No. 00-730

IN THE

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

NORMAN Y. MINETA, SECRETARY OF TRANSPORTATION, *et al*.,
Respondents.

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

BRIEF OF *AMICI CURIAE* NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, ASIAN PACIFIC AMERICAN LEGAL CENTER, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN LAW CAUCUS, *ET AL*. IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The National Asian Pacific American Legal Consortium ("NAPALC") is a national, nonprofit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian-Pacific Americans. NAPALC is committed to supporting affirmative action as a way of ensuring equal opportunities for women and minorities. NAPALC focuses on educating policymakers, corporations, institutions, and the general public on the facts and importance of affirmative action to the Asian-Pacific community, and works with other civil rights organizations and policymakers to ensure that affirmative action programs are appropriate and effective and that they address Asian-Pacific American concerns.

The Asian Law Caucus ("ALC") is a nonprofit, public-interest legal organization whose mission is to promote, advance, and represent the civil rights of Asian-Pacific Islander communities. Founded in 1972, the ALC is the nation's oldest Asian-Pacific Islander civil rights legal organization. The ALC has provided legal services and community education on affirmative action and discrimination, represented individuals in discrimination suits, and conducted local and regional policy advocacy on affirmative action.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a nonprofit civil rights organization based in New York City. AALDEF protects and promotes the civil rights of Asian Americans through

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[1] Pursuant to Supreme Court Rule 37.3(a), *Amici* have obtained consent from Petitioner and Respondents to file this brief. Pursuant to Supreme Court Rule 37.6, *Amici* note that the position they take in this brief has not been approved or financed by Respondents or their counsel. No counsel for Petitioner or Respondents had any role in authoring this brief. The written consents of Petitioner and Respondents have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3(a).

litigation, legal advocacy, and community education. AALDEF has challenged discrimination on the basis of race, national origin, and immigration status in both the public and private sectors, and works to secure for Asian Americans opportunities denied to them as a result of their historic exclusion from the mainstream of American life and of their legacy of discrimination sanctioned by law.

The Asian Pacific American Legal Center ("APALC") is the leading organization in Southern California dedicated to providing the growing Asian-Pacific American community with multilingual, culturally sensitive legal services, education, and civil rights advocacy.

The Asian Law Alliance ("ALA"), founded in 1977, is a nonprofit, public-interest legal organization with the mission of providing equal access to the justice system for the Asian and Pacific Islander communities in Santa Clara County, California. ALA has provided community education and legal services on affirmative action and discrimination issues.

The Organization of Chinese Americans, Inc. ("OCA") is a nonprofit nonpartisan civil rights organization dedicated to ensuring the equality of Chinese Americans, Asian Americans and all Americans in the United States. Founded in 1973, OCA currently represents over 10,000 members in 41 chapters and 26 college affiliates. OCA has worked to ensure that Asian-Pacific Americans have had equal opportunities and access to education and the business world, as well as career opportunities.

The National Asian Pacific American Bar Association ("NAPABA") is the national professional association of Asian-Pacific American attorneys, judges, law professors, and law students. NAPABA was incorporated in 1989 to represent and advocate for, on a national level, the interests of Asian-Pacific American attorneys and their communities.

To advance its goals, NAPABA monitors legislative developments and judicial appointments, and advocates on issues of importance to Asian-Pacific American lawyers and their communities.

The National Federation of Filipino American Associations ("NaFFAA") is a private, nonprofit, nonpartisan, tax-exempt organization established in 1997 to promote the welfare and well-being of all Filipinos and Filipino-Americans throughout the United States. NaFFAA joins this *amici curiae* brief to inform this Court about the benefits for Asian Americans resulting from equal opportunity programs and policies in public contracting.

The Japanese American Citizens League ("JACL"), founded in 1929, is one of the oldest and largest Asian-American nonprofit, nonpartisan organizations committed to securing and upholding the human and civil rights of Americans of Japanese ancestry and others. During World War II, Japanese Americans were denied constitutional rights and were incarcerated by the United States for no reason other than their ethnicity. Through JACL and other groups, those who were wrongfully forced into internment camps obtained redress, but discrimination against Japanese Americans remains an issue. Knowing the harm caused by discrimination and the importance of programs that counter the effects of discrimination, JACL has worked hard to educate people on the need for affirmative action programs.

The Southwest Center for Asian Pacific American Law ("SCAPAL") is a nonprofit public-benefit corporation formed by concerned professionals from San Diego's legal, business, and academic communities for the purpose of preserving and protecting the legal rights of individuals in the San Diego region who do not have adequate access to the legal system.

This case addresses federal efforts to remedy past and present discriminatory practices within federal government contracting that have led to the underutilization of minority-owned business enterprises ("MBEs") and women-owned business enterprises ("WBEs"). Specifically, this case addresses the appropriate role that the United States Department of Transportation's Disadvantaged Business Enterprise program (the "DBE Program" or "Program") plays in remedying past discrimination by raising the utilization of qualified MBEs and WBEs to levels that reflect justice and fair play – issues that long have been of vital concern to all *amici curiae* (collectively, "*Amici*"). The decision of this Court will affect not only the program at issue but also similar public contracting programs administered by local and state governments. Accordingly, because of the broad impact of the decision here, *Amici* have an important and substantial interest in the outcome of this case.

SUMMARY OF ARGUMENT

Petitioner challenges the Court of Appeals' decision that the DBE Program is narrowly tailored to further Congress' compelling interest in eradicating racial discrimination and its effects in federal highway transportation contracting. In creating the DBE Program, Congress made extensive findings that racial discrimination against minority-owned businesses, including those owned by Asian-Pacific Americans, is a pervasive problem that compels a nationwide, federal solution. Congress fashioned such a solution by creating a rebuttable presumption that individual members of certain historically discriminated-against groups, including Asian-Pacific Americans, suffer social and economic disadvantages that justify limited remedial measures that allow them to compete fairly for government contracts. This brief details the continuing racial

discrimination against Asian-Pacific Americans that justifies this rebuttable presumption.

As this brief demonstrates, Congress' findings that Asian-Pacific Americans suffer discrimination in government contracting must be placed in a broader historical context of discrimination. Asian-Pacific Americans have experienced racial discrimination in virtually all areas of public and private life. Since this nation's earliest days, racially discriminatory federal, state, and private actions have denied Asian-Pacific Americans basic rights in areas as diverse as immigration and citizenship, land ownership and education, business, and, ultimately, government contracting.

Congress' findings, which are well supported by numerous other sources, demonstrate the existence of direct discrimination against Asian-Pacific-American-owned businesses in the awarding of federal government contracts. In addition to direct discrimination, other, more insidious means of racial discrimination also prevent Asian-Pacific Americans from competing for federal government contracts. By limiting available opportunities for funding, training, and experience, racial discrimination blocks Asian-Pacific Americans from establishing contracting businesses in the first instance. Then, by excluding Asian-Pacific Americans from the "old boy" networks critical to contracting decisions, racial discrimination prevents even those Asian-Pacific Americans who are able to start businesses from competing on a fair basis for many government contracts. Racial discrimination further blocks fair competition because it often results in, among other things, higher price quotations from suppliers, bid-rigging, and blocked access to bonding and financing from commercial lenders.

The continuing history of discrimination more than justifies the DBE Program's rebuttable presumption that Asian-Pacific Americans are disadvantaged as a result of

racial discrimination in competing for federal contracts. Accordingly, this Court should uphold the Court of Appeals' conclusion that the DBE Program satisfies strict scrutiny.

ARGUMENT

I. INTRODUCTION

It is well established that a federal program may constitutionally apply race-conscious remedies so long as it is narrowly tailored to serve a compelling governmental interest. *See, e.g., Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 235-36 (1995) ("*Adarand I*"); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 507-08 (1989). The scrutiny given to such a program, although strict, is not fatal. *See Adarand I*, 515 U.S. at 237. Here, the Court of Appeals, applying strict scrutiny, correctly agreed with the government's argument that the DBE Program was an appropriate means of "remedying the effect of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups." *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147, 1164 (10th Cir. 2000) (internal citation omitted) ("*Adarand II*"). The Court of Appeals correctly found that the DBE Program was narrowly tailored to further the government's compelling interest in "eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies." *Id.* at 1176. The Court of Appeals based this conclusion on a detailed review of Congress' substantial findings regarding discrimination against minorities in public contracting.

Petitioner challenges the Court of Appeals' decision, asserting, among other things, that the government failed to demonstrate that the Program serves a compelling interest. Petitioner urges this Court to adopt the view that the strict scrutiny requirements never can be satisfied by a racial classification in government contracting, *see* Petitioner's

Brief on the Merits ("Pet. Brief") at 21-22, a view that this Court already rejected in *Adarand I*. *See Ararand I*, 515 U.S. at 237 ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'") (citation omitted); *see also Croson*, 488 U.S. at 493-94 (remedying past discrimination is a compelling governmental interest); *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 301-02 & n.41 (1978) (discussing government authority to take remedial measures to alleviate past discrimination). Petitioner also takes issue with the evidence that racial discrimination causes racial disparities in the contracting industry and asserts that Congress made inadequate findings even with respect to the fact of discrimination. *See* Pet. Brief at 28 (speculating that Congress' motivation was "racial politics," not remedying discrimination).

Contrary to Petitioner's assertions, and as the Court of Appeals recognized, Congress found an extensive history of discrimination that disadvantages minority-owned businesses, and Asian-Pacific-American-owned businesses in particular, in the context of government contracting. *See infra* § III.[2] In the DBE Program, Congress sought to remedy this history of discrimination by creating a rebuttable presumption that individual members of certain historically discriminated-against groups, including Asian-Pacific Americans, have suffered social and economic disadvantages that justify limited remedial measures that allow minorities

[2] *See also* 144 Cong. Rec. H3945-02, H3957 (1998) (statement of Rep. Norton) (debate over Conference Report on H.R. 2400, Transportation Equity Act for the 21st Century) (referencing twenty-nine Congressional hearings on discrimination in public contracting between 1980 and 1995 to support the proposition that "there is a raft of evidence of discrimination in the transportation construction industry.")

to compete fairly for government contracts.[3] Congress' findings more than justify this rebuttable presumption.

This brief describes the widespread discrimination against Asian-Pacific Americans that justifies the DBE Program's rebuttable presumption that Asian-Pacific-American-owned businesses are disadvantaged in government contracting. First, this brief discusses the history of pervasive discrimination against Asian-Pacific Americans that served as the context for Congress' establishment of the DBE Program. Next, this brief discusses the extensive evidence (in both the congressional findings and in academic and statistical studies) of discrimination against Asian-Pacific Americans in public contracting. The brief demonstrates not only that Asian-Pacific Americans are underutilized in public contracting, but also that discrimination in numerous areas related to contracting prevents them from competing on an equal basis for public contracts.

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[3] Because the DBE Program employs a rebuttable presumption, the Program does not go as far as other programs that the Court has considered, such as the set-aside program in *Croson* or the quota program in *Bakke*. To the contrary, if individual members of traditionally disadvantaged groups have overcome the effects of present and past discrimination so that they no longer are disadvantaged, the presumption may be rebutted. *See* Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1101(b), 112. Stat. 107, 113 (1998); 49 C.F.R. § 26.67 (2001) (discussing rebuttable presumption criteria). Indeed, as the DBE Program achieves its goals, the presumption will be rebutted more and more frequently. Additionally, Congress provided for companies owned by members of groups other than specified racial or ethnic minorities to qualify as DBEs where those individuals can show that they have suffered qualifying disadvantage. *See id*. Indeed, Petitioner itself has applied for and been granted DBE status under Colorado's DBE program. *See Adarand II*, 228 F.3d at 1157.

II. CONGRESS ENACTED THE DBE PROGRAM IN THE CONTEXT OF A CONTINUING HISTORY OF WIDESPREAD DISCRIMINATION AGAINST ASIAN-PACIFIC AMERICANS

The discrimination in government contracting addressed in the DBE Program must be understood in the context of a widespread history of racial discrimination that has affected Asian-Pacific Americans in virtually every aspect of life – from citizenship to immigration; from fundamental personal rights to business and professional life; and, ultimately, in government contracting. Unfortunately, discrimination against Asian-Pacific Americans is not merely a problem of the past; it continues to this day. Thus, Congress' attempt to remedy discrimination in the government contracting context represents an effort to begin to break the cycle of discrimination and disadvantage.

A. Asian-Pacific Americans Historically Have Suffered Extensive Racial Discrimination

From the very beginnings of American history, Asian-Pacific Americans have faced governmental discrimination that has prejudiced their ability to exercise the most basic rights. In 1790, among the first acts of the new federal Congress was to bar Asian-Pacific Americans and other minorities from becoming naturalized citizens. *See, e.g.*, Naturalization Act of March 26, 1790, ch. 3, 1 Stat. 103 (1790) (repealed 1795).[4] Starting in the mid-1800's,

[4] This prohibition lasted until 1952 for people of Japanese and Korean ancestry. *See* Immigration & Nationality Act, Pub. L. No. 82-414, ch. 477, 66 Stat. 163 (1952); *see also* Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 Wm. & Mary L. Rev. 1, 17 & n.59 (1994) (discussing repealing of discriminatory immigration statutes). The courts, too, permitted exclusionary discrimination against Asian-Pacific Americans in citizenship. *See, e.g.*, *United States* v. *Thind*,

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immigration laws severely restricted the ability of Asian-Pacific Americans to enter the United States.[5] Indeed, between 1917 and 1965, the United States enacted no fewer than five statutes intended to eliminate or limit Asian and Pacific Islander immigration.[6] Indeed, it was not until 1965 that discriminatory quotas were halted against Asian Pacific immigration.[7] Discrimination against Asian immigration

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261 U.S. 204, 214 (1923) (upholding congressional intent to "exclude Asiatics generally from citizenship"); *Ozawa* v. *United States*, 260 U.S. 178 (1922) (holding Japanese immigrant continuously residing for twenty years in the U.S. to be ineligible for citizenship).

[5] *See, e.g.*, Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943) (generally suspending entry of Chinese laborers to the United States for a period of ten years); Angelo N. Ancheta, *Race, Rights and the Asian American Experience* 25 (1998) ("*Race, Rights"*) ("The Page Law of 1875 [ch. 141, 18 Stat. 477 (1875)] was directed at preventing the entry of prostitutes, but immigration officials limited the entry of all Chinese women by classifying them as prostitutes").

[6] *See, e.g.*, U.S. Dep't of State, *Papers Relating to the Foreign Relations of the United States* vol. 2 at 339 (1939) (collected correspondence comprising the so-called "Gentleman's Agreement," which limited Japanese immigration); Act of February 5, 1917, Pub. L. No. 64-301, ch. 29, 39 Stat. 874 (1917) (repealed 1952) (banning immigration from almost all countries in the Asia-Pacific region); Act of May 19, 1921, Pub. L. No. 67-5, ch. 8, 42 Stat. 5 (1921) (repealed 1952) (limiting immigration based on nationality); Immigration Act of 1924, Pub. L. No. 68-139, ch. 190, 43 Stat. 153 (1924) (limiting Asian immigration) (repealed 1952); Tydings-McDuffie Act of 1934, Pub. L. No. 73-127, ch. 84, 48 Stat. 456 (1934) (repealed 1952) (imposing annual quota of fifty Filipino immigrants).

[7] *See, e.g.*, William Pham, *Section 633 of IIRIRA: Immunizing Discrimination in Immigrant Visa Processing*, 45 U.C.L.A. L. Rev. 1461, 1471 (1998) ("Pham") (explaining how "Congress enacted the Immigration and Nationality Act of 1965 and replaced the archaic national origins quotas system with a more neutral preference system based primarily on U.S. family ties and employment needs"); Katherine Tonnas, *Out of a Far Country: The Sojourns of Cubans, Vietnamese, Haitians, and Chinese to America*, 20 S.U. L. Rev. 295 (1993)

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continued through the 1980s and 1990s in the often uneven reactions to the recent waves of Vietnamese and Chinese political refugees.[8] The relatively few Asians and Pacific Islanders who overcame the discriminatory immigration laws faced high barriers to the exercise of the rights that this country holds out as the promise of its founding, including (among others) the rights to own land,[9] to marry,[10] and to obtain an education.[11] Perhaps the most egregious example of the effects of discrimination against Asian-Pacific Americans, though, was the brutal internment of approximately 120,000 Japanese Americans during World

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(… Continued)
("Tonnas") (Chinese immigration faced "an age of exclusion from 1882-1965").

[8] *See, e.g.*, Pham, 45 U.C.L.A. L. Rev. at 1474-80 (discussing history of discrimination in visa and refugee applications of Vietnamese immigrants); Tonnas, 20 S.U. L. Rev. at 323-29, 338-43 (discussing both Vietnamese and Chinese immigration).

[9] *See* discussion *infra*, pp. 12-13.

[10] *See, e.g.*, Ancheta, *Race, Rights*, at 30 (noting that laws prohibiting intermarriage with Asians were "common in Western states, and many laws remained on the books until the United States Supreme Court ruled them to be unconstitutional in [*Loving* v. *Virginia*, 388 U.S. 1 (1967)]").

[11] Like other racial minorities, Asian-Pacific American children were required to attend segregated schools. *See, e.g.*, Ronald Takaki, *A History of Asian Americans: Strangers From A Different Shore* 201 (1998) (stating that "the San Francisco Board of Education directed principals to send all Chinese, Japanese and Korean children to the Oriental School") (internal quotations omitted); *see also Lum* v. *Rice*, 275 U.S. 78, 86-87 (1927) (applying separate-but-equal doctrine of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), to Chinese citizens). Asian-Pacific Americans have continued to face hardships resulting from discriminatory rules regarding language usage. *See, e.g.*, U.S. English, Inc. official website, *available at* http://www.us-english.org/inc/ (visited July 3, 2001) (noting that 26 states currently have English-only statutes on their books).

War II. *See Korematsu* v. *United States*, 323 U.S. 214 (1944).[12]

Asian-Pacific Americans also have suffered discrimination in business. For example, between 1873 and 1884, San Francisco enacted fourteen ordinances with a discriminatory intent to restrict the economic growth and advancement of Chinese laundries. *See Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74 (1886) (striking down ordinances as a violation of equal protection because of the discriminatory manner in which they were enforced); *see also* Sucheng Chan, *Asians: An Interpretive History* 94 (1991) ("*Interpretive History*") (documenting "[t]he harassment Chinese importers [and laundrymen] experienced") .

Further, until as recently as the late 1940s, several states prohibited Asian-Pacific Americans, including American-born citizens of Asian descent, from owning land. *See* Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 Cal. L. Rev. 7 (1947) (detailing the history of preclusion of Japanese Americans from land-ownership in eleven states). Under so-called "Alien Land Laws," peoples of Asian descent could not buy agricultural land or lease it for long periods, preventing them from establishing agricultural businesses. *See, e.g.*, Ancheta, *Race, Rights* at 29 (discussing how California's Alien Land

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[12] Ironically, to support its position, Petitioner erroneously suggests that *Korematsu* stands for the proposition that this Court allows racial classifications only in the face of threats to national security such as espionage and sabotage, *see* Pet. Brief at 19, a proposition that directly contradicts *Adarand I*. *See Adarand I*, 515 U.S. at 236 (recognizing that the internment of Japanese Americans upheld in *Korematsu* was "illegitimate," and citing Congressional finding that "these actions [of relocating and interning civilians of Japanese ancestry] were carried out without adequate security reasons . . . and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership" (alterations in original; citation omitted).

Law of 1913 prevented Japanese from establishing agricultural businesses by "prohibiting [Japanese] persons ineligible for citizenship from purchasing land in the state and by limiting lease terms to three years or less"). In 1920, "California's voters supported an initiative . . . that ended the ability of Asian aliens to lease farm land altogether." Chan, *Interpretive History*, at 47. That same initiative also prohibited them from purchasing land through corporations or in the names of their American-born children. *See id.* Following California's example, numerous other states enacted similar laws. *See id.; see also* Ancheta, *Race, Rights*, at 29-30; Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. Rev. 37 (1998). This Court upheld these discriminatory laws. *See, e.g.*, *Porterfield* v. *Webb*, 263 U.S. 225 (1923) (upholding the Alien Land Act of California); *Terrace* v. *Thompson*, 263 U.S. 197 (1923) (affirming similar Washington state discriminatory land law). The last of these discriminatory land laws were not repealed or struck down until the early 1950's. *See, e.g.*, *Fujii* v. *California*, 242 P.2d 617 (Cal. 1952) (striking down California's Alien Land Law); *Namba* v. *McCourt*, 204 P.2d 569 (Or. 1949) (striking down Oregon's Alien Land Law).

B. Discrimination Against Asian-Pacific Americans Continues To This Day

Discrimination against Asian-Pacific Americans continues to this day. As recently as 1994, the United States Commission on Civil Rights found that being of "Asian descent" had a "negative effect" on an employee's chance to move upward into management. Deborah Woo, *The Glass Ceiling and Asian Americans: A Research Monograph* 42 (July, 1994) (unpublished manuscript) (citing to the U.S. Comm'n on Civil Rights, *Economic Status of Americans of Asian Descent: An Exploratory Investigation* (1988)) ("*Glass Ceiling and Asian Americans*") (copy lodged with

the Clerk of the Court). Indeed, one recent study stated that Asian-Pacific Americans "face the worst chance [among all racial groups] of being advanced into management positions." LEAP Asian Pacific American Pub. Policy Inst. & UCLA Asian American Studies Ctr., *The State of Asian Pacific America* 215-216 (1993). Asian-Pacific Americans have the lowest representation in the senior ranks in the federal government. *See* U.S. General Acc'g Office, *Senior Executive Service: Diversity Increased in the Past Decade* 109 (March 2001) (copy lodged with the Clerk of the Court) (finding that, in 2000, only 1.64 % of career senior executives in the federal government were Asian-Pacific Americans). Also, a study of senior executives of Fortune 500 industrial corporations and Fortune 500 service firms conducted in 1989 found that only 0.3% of survey respondents reported having "Oriental" ethnic origin. Korn/Ferry Int'l, *Executive Profile: A Decade of Change in Corporate Leadership* 23 (1990) (copy lodged with the Clerk of the Court). Asian-Pacific Americans also experience a lower return on their education than other groups. *See Woo*, *Glass Ceiling and Asian Americans*, at 44 (discussing Asian-Pacific Americans' "inability to find job opportunities commensurate with [their] education and training").

Moreover, as business owners today, Asian-Pacific Americans experience great disparities in their revenues compared to white-owned businesses. In 1987, Asian-Pacific Americans owned 2.6 % of all U.S. businesses, but revenues from Asian-Pacific-American-owned businesses accounted for only 1.7 % of total revenues from all businesses. *See* NAPALC, *Asian Pacific Americans and Public Contracting*, 4 (1997) ("Public Contracting") (copy

lodged with the Clerk of the Court).[13] Indeed, 1987 annual receipts for Asian-Pacific-American-owned businesses averaged $107,000, well below the $189,000 average for businesses owed by white men. *See id.* at 4-5 (citation omitted). In fact, over one-third of Asian-Pacific-American-owned businesses had receipts of less than $10,000. *See id.* at 6 (citation omitted).

Perhaps most ominous, though, is a recent study that shows that many Americans continue to harbor deeply racist views against Asian-Pacific Americans. This study found that approximately 25% of the American public hold decisively negative views of Chinese Americans, and that 32% believe that Chinese Americans are more loyal to China than to the U.S. *See* Committee of 100, *American Attitudes Toward Chinese Americans and Asian Americans* 12, 15 (Apr. 25, 2001), *available at* http://www.committee100.org/amer-att/amer-att.pdf. Indeed, the survey showed that 46% of those surveyed believe that "Chinese Americans passing on information to the Chinese government is a problem," *id.* at 25, and 23% said that they would be "uncomfortable" if an Asian American were elected president, in contrast to 15% who would be uncomfortable with an African-American President. *Id.* at 29. Almost 25% of those polled believe Chinese Americans are "taking away too many jobs from Americans," are "[o]verly aggressive in the workplace," and "have too much power in the business world." *Id.* at 12-13. Moreover, approximately 15% of those polled believed that Chinese Americans were "[m]ore willing than others to use shady practices," and also that Chinese Americans are "two-faced" and "conceited." *Id.* at 13; *see also* Thomas B. Edsall, *25% of U.S. View Chinese Americans Negatively,*

[13] *Amici* believe this report to be among the most comprehensive studies available on discrimination against Asian-Pacific Americans in public contracting.

Poll Says, Wash. Post, Apr. 26, 2001, at A4 (discussing Committee of 100 survey results).[14] Disturbingly, the underlying racism that gave rise to *Korematsu* still appears to be with us today, and forms the backdrop that this Court should consider in assessing Congress' efforts to remedy discrimination in the public contracting context.

III. THE DBE PROGRAM ADDRESSES THE SUBSTANTIAL EVIDENCE OF DISCRIMINATION AGAINST ASIAN-PACIFIC AMERICANS IN GOVERNMENT CONTRACTING

In creating the DBE Program, Congress recognized that the broad history of discrimination against Asian-Pacific Americans includes discrimination in government contracting. Congress repeatedly has considered the issue of discrimination against Asian-Pacific Americans in government construction procurement contracts, finding each time that racial discrimination against Asian-Pacific Americans and its continuing effects have distorted the market for public contracts. *See infra* § III.A. Congress' findings and other evidence show that, in the government contracting context, Asian-Pacific Americans are victims of both direct discrimination, which prevents them from receiving government contracts, and indirect discrimination,

[14] The results of this survey are supported by other examples of discriminatory behavior in public life. High-profile incidents include former Senator Alfonse d'Amato's caricaturing Judge Lance Ito (a U.S.-born citizen who speaks with a standard American accent) in "an exaggerated Japanese accent," *see* Cynthia Kwei Yung Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 Hastings Women's L.J. 165, 176 (1995), and recent incidents of race-based violence against Asian-Pacific Americans, *see* NAPALC, *Audit of Violence Against Asian-Pacific Americans* (1999) (copy lodged with the Clerk of the Court); Jerry Kang, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926 (1993).

which prevents them from acquiring the training, connections, and financing to compete on an equal basis for government contracts. Those findings necessitate and justify the rebuttable presumption at the heart of the DBE Program that Asian-Pacific-American-owned businesses are disadvantaged in government contracting.

A. Congress Made Extensive Findings That Asian-Pacific Americans Suffer Direct Discrimination In Government Contracting

Prior to the enactment of the DBE Program, Congress made findings in the Small Business Act ("SBA"), 15 U.S.C. § 631, that minorities, including Asian-Pacific Americans, are "socially disadvantaged because of their identification as members of a group that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control." 15 US.C. § 631(f)(1)(B) (2000). Moreover, federal courts considering allegations of racial discrimination against Asian-Pacific Americans in public contracting have recognized Congress' extensive findings in the SBA. As one federal court explained, "Congress has made findings specific to Asian Americans . . . and post-enactment evidence bolsters those findings." *Rothe Dev. Corp.* v. *United States Dept. of Defense*, 49 F. Supp. 2d 937 (W.D. Tex. 1999) (holding that congressional findings regarding discrimination in public contracting against Asian-Pacific Americans and others were sufficient to justify a race-conscious federal program that benefited a Korean-American contractor). *See also M.C. West, Inc.* v. *Lewis*, 522 F. Supp. 338, 347 (D. Tenn. 1981) (stating that "MBE programs . . . of the Secretary of Transportation are valid efforts to promote minority businesses. . . . Congress has found that minority businesses are in need of remedial assistance . . . particularly in the construction industry. . . .").

To ensure that the DBE Program complies with this Court's ruling in *Adarand I*, Congress made specific findings regarding racial discrimination against Asian-Pacific Americans and others in public contracting. *See* Notice: Proposed Reforms to Affirmative Action in Federal Procurement, *Appendix – The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26042, 26050-63 (May 23, 1996) ("*Compelling Interest*") (citing approximately thirty congressional hearings since 1980 regarding discrimination against MBEs). For instance, Congress found that "11 percent of Asian business owners had experienced known instances of discrimination in the form of higher quotes from suppliers." *Id.* at 26061. Congress further found that "studies show underutilization by state and local governments" of businesses owned by Asians. *Id.* In particular, Congress found that Asian-Pacific-American-owned businesses receive, on average, only 60 cents of each dollar "of state and local expenditures that those firms would be expected to receive, based on their availability." *Id.* at 26061-62.

Statements by members of Congress also brought to light specific evidence of discrimination in government contracting against Asian-Pacific Americans. For example, Representative Norton stated that affirmative action programs are "still desperately needed." 144 Cong. Rec. H3945-02, 3959 (May 22, 1998) (statement of Rep. Norton). She explained that an Urban Institute Report found that disparities between the number of contracts awarded to Asian-Pacific-American-owned businesses and the number they would have been expected to receive were "more pronounced" in areas where there were no affirmative action programs in place, and that, in such instances, the percentage of awards for Asian-Pacific Americans fell to a mere 13% of what would be expected in the absence of discrimination. *See id.; see also* 144 Cong. Rec. S1395-01, 1430 (Mar. 5,

1998) (statement of Sen. Kennedy) (the DBE Program gives minorities, including Asian-Pacific Americans, "a fair chance to succeed" in the face of clear and convincing evidence of discrimination).

In implementing the DBE Program, the Department of Transportation recognized Congress' findings with respect to discrimination against Asian-Pacific Americans in the government contracting field. The Department stated, "Congress has determined that Asian Americans are presumptively disadvantaged (a judgment that can be supported by a substantial history of discrimination against many Asian groups in this country)." Participation by Disadvantaged Business Enterprises in the Dep't of Transportation Programs, 62 Fed. Reg. 29548, 29550 (May 30, 1997).

Current findings support Congress' conclusions. To keep Congress abreast of the effects of the Department of Transportation's DBE Program, the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 3009, 112 Stat. 107, 357 (1998), requires the U.S. General Accounting Office ("GAO") to conduct periodic assessments of the DBE Program. In its June 2001 report, the GAO notes industry officials at the agencies it surveyed cited factors such as limited access to bonding, working capital and credit, and prequalification requirements as limiting the ability of DBEs to obtain contracts. *See* U.S. General Accounting Office, *Report to Congressional Committee: Disadvantaged Business Enterprises* 7 (June 2001) ("June 2001 GAO Report") (copy lodged with the Clerk of the Court).

Congress' findings are well supported by academic and statistical studies, which have found particularly pernicious discrimination against Asian-Pacific Americans in government contracting. *See, e.g.*, Theodore Hsien Wang, *Swallowing Bitterness: The Impact of the California Civil*

Rights Initiative on Asian-Pacific Americans, Ann. Survey Am. L. 463 (1995).

> Numerous studies conducted by local governments in California since 1989 have concluded that Asian American businesses continue to face significant discriminatory barriers in competing for government contracts. For instance, from 1990-92, Asian-owned businesses comprised 25.5% of the professional service engineering market in Richmond, California, but received only 3.2% of the city's contracts. In addition, a study of Contra Costa County's procurement practices found that Asian prime contractors failed to receive a single non-federally-funded construction contract during a two-year period in which the county did not have an affirmative action policy. Once the county enacted an affirmative action policy in 1987, about 7% of the county's prime construction dollars were awarded to Asian-owned businesses.

Id. at 469.

Similarly, the San Francisco Unified School District recently reported that it had used discriminatory bidding and contracting procedures, rejecting bids of minority contractors even if they were the lowest bids, and had withheld information from minority contractors, including failing to provide sufficient notice to them. *See* BPA Economics, Inc., *MBE/WBE Policy and MBE/WBE Disparity Study*, Vol. II, Part IV pp. 5-14 (Jan. 1991) (relevant excerpts lodged with the Clerk of the Court) (documenting discrimination against Asian-Pacific American contractors in San Francisco); *see also* National Economic Research Associates ("NERA"),

The Utilization of Minority and Women-Owned Business Enterprises by the City of Hayward, Executive Summary, Table B, and Ch. 6 (March 1993) ("*Hayward Report*") (copy lodged with the Clerk of the Court) (documenting discrimination against Asian-Pacific-American-owned businesses in Hayward, California). California's experience is typical of the discrimination that exists nationwide against Asian-Pacific-American-owned businesses in government contracting. *See, e.g*, Harvey Gee, Comment, *Changing Landscapes: The Need for Asian Americans To Be Included in the Affirmative Action Debate*, 32 Gonz. L. Rev. 621, 638 & n.102 (1996-97) (noting Asian-Pacific American contractors' complaints of lack of inclusion in city construction projects in St. Louis, Missouri).

B. Racial Discrimination Also Indirectly Disadvantages Asian-Pacific Americans In Government Contracting

Congress' findings and other evidence of direct discrimination against Asian-Pacific Americans in the government contracting context illustrate the compelling need to remedy such discrimination. Congress, though, recognized additional evidence that shows that Asian-Pacific Americans also struggle with indirect forms of discrimination that insidiously prevent them from starting and developing contracting businesses. As Congress noted, "[m]inority-owned firms face troubles" in obtaining financing to begin a business; once formed, minority-owned business face similar difficulties in gaining access to capital for investments necessary for business development." *Compelling Interest*, 61 Fed. Reg. at 26058.[15] As

[15] The situation that Asian-Pacific American contractors confront is analogous to that faced by the minority plaintiffs in *White* v. *Regester*, 412 U.S. 755 (1973). There, the Court found not simply that the percentage of minority legislators was less than the percentage of

(Continued …)

demonstrated below, the relatively few Asian-Pacific Americans who are able to start businesses face discriminatory hurdles that limit their ability to compete for government contracts.

1. Discrimination In Financing And Lending

Financial institutions historically have utilized discriminatory practices against Asian-Pacific Americans and other minorities, including requiring minorities to meet criteria different from those required of white borrowers and requiring greater collateral from minorities than from white business owners. Congress has recognized that "[o]ver and over again, studies show that minority applicants for business loans are more likely to be rejected and, when accepted, receive smaller loan amounts than nonminority applicants with identical collateral and borrowing

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(… Continued)
minority voters in certain counties in Texas but also that minority voters "generally [were] not permitted to enter into the political process in a reliable and meaningful manner." *Id*. at 765 (discussing African-American voters); *see also id*. at 769 (discussing Mexican-American voters). The Court based these findings on evidence that minorities had experienced a history of discrimination, that they continued to suffer from the effects of such discrimination, that certain legal requirements (though not in themselves invidious) made it more difficult for minority candidates to win office, and that African-Americans were not slated by a white-dominated organization that effectively controlled Democratic Party candidate slating in Dallas County. *See id*. at 766-68. Here, there is a disproportion between the percentage of Asian-Pacific American-owned businesses and the percentage of contracts awarded to Asian-Pacific-American-owned businesses. But here, as in *White*, there is much more than a mere disproportion. Here, in a manner analogous to that faced by the minorities in *White*, there is evidence that minorities are not permitted to participate in the contracting process in a meaningful matter because of the combination of a variety of forms of discrimination discussed below.

credentials." *Compelling Interest*, 61 Fed. Reg. at 26057-58; *see also* NERA, *Hayward Report*, at 6-14; *see also* Willie E. Rice, *Race, Gender, "Redlining," and the Discriminatory Access to Loans, Credit and Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts, 1950-1995*, 33 San Diego L. Rev. 583, 683 & nn. 11, 138 (1996).

As an illustration, according to the 1987 Economic Census, 16.9% of businesses owned by white males were started by means of a commercial bank loan, versus only 13% of Asian-Pacific-American-owned businesses. *See* The Urban Institute, *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?* 37 (October 1996) (copy lodged with the Clerk of the Court) (citing the 1987 U.S. Economic Census). This means that Asian-Pacific Americans are only about 75% (13% divided by 16.9%) as likely as their white counterparts to begin their businesses through commercial bank financing. For many Asian-Pacific Americans who are unable to borrow money from commercial lenders to start businesses, the only recourse is either to borrow from families or friends or to forego any hope of starting a business. *See id.* at 38 ("Asian business owners . . . rely far more heavily on family and friends as sources of start-up capital than do nonminority males."); *Economic Diversity, Issues & Policies* 49 (Paul Ong ed. 1994) (finding that 20% of Asian-Pacific Americans relied on loans from family and friends as their primary source of start-up capital, making them twice as likely as non-minorities to do so).

2. Discrimination In The Development Of Human Capital

Asian-Pacific Americans also experience racial discrimination in the development of the human capital necessary to compete in public contracting. Important

factors for success in public contracting include a business owner's experience and contacts. As Congress found, however, deep-rooted discrimination in the contracting field stymies Asian-Pacific Americans' ability to gain that necessary experience. *See Compelling Interest*, 61 Fed. Reg. at 25055-60. Prior to the 1960s, minorities, including Asian-Pacific Americans, "were segregated into menial, low wage positions," which "left minorities unable to gain the experience needed to operate all but the smallest businesses . . . located in segregated neighborhoods, and serving an exclusively minority clientele" and precluded them from developing contacts in mainstream business communities. *Id.* at 26055. Without experience and contacts, Asian-Pacific Americans have greater difficulty than their white competitors developing business, securing contracts, and obtaining bonding. *See id.* at 26060 (noting that experience often is required to obtain surety bonds necessary to secure large government contracts).

Because Asian-Pacific Americans were denied the equal opportunity even to enter the United States until a mere forty years ago, *see supra* § II.A., many are recent immigrants. As a result of this discriminatory exclusion by the federal government, Asian-Pacific Americans, as a group, have been deprived of the opportunities to obtain some of the same business experience, including the opportunity to inherit family businesses, as their white counterparts. Indeed, Asian Pacific American business owners have the disadvantage of having had little work experience prior to starting their own businesses. Nearly a quarter of Asian Pacific American business owners began their businesses with less than two years of work experience, and another third with two to nine years of work experience. These figures contrast sharply with the figures reflecting the work experience of white male business owners, 54% of whom have had at least ten years of work experience. *See* U.S. Bureau of Census, *1992 Economic Census: Characteristics of Business Owners* at 41,

available at http://www.census.gov/prod/3/97/pubs/cbo-9201.pdf.[16]

3. Discrimination By Labor Unions

Asian-Pacific Americans also suffer discrimination from unions, membership in which often is a prerequisite to obtaining contracting jobs. *See Compelling Interest*, 61 Fed. Reg. 26,055 ("Discrimination by unions has been recognized as a major factor in preventing minorities from obtaining employment opportunities in the skilled trades.") Asian-Pacific Americans historically have faced great obstacles in the form of discriminatory legislation blocking their membership in unions at both the federal and local levels. *See* Gregory Defreitas, *Unionization Among Racial and Ethnic Minorities*, 46 Indus. and Labor Relations Rev. 284 (1993) (discussing how citizenship and immigration laws were used to exclude Asian-Pacific Americans from unions). In addition to the legal barriers that kept Asian-Pacific Americans out of unions, they also were subjected to frequent employer efforts to forestall union solidarity through pitting minority employees against union efforts and to "explicit bans on Asian Pacific American membership in most AFL unions." *Id.* at 290. "As a result, at least until the 1940s, Asian Pacific American unionization was often limited to ethnically segregated 'blood unions' or to guild-

[16] The relatively short time spent prior to starting their own businesses may result from the "glass ceiling" effect, where minorities are unable to advance and thus begin to believe that starting their own businesses will provide better opportunities. This belief is not unreasonable in light of the findings of the Federal Glass Ceiling Commission, which documented the paucity of Asian-Pacific Americans in corporate, upper-management, and executive positions. The Federal Glass Ceiling Commission, *Good for Business: Making Full Use of the Nation's Capital* 111 (Mar. 1995) (relevant excerpts lodged with the Clerk of the Court) (finding that "Asian and Pacific Islanders feel they are being held back by a glass ceiling"); *see also supra* § II.B.

like associations confined to joint-credit pools and social events." *Id.*

As recently as the late 1980s, when 19.2% of all American workers belonged to a union, only 12.5% of Asian American workers were union members, the lowest percentage of any ethnic group, including non-minorities. *Id.* at 292; *see also id.* ("Asian workers average the lowest [union] coverage of all groups."). Moreover, "[e]ven after Title VII went on the books, . . . unions precluded minorities from membership through a host of discriminatory policies, including the use of tests and admissions criteria which have no relation to on-the-job skills and which have a differential impact on minorities." *Id.* (internal quotation marks and brackets omitted); *see also* NAPALC, Public Contracting, at 36 ("many unions and trade associations still practice both overt and subtle race . . . discrimination").

4. Discrimination In Bonding

Asian-Pacific Americans also face discrimination in bonding, another prerequisite for many government contracts. Almost half (42%) of minority business owners attending a City of Hayward public hearing cited bonding as a particular problem. *See Hayward Report*, Executive Summary, p. 1 of Table B. Many Asian-Pacific Americans "expressed dissatisfaction with their access to information about bond requirements, and indicated that surety agents sometimes provided them with unclear information about denials or changes in requirements." NAPALC, Public Contracting, at 31. Also, "[s]ome non-bonded minority firms indicated that the financial commitment required of them for a bond was too large for them to accept." *Id.*

Further, a U.S. General Accounting Office report states that many minority construction firms, including those owned by Asian-Pacific Americans, no longer even attempt

to secure surety bonds for reasons including the amount of the necessary financial commitment. *See* U.S. General Acc'g Office, *Small Business: Construction Firms' Access to Surety Bonds* 47 (June 1995) ("June 1995 GAO Report") (copy lodged with the Clerk of the Court). Specifically, as compared to white-male-owned firms, minority firms, including Asian Pacific American firms "[1] less frequently reported that they were not required to obtain bonds or did not bid on bonded jobs; [2] more frequently did not apply for bonds because they did not think they would get them; [3] were more likely to use cash instead of bonds to secure construction contracts; and [4] more frequently performed work in partnership or in a joint venture with a bonded firm." NAPALC, Public Contracting, at 32 (citing the June 1995 GAO Report).

Moreover, the cost of bonding can vary significantly, which has a disproportionate effect on minorities when bonding agents often discriminate. For instance, "the cost of a $1 million bond for a well-established firm would be approximately $13,000; that same bond could cost three or four times more for a new, small, and, inexperienced firm." George R. La Noue & John C. Sullivan, *Race Neutral Programs in Public Contracting*, 55 Public Admin. Rev. 348, 352 (1995) ("*Race Neutral Programs*"). Because most Asian-Pacific-American-owned firms are small and inexperienced, *see* discussion of 1992 Economic Census, *supra* § III.B.2. (depicting lack of experience of Asian Pacific American firm owners), this cost differential consequently has a racially discriminatory effect. Also, "'[c]haracter, credit, and capability' are the most frequently expressed measures weighed by a surety in making bonding decisions," but "[t]hese factors are inherently discretionary and some believe discriminatory." La Noue & Sullivan, *Race Neutral Programs*, at 352 (noting that one interviewee stated, "The bonding industry is the most racist industry I know of…[u]nderwriting standards are too subjective.").

5. Discrimination By Prime Contractors and Suppliers

Prime contractors are an additional source of discriminatory conduct against Asian-Pacific Americans. As Congress found, "[a]nother factor restricting the ability of minority-owned businesses to compete in both private and public contracting is discrimination allowing non-minority subcontractors and contractors to get special prices and discounts from suppliers which are not available to minority purchasers." *Compelling Interest*, 61 Fed. Reg. at 26061 (internal quotation marks and brackets omitted)); NAPALC, Public Contracting, at 33 (citing numerous reports and finding that Asian-Pacific American and other minority-owned firms had disproportionately fewer opportunities in the construction industry due to, for example, "'bid-shopping' by white-owned prime contractors who, after the bidding process closes, secretly disclose the lowest bid to majority-owned subcontractors to solicit a lower bid"). Suppliers, too, discriminate against minority-owned businesses. *See Compelling Interest*, 61 Fed. Reg. 26061 & n.123 (special prices and discounts given by suppliers to white-owned firms restrict the ability of minority-owned businesses to compete). Indeed, 11% of Asian business owners "had experienced known instances of discrimination in the form of higher quotes from suppliers." *Id.* Numerous other state and local studies have reported similar findings. *See id.* As a result, Asian-Pacific Americans face higher business costs, cannot compete for certain contracts, and, on the contracts that they do win, earn lower profits.

IV. CONCLUSION

Cognizant of the widespread discrimination against Asian-Pacific Americans throughout American history, Congress investigated discrimination in the government contracting field and discovered the sad truth that

discrimination hinders Asian-Pacific Americans at every turn from competing on a fair basis. In light of its findings, Congress recognized its compelling interest in remedying this discrimination and its effects and created the narrowly tailored DBE Program to address that interest. Unlike other affirmative action programs, the DBE Program accomplishes its goal by creating a rebuttable presumption in favor of members of certain groups that Congress found face unfair challenges resulting from a demonstrated history of discrimination in government contracting. With respect to Asian-Pacific Americans, Congress' findings and the substantial evidence of discrimination more than justify that presumption.

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