In order to be “narrowly tailored,” a remedial program should (1) consider race-neutral alternatives to set-aside programs, (2) be more than a mere promotion of racial balancing, (3) be based on the number of qualified minorities in the area capable of performing the scope of work identified in the set-aside plan, (4) not require numerical quotas, but permit bids and waivers on a case-by-case basis, and (5) not be overinclusive by presuming discrimination against certain minorities. *Id.* at 507-08.

Applying this framework, the Supreme Court found the Richmond ordinance to be unconstitutional because: 1) there was no evidence that the city council considered any race-neutral alternatives; 2) the ordinance seemed to promote racial balancing by adopting a thirty percent set aside that assumed that racial groups will “choose a particular trade in lockstep proportion to their representation in the local population;” 3) the ordinance imposed a rigid numerical quota; and 4) the ordinance included an inflexible waiver process. *Id.*

## **II) Developing More Precise Advice for State and Local Governments**

### ***A) Circuit Court Decisions***

In the absence of a post-*Adarand I* Supreme Court decision reviewing the application of strict scrutiny to the use of racial distinctions in government contracting, decisions by federal appellate courts in some jurisdictions provide controlling authority

as to the types of programs that withstand (or do not withstand) strict scrutiny. Further research into the controlling appellate authority in each federal judicial circuit will inform our advice to state and local governments regarding how they may use ARRA funds to promote opportunity for racial minorities.

Locating this authority and translating it into easily understandable “do’s and don’t’s” may provide state and local governments with direction as to the steps that they must take before enacting ARRA-fund disbursement policies featuring racial distinctions that withstand constitutional scrutiny. Moreover, it is also important to identify controlling circuit authority because federal appellate courts may have diverged to a degree in their determinations of the strength of evidence required to support a government entity’s conclusion that it is necessary to employ racial distinctions to promote a compelling state interest that is narrowly tailored.

The following decisions by federal appellate courts present a starting point for this research.

- In *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 900 (11th Cir. 1997), the Court of Appeals for the Eleventh Circuit held that three affirmative action programs enacted by Miami Dade County—the Black Business Enterprise program, the Hispanic Business Enterprise program, and the Women Business Enterprise program—violated the Equal Protection Clause of the Fourteenth Amendment.
  - The court found that the county failed to proffer sufficiently strong statistical evidence of discrimination in the county construction market to create a “foundation” for anecdotal evidence to build upon. *Id.* at 926.
  - The Eleventh Circuit held that the county failed to provide a strong basis in evidence for the conclusion that a remedial program using racial distinctions was necessary because it lacked such statistical evidence. *Id.*
  - The court also found that the race-based affirmative action programs were not narrowly tailored because the county “failed to give serious and good-faith consideration to the use of race- and ethnicity-neutral measures to increase [Black Business Enterprise] and [Hispanic Business Enterprise] participation in the County construction market,” failed to take any action “to ferret out and respond to instances of discrimination if and when they have occurred in the County’s own contracting process,” and failed to pass any local ordinances to outlaw discrimination by local contractors, subcontractors, suppliers, bankers, or insurers. *Id.* at 928-29.
- In *Adarand Constructors, Inc. v. Slater* (“*Adarand VII*”), 228 F.3d 1147 (10th Cir. 2000), *cert. dismissed sub nom., Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001), the Court of Appeals for the Tenth Circuit considered the constitutionality of the U.S. Department of Transportation’s disadvantaged

business enterprise (DBE) program. It reviewed the program that was in place at the time of the district court's decision that followed remand from the Supreme Court's decision in *Adarand I* and after later revisions were made to DBE regulations. *Adarand VII*, 228 F.3d at 1167-87.<sup>5</sup> The Tenth Circuit concluded that the system of financial incentives considered in *Adarand I* was not narrowly tailored, but that the new DBE program, known as the Transportation Equity Act for the 21st Century ("TEA-21"), which authorized the use of race- and sex-based preferences in federally funded transportation contracts, was constitutional on its face. *Id.* at 1187.

- The Tenth Circuit undertook an exhaustive inquiry into the evidence and found that the record showed that Congress had a compelling interest in remedying the federal government's passive complicity with private discrimination in the construction industry, which contributed to discriminatory barriers in federal contracting. It concluded that "both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises . . . are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market." *Id.* at 1175-76. As a result, the evidence was found to "more than satisf[y] the government's burden of production regarding the compelling interest for a race-conscious remedy." *Id.* at 1176.
- The Tenth Circuit also concluded that the TEA-21 program was narrowly tailored. *Id.* at 1187.
- In *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 124 S.Ct. 2158 (2004), the Court of Appeals for the Eighth Circuit upheld TEA-21 on its face and as applied by the States of Minnesota and Nebraska.
  - It concluded that the legislative record demonstrated Congress's compelling interest in remedying the effects of discrimination within the

---

<sup>5</sup> The Tenth Circuit's decision in *Adarand VII* followed a series of decisions that were issued subsequent to the Supreme Court's remand of the case to the district court for the application of strict scrutiny review in *Adarand I*, 515 U.S. at 200, 205. On remand, the district court determined that Congress had a compelling interest in redressing discrimination, but that the challenged U.S. Department of Transportation incentive program was not "narrowly tailored." *Adarand Constructors, Inc. v. Pena (Adarand II)*, 965 F. Supp. 1556, 1580 (D. Colo. 1997), *rev'd*, *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir 2000) (*Adarand VII*), *cert. dismissed sub nom.*, *Adarand Constructors, Inc., v. Mineta (Adarand VIII)*, 534 U.S. 103 (2001). The district court enjoined the DBE program. *Id.* *Adarand* then sued the state of Colorado, challenging its use of DBE programs in administering federal highway programs. Colorado modified its regulations in response, which led *Adarand* to become certified as a DBE. As a consequence, the Tenth Circuit Court of Appeals rejected the government's appeal of *Adarand II*, concluding that the case was moot due to *Adarand*'s DBE status. *Adarand Constructors, Inc. v. Slater (Adarand III)*, 169 F.3d 1292 (10<sup>th</sup> Cir. 1999), *rev'd*, 120 S.Ct 722 (2000). The Supreme Court reversed the decision and remanded the case to the Tenth Circuit, which subsequently issued *Adarand VII*.

transportation contracting industry, particularly since “Congress has spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.” *Id.* at 970.

- In *Concrete Works of Colorado, Inc.*, 321 F.3d 950 (10th Cir. 2003), the Court of Appeals for the Tenth Circuit held that the city and county of Denver demonstrated a compelling governmental interest in remedying racial discrimination within its jurisdiction sufficient to support the institution of an ordinance establishing participation goals for racial minorities and women on city construction and professional design projects. The court set forth the law from *Shaw* and *Croson* described in Part I of this memorandum and required Denver to show that its interest in remedying discrimination was compelling by identifying the past or present discrimination “with some specificity” and by demonstrating that there was a strong basis in evidence to conclude that the ordinances were necessary. *Id.* at 958 (citing *Shaw*, 517 U.S. at 909-10)
  - Reviewing thousands of pages of statistical and anecdotal evidence, the court held that Denver demonstrated that it had a strong basis in evidence to show that the ordinances were required to remedy racial discrimination in the Denver construction industry and that the gender-based measures were based on “reasoned analysis.” *Id.* at 990-91.
  - The Tenth Circuit concluded that Denver met its burden to show a compelling government interest in remedying discrimination and that the plaintiff had failed to rebut this evidence. *Id.* at 990.
- In *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (2005), the Court of Appeals for the Ninth Circuit upheld TEA-21 against a facial challenge, but determined that the State of Washington’s implementation of the program was not narrowly tailored to serve the compelling governmental interest in ensuring that federal funding was not distributed in a way that reinforced the effects of either public or private discrimination.
  - First, the Ninth Circuit held that Congress sought to further a compelling state interest in adopting the remedial program because “in light of the substantial body of statistical and anecdotal material considered at the time of TEA-21’s enactment, Congress had a strong basis in evidence for concluding that—in at least some parts of the country—discrimination within the transportation contracting industry hinders minorities’ ability to compete for federally funded contracts.” *Id.* at 993.
  - The court also found that TEA-21’s racial preferences were narrowly tailored because “[r]ace-conscious remedies are used only when race-neutral means prove ineffective, these race-conscious measures are

employed in a flexible manner and for a limited duration, and the program is tied to the labor market in each State and is designed to minimize the burden on non-minorities.” *Id.* at 995.

- The Ninth Circuit determined, however, that the State of Washington’s implementation of the program was not narrowly tailored to further Congress’s remedial objective because “[t]he record is devoid of any evidence suggesting that minorities currently suffer—or have ever suffered—discrimination in the Washington transportation contracting industry.” *Id.* at 1002.

Comparative analysis of these federal appellate decisions will enable the provision of jurisdiction-specific advice to state and local governments regarding the measures they must take prior to employing race-based measures to promote minority involvement in contracting opportunities created by the ARRA.

### ***B) Existing Data to Support State and Local Programs Using Race-Based Classifications***

Following legal challenges to disadvantaged business enterprise programs in several states, including the *Adarand* line of cases and *Sherbrooke Turf*, states have generally “prepare[d] more sophisticated disparity and availability studies to support their programs.”<sup>6</sup> Examining examples of the statistical data that currently support the use of racial distinctions in state and local contracting programs will permit the provision of specific advice to state and local governments about the evidence they must secure to enact race-based measures to promote minority participation in contracting programs funded by the ARRA.

### **III) Devising Race-Neutral Approaches that Promote Opportunity in a Race-Sensitive Manner**

State and local governments may avoid the rigorous demands of devising contracting programs that withstand strict scrutiny review by enacting race-neutral strategies to promote opportunity and involvement by racial minorities. These approaches include, for example, providing financing for small firms and information and instructional programs to help small businesses successfully apply for government contracts. Such initiatives may promote opportunity for businesses in the contracting industry that are owned by disadvantaged minorities because they address market failures that disproportionately impact these groups. *See, e.g., Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738, 2792 (2007) (Kennedy, J., concurring) (concurring in judgment that the school assignment plans violated the Equal Protection Clause, but noting that “[s]chool boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including

---

<sup>6</sup> Insight Center for Community Economic Development, *State Policies and Programs for Minority- and Women-Business Development*, 26 (December 14, 2007).

strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.”)

Moreover, the use of race-neutral approaches will permit state or local governments to disburse ARRA funds in a manner than promotes opportunities for racial minorities without gathering the costly statistical data that courts have required to support the use of racial classifications in government contracting programs, particularly in order to meet the “compelling governmental interest” prong of strict scrutiny review.

Finally, if a state or local government adopts a race-based remedy after considering and/or attempting race-neutral approaches, it is more likely that a court will find that the program meets the narrow tailoring requirement of strict scrutiny. *See Croson*, 488 U.S. at 507 (finding that the government contracting program at issue was not narrowly tailored in part because “there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting”); *Wygant*, 476 U.S. at 280 n. 6 (plurality opinion) (“The term ‘narrowly tailored’ . . . require[s] consideration of whether lawful alternative and less restrictive means could have been used . . . [T]he classification at issue must ‘fit’ with greater precision than any alternative means.”) (citation omitted); *Western States Paving Co., Inc.*, 407 F.3d at 993-94 (viewing favorably TEA-21 regulations seeking to help DBEs through race-neutral means, such as informational and instructional programs targeted toward all small businesses and those authorizing the state to use race-conscious measures only when race-neutral efforts are inadequate).

Without advising state and local governments against the use of racial distinctions where appropriate, it is important to identify measures that are race-conscious, but fall short of employing explicit “racial classifications,” as one way of promoting the economic empowerment and inclusion of marginalized racial minority groups in contracting opportunities created by the disbursement of ARRA funds.

### **NEXT STEPS**

- Since the Supreme Court decided *Adarand I* in 1995 and established that strict scrutiny review applies to programs at any level of government that use racial classifications for a remedial purpose, it has not upheld a race-based remedial program in government contracting. Its decision in *Croson*, 488 U.S. 469, striking down a municipal contracting program that used racial classifications, remains the most recent Supreme Court authority on the standard for demonstrating that such a program is narrowly tailored to further a compelling governmental interest. A next step is to determine the controlling decisions

governing the enactment of remedial programs using racial classifications in each federal judicial circuit to guide state and local governments about the types of programs that do (or do not) withstand strict scrutiny review.

- Elaborate upon how state and local governments may craft strategies to disburse ARRA funds that are sensitive to race in that they seek to redress the disproportionate impact of the economic downturn on people of color and the historical exclusion of certain racial minority groups from certain sectors of the mainstream economy, but are nevertheless race-neutral and therefore are not subject to strict scrutiny judicial review.
- Identify controlling authority from the Supreme Court and in each federal circuit regarding the application of gender-sensitive measures regarding the disbursement of ARRA funds.