No. 00-730

IN THE

SUPREME COURT of the UNITED STATES

ADARAND CONSTRUCTORS, INC.,

Petitioner,

– v. –

NORMAN Y. MINETA, Secretary of the United States Department of Transportation, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE NOW LEGAL DEFENSE AND EDUCATION FUND, LAWYERS COMMITTEE FOR HUMAN RIGHTS, AND ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied the strict scrutiny standard in determining that Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling government interest.

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STATEMENT OF INTEREST

Amici curiae are non-profit organizations dedicated to using international and domestic law to promote civil and human rights.[1]

FACTUAL AND PROCEDURAL BACKGROUND

At issue in this case is the Disadvantaged Business Enterprise ("DBE") program of the U.S. Department of Transportation ("DOT"), which implements the congressional mandate—first established in the Small Business Act ("SBA"), and reaffirmed in subsequent legislation—of ensuring that "small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." 15 U.S.C. § 637(d)(1) (1997).

To carry out Congress's mandate, the DBE program must successfully target the disadvantaged. The program therefore establishes several routes through which individuals may qualify. While individuals from certain racial groups are presumed to be socially and economically disadvantaged, that presumption is far from conclusive and may be rebutted by evidence to the contrary. All individuals claiming to be disadvantaged must submit affidavits affirming that they are in fact socially and economically disadvantaged within the meaning of the statute. 49 C.F.R. § 26.67(a)(1); 64 Fed. Reg. 5096, 5136 (1999). Individuals who are not subject to the presumption, but who in fact *are* socially and economically disadvantaged, may also be certified to participate in the program. 49 C.F.R. § 26.67(b)(2). Petitioner, who was not subject to the presumption, was granted DBE certification under the revised program. Pet. App. 7-9.

The DBE regulations specifically prohibit any use of quotas or set-asides. 49 C.F.R. § 26.43; 64 Fed. Reg. 5096, 5107-08 (1999). There are also strict durational limits on the DBE program. Each certified contractor's presumption of social and economic disadvantage lapses after three years, and the DBE program itself expires at the end of six years.

Applying the strict scrutiny test mandated for review of racial classifications by this Court's Equal Protection Clause jurisprudence—to determine whether the program is "narrowly tailored" to advance a "compelling" federal interest—the Tenth Circuit held that the current DBE program passes constitutional muster. First, the court concluded that the government had sufficiently demonstrated a compelling interest in "not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements." Pet. App. 26. Second, the Tenth Circuit concluded that the DBE program, as currently structured, was narrowly tailored when considered in light of factors including the availability of race-neutral alternative remedies, the duration of the race-conscious measures at issue, the program's burden on third parties, and the program's over- or under-inclusiveness. Pet. App. 54-79.

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[1] The separate statements of interest of each of the *amici* non-profit organizations are included in the Appendix. *Amici curiae* state that no party or its counsel has authored this brief in whole or in part, nor has any person or entity other than amici and their counsel made any monetary contribution to its preparation. Letters of consent by the parties to the filing of this Brief have been lodged with the Clerk of this Court.

The Tenth Circuit's holding finds ample support in the record and in this Court's equal protection jurisprudence. Opp. Cert. at 17-30. That holding also finds support in relevant authority under international law and the domestic law of other countries facing similar issues.

SUMMARY OF ARGUMENT

International and comparative law support the lower court's decision upholding the DOT regulations, and are relevant to this Court's consideration of the constitutionality of affirmative action programs for two reasons. First, our common law system embraces an empirical approach to solving legal questions. There is practical value in examining how other constitutional courts have analyzed similar issues. Second, in an era of globalization, this Court maintains its intellectual leadership in the human rights field by acknowledging the international dimension of its decisions.

The United States is party to international treaties which not only permit race-based affirmative action programs, but which may also require the implementation of such programs when failure to do so would perpetuate wrongful discrimination. These treaties, the International Covenant on Civil and Political Rights, December 19, 1966, 999 U.N.T.S. 171, and the Convention of the Elimination of All Forms of Racial Discrimination, March 7, 1966, 660 U.N.T.S. 195, allow race-based affirmative action policies in order to eliminate the effects of past and present society-wide discrimination. These treaties constitute the "Supreme Law of the Land" under the Supremacy Clause, and are thus valuable sources of interpretive guidance to this Court when considering the validity of the DBE program.

Furthermore, the constitutional courts of governments as diverse as Canada, India, South Africa, and the European Union have all confronted challenges to affirmative action policies in recent years. These courts have uniformly upheld government employment policies comparable to the DBE program as consistent with their constitutional guarantees of equal protection. Indeed, the European Court of Justice has utilized a balancing test similar to this Court's strict scrutiny test to find affirmative action programs consistent with the equality guarantees of the Treaty Establishing the European Community. As members of this Court have previously recognized, wisdom gleaned from the opinions of colleagues in foreign jurisdictions can assist this Court in reaching sound conclusions under domestic law.

ARGUMENT

I. INTERNATIONAL AND COMPARATIVE LAW ARE RELEVANT SOURCES OF INTERPRETIVE GUIDANCE

American jurists, including members of this Court, have long recognized that international and comparative law perspectives can provide useful guidance when interpreting federal law. During the nineteenth century, "it was commonplace for American courts to follow developments in English courts." Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45 Fed. Lawyer 20 (Sept. 1998) (hereinafter "O'Connor, *Broadening Our Horizons*"): see, e.g., *New England R.R. Co. v. Conroy*, 175 U.S. 323, 333 (1899) (finding decisions of "this court . . . to be in substantial harmony with the current of authority in . . . English courts" in determining scope of employer liability for employee's injury).

However, the willingness of American courts to consider international perspectives has never been limited to English common law. From its earliest days, this Court has recognized that the laws of the United States should be construed to be consistent with international law whenever possible. *See, e.g.*, *Murray v. Schooner*, 6 U.S. (2 Cranch) 64, 118 (1804): *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801); Sandra Day O'Connor, *Federalism of Free Nations, reprinted in International Law Decisions in National Courts* 13, 15-16 (Thomas M., Franck & Gregory H. Fox eds., 1996) (hereinafter "O'Connor, *Federalism of Free Nations*") (discussing *Charming Betsy's* "acknowledge[ment] that the law of nations is an integral part of [our] jurisprudence"). And over the past fifty years, the Court has continued to recognize the importance of looking to international and comparative law for interpretive guidance in several areas of constitutional law. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 710 & n.8 (1997) (noting that "[i]n almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide," and citing a Canadian decision discussing assisted suicide provisions in Austria, Spain, Italy, Great Britain, the Netherlands, Denmark, Switzerland, and France); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (considering international practices to analyze whether death penalty is constitutional as applied to 15-year-old); *Miranda v. Arizona*, 384 U.S. 436, 486-89 (1966) (looking to experiences in England, India, Scotland, and Ceylon to inform Fifth Amendment analysis of custodial interrogation practices).

In recent years, American judges, including several members of this Court, have signaled an increased willingness to consider international and comparative law when resolving domestic legal questions. In 1989, for example, Chief Justice Rehnquist called on domestic courts to consider international precedents, noting that in light of the establishment of "solidly grounded" constitutional traditions "in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process." William Rehnquist, *Constitutional Courts—Comparative Remarks* (1989), *reprinted in Germany and its Basic Law: Past, Present and Future—A German-American Symposium* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993); *see also Thompson*, 487 U.S. at 851 (O'Connor, J., concurring) (invoking United States' ratification of Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365 (entered into force for United States on Feb. 2, 1956), and its signature of two other international agreements that had not been ratified, as relevant expressions of international practice to consider when evaluating application of death penalty to 15-year-old defendant); *New York v. Quarles*, 467 U.S. 649, 672-74 (1984) (O'Connor, J., concurring) (discussing how Supreme Court analyzed laws of England, India, Scotland, and Ceylon to inform its holding in *Miranda*, 384 U.S. at 486-89, and concluding that "[t]he learning of these countries . . . should be of equal importance in establishing the scope of the *Miranda* exclusionary rule today").

Two broad rationales justify the use of international and comparative law perspectives to help resolve domestic legal issues. First, there is a practical value to drawing upon international law and the experiences of other nations as aids to interpretation. As Justice Holmes wrote, "the life of the law has not been logic, it has been experience." Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881). Justice Breyer, for example, has repeatedly noted the practical value that international and comparative perspectives can have. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (describing Supreme Court majority's approach to campaign finance regulation as consistent with approaches taken by constitutional courts in other nations "facing similarly complex constitutional problems"); *Knight v. Florida*,

528 U.S. 990, 995-96 (1999) (Breyer, J., dissenting) (demonstrating that "this Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances," and citing cases from Canada, India, Great Britain, and Zimbabwe) *Printz v. United States*, 521 U.S. 898, 976-77 (1997) (Breyer, J., dissenting) (discussing how experiences of Switzerland, Germany, and the European Union may "cast an empirical light on the consequences of different solutions to a common legal problem").

Similarly, Justice O'Connor has recognized that "[o]ther legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit." O'Connor, *Broadening Our Horizons*, *supra*, at 20. The possibilities for such learning are particularly strong when those other legal systems "have struggled with the same basic constitutional questions as we have: equal protection, due process, the rule of law in constitutional democracies." *Id.*; *see also Quarles*, 467 U.S. at 672-74 (O'Connor, J., concurring); *United States v. Then*, 56 F.3d 464, 468-69 (2d Cir. 1995) (Calabresi, J., concurring) (noting that German and Italian constitutions "unmistakably draw their origin and inspiration from American constitutional theory and practice" and that as a result, "how [those countries] have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues"). In this regard, the use of international and comparative law is analogous to the use of state law by federal courts for interpretive guidance when giving content to federal law. In such circumstances, state law does not apply of its own force, but instead supplies a useful source of persuasive authority. *See, e.g.*, *Holmberg v. Armbrecht*, 327 U.S. 392, 394-98 (1946) (Frankfurter, J.); *Board of County Comm'rs v. United States*, 308 U.S. 343, 349-52 (1939) (Frankfurter, J.).

Second, acknowledging the international context of this Court's decisions helps to ensure the continued intellectual leadership of the United States in issues involving human rights, and to maintain international respect for our courts in an era of globalization. Throughout its history, this Court has served as a model for countries around the world. As Justice L'Heureux-Dube, of the Supreme Court of Canada, has explained, high courts in other countries have historically looked to the jurisprudence of this Court for guidance, and the United States government has been an international leader in proclaiming the importance of international law and the promotion of human rights. *See* Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 Tulsa L.J. 15, 16-17 (1998) (acknowledging United States's past judicial influence "[i]n the fields of human rights and constitutional principles"). However, as members of this Court have indicated, "United States courts, and legal scholarship in our country, generally, have been somewhat laggard in relying on comparative law and decisions of other countries." Rehnquist, *supra*, at 412; *see also* O'Connor, *Broadening Our Horizons*, at 20 (noting that American judges and lawyers "sometimes seem a bit more insular"); O'Connor, *Federalism of Free Nations*, *supra*, at 18 ("The flow of ideas from our Court to other tribunals around the world is well-chronicled, but we have not seen fit to reciprocate in kind."). To be sure, in many areas of constitutional law this Court has recognized the importance of looking to the laws and experiences of other nations, as noted above. Nevertheless, as Justice O'Connor has argued, we fail to broaden[ ] our horizons" at our peril:

> The vibrancy of our common law legal culture has stemmed, in large part, from its dynamism, from its ability to adapt over time. Our flexibility, our ability to

> borrow ideas from other legal systems, is what will enable us to remain progressive with systems that are able to cope with a rapidly shrinking world.

O'Connor, *Broadening Our Horizons*, *supra*, at 21; *see also* Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 Alb. L. Rev. 417, 421-28 (2000) (arguing that in the 21st century, courts must acknowledge international context of decisions in order to maintain stature). As members of this Court have indicated, increased engagement with the constitutional courts of other countries can help to ensure the continued leadership role of American courts and the United States more generally.

Both of these rationales for considering international and comparative perspectives are relevant to the constitutionality of the DBE program at issue in this case. The United States is not alone among nations in using affirmative action to remedy the lingering effects and current practices of societal discrimination against particular social groups; nor has the United States been alone in requiring that such programs be reconciled with formal guarantees of equality before the law. Moreover, this Court's pronouncements on equality traditionally have carried tremendous weight in international human rights law and the constitutional law of other countries, and that prestige can only be enhanced by considering how other nations have interpreted the equality norms they share with the United States. As Justice Ginsburg has argued, consideration of the experiences of other countries can serve an important function in the analysis of affirmative action:

> [C]omparative analysis emphatically *is* relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world. In this reality, as well as the determination to counter it, we all share.

Ruth Bader Ginsburg & Deborah Jones Merritt, *Lecture: Fifty-First Cardozo Memorial Lecture-Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253, 282 (1999).

II. INTERNATIONAL AND COMPARATIVE LAW SUPPORT THE CONSTITUTIONALITY OF THE DBE PROGRAM

A. Treaties to Which the United States Is a Party Embrace Affirmative Action

In order to eliminate the effects of past and present society-wide discrimination, two treaties ratified by the United States specifically permit race-based distinctions: the International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 2(2), 999 U.N.T.S. 171, 173 (hereinafter "ICCPR" or the "Covenant"); and the Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, art. 2(2), 660 U.N.T.S. 195, 218 (hereinafter "CERD"). Both treaties have garnered wide support within the international community, with 149 countries ratifying the ICCPR and 158 countries ratifying CERD. *See* U.S. Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force as of January 1, 2000*, at 392-93, 449-50 (June 2000) (Dep't of State Pub. No. 9434). The United States does not enter into such treaty obligations lightly, for once ratified, treaties constitute the

"supreme Law of the Land" under the Supremacy Clause. *U.S. Const.* art. VI, cl. 2. As noted above, members of this Court have recognized that international treaties can be a relevant source of guidance when interpreting domestic law. *See, e.g.*, *Thompson*, 487 U.S. at 851 (O'Connor, J., concurring); Ginsburg & Merritt, *supra*, at 255-61; O'Connor, *Federalism of Free Nations*, *supra*, at 15-16. The ICCPR and CERD offer relevant, legitimate sources of guidance for this Court's evaluation of whether the DBE program furthers compelling interests in remedying nationwide discrimination.

Article 26 of the ICCPR provides that "[a]ll persons are equal before the law" and that States Parties "shall . . . guarantee to all persons equal and effective protection against discrimination on any ground such as race." *Id.* at 179. Moreover, States Parties are bound to take "necessary steps" to effectuate rights guaranteed by the Covenant. ICCPR, *supra*, art. 2(2), 999 U.N.T.S. at 173. According to the Human Rights Committee created by the Covenant:

> The principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. . . .Such action may involve granting for a time. . .certain preferential treatment in specific matters. . . .

Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, General Comment 18, ¶ 10, at 2 (1994) (hereinafter "General Comment 18").

The United States affirmed the Human Rights Committee's construction when it ratified the ICCPR. The formal "understanding" adopted at that time states in pertinent part:

> The United States understands distinctions based upon race . . .—as those terms are used in Article 2, paragraph 1 and Article 26—to be permitted which [sic] such distinctions are, at a minimum, rationally related to a legitimate governmental objective.

United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, 31 I.L.M. 645, 655 (May 1992) (earlier draft, adopted later by the Senate and President). The Report of the Senate Committee on Foreign Relations, addressing the ICCPR, also noted that the Human Rights Committee had interpreted the treaty to allow certain forms of "differentiation":

> In interpreting the relevant Covenant provisions, the Human Rights Committee has observed that not all differentiation in treatment constitutes discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

Id.; *see also* Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 Mich. J. Int'l L. 659, 662-63 n.12 (1997).

In sum, the ICCPR has been construed—by the United Nations Human Rights Committee and the United States Senate—to squarely permit affirmative action. Indeed, the Human Rights Committee has indicated that affirmative action may be "require[d]" when States

Parties' failure to take such affirmative steps would perpetuate discrimination. General Comment 18, *supra*, at ¶ 10, at 2.

CERD also embraces affirmative action programs as a proper remedy to redress past wrongs. While the treaty's general provisions outlaw all forms of racial discrimination, *see* CERD, *supra*, arts. 2-5, 660 U.N.T.S. at 216-22, certain "special measures" are expressly excluded from the definition of proscribed racial discrimination. As the Convention states in Article 1, paragraph 4:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

CERD, *supra*, art. 1(4), 660 U.N.T.S. at 216.

Again, the United States has expressly endorsed this approach. In his formal statement to Chairman Claiborne Pell of the Senate Foreign Relations Committee concerning ratification of the treaty, Conrad Harper—who at the time was Legal Adviser to the State Department—noted:

> Article 1(4) explicitly exempts "special measures" taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection.

Marian Nash, *U.S. Practice: Contemporary Practice of the United States Relating to International Law*, 88 Am. J. Int'l L. 719, 722 (1994). Significantly, Article 2 of CERD also imposes on States Parties the *duty* to take special and concrete measures of affirmative action "when the circumstances so warrant." CERD, *supra*, art. 2(2), 660 U.N.T.S. at 218; *see also* Paust, *supra*, at 666-67. In ratifying CERD on November 20, 1994, the United States consented to all of its provisions.

B. High Courts in Other Jurisdictions Have Upheld Affirmative Action Measures

This Court also may find useful the experiences of other countries facing similar social problems in determining whether the DBE program meets the strict scrutiny standard established in *Adarand v. Pena*, 515 U.S. 200 (1995). *Amici* thus present examples of how other nations facing historical and present-day practices of society-wide discrimination have formulated affirmative action policies and how these nations have ensured that their policies do not violate the norm of equality before the law that has become enshrined as a fundamental human rights principle.

1. Other Nations Have Found That National Governments Have a Strong Interest in Supporting Flexible Affirmative Action Policies That Realize Constitutional Guarantees of Equality

The understanding of equality that animates federal affirmative action policies such as the DBE program is not unique to the United States. Nations as diverse as India, Germany, and Canada have adopted the equal protection principle in their constitutions and have wrestled with the proper role of affirmative action programs that seek to realize substantive equality while protecting the individual right to be free from discrimination. In every case, however, these countries have recognized a strong governmental interest—one that would be characterized as "compelling" in the United States—in implementing affirmative action programs designed to dismantle the effects of society-wide discrimination.

Indeed, India, South Africa, Canada, and the European Union, among others, have recognized that historical discrimination can and should be identified and addressed at the highest levels of government. These systems have found the governmental interest in remedying past and current effects of discrimination sufficiently compelling to authorize affirmative action programs in their constitutional equal protection provisions. See *India Const.* art. 16(4) ("Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. . . ."); *Can. Const.* (Constitution Act. 1982) pt. I (Canadian Charter of Rights and Freedoms), ¶ 15(2) ("[The equal protection guarantee] does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, [or] sex. . . ."); *S. Afr. Const.* art. 9(2) ("[To] promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."); *Treaty Establishing the European Community*, Nov. 10, 1997, O.J. (C 340) 1 (1997) art. 141(4) ("[T]he principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."). These constitutions thus provide explicitly what this Court has held implicitly: that the principle of equal protection is not inconsistent with race or gender-conscious action furthering the federal government's compelling interest in redressing discrimination. Indeed, affirmative action programs in these countries have reflected and advanced this compelling interest.

Like the United States, India is a democracy that confronts a history of racial injustice. As Justice Ginsburg recently has observed, the social category of "caste" has subjected particular social groups in India to unrelenting and systematic discrimination. Like racism in the United States and elsewhere, "casteism" in India—and the accompanying practice of "untouchability"—has persisted for generations and has created the need for measures to remedy the society-wide injustices suffered by individuals from lower castes and a variety of different disadvantaged social groups. Ginsburg & Merritt, *supra*, at 273-77.

While formal legal equality prevails in India,[2] the government and Supreme Court of India have recognized that constitutional guarantees of equal opportunity do not suffice to dismantle generations of discrimination. Rather, India has found that in order to remedy the persisting effects of pernicious caste practices, the Indian Constitution's formal guarantees of equality can and must be supplemented with affirmative action measures that directly address the historical disadvantage suffered by members of particular social groups. Indeed, such programs often have been understood in India as a means of vindicating these formal equality guarantees. For example, in *Indra Sawhney v. Union of India*, A.I.R 1993 S.C. 477, the Supreme Court of India held that the affirmative action provisions of Article 16(4) of the Indian Constitution reinforced Article 16(1)'s guarantee of "equality of opportunity" in public employment, rather than creating an exception to this guarantee.[3] The Court held, that "[f]or assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate inequality. Article 16(4) is an instance of such classification." *Id.* at 539.

Similarly, the Supreme Court of India has recognized that certain affirmative action measures are consistent with the "equality before the law" and "equal protection" provisions of Article 14, a provision explicitly patterned after the Fourteenth Amendment to our Constitution.[4] In *Jagdish Saran v. Union of India*, A.I.R 1980 S.C. 820, 831, Justice Krishna Iyer noted that "the process of equalization and benign discrimination are integral, and not antagonistic to the principle of equality." *See id*. at 832 (holding that university admissions policy granting preferential treatment to graduates of a certain college was unconstitutional because these graduates were not "deprived categories of students," and distinguishing program from those affirmative action policies that are consistent with equality of opportunity). In reaching these conclusions, the Indian Supreme Court explicitly has recognized the similarities in the situations faced by India and the United States. In *Sahwney*, for example, the Court "examined the decisions of [the] U.S. Supreme Court at some length . . . with a view to notic[ing] how another democracy is grappling with a problem similar in certain respect to the problem facing [India]." A.I.R 1993 S.C. at 536, and noted that the "problem of blacks [in the United States] . . . holds a parallel to the problem of Scheduled Castes, Scheduled Tribes and Backward Classes in India." *Id.* at 529.

South Africa is another example of a country that has developed affirmative action policies to remedy a history of racial injustice. As South Africa confronts its recent past of egregious discrimination, its judiciary has looked to the experiences of the United States, and particularly to the jurisprudence of this Court, as it engages in the task of realizing constitutional guarantees of equality. *See Public Servants' Ass'n of S. Afr. v. Minister of Justice & Others*, 1997 (5) BCLR 577 (T) (citing *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), and

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[2] Since its adoption in 1950, the Constitution of India has abolished "untouchability." *India Const.* art. 17. It has also provided that "[t]he State shall not discriminate against any citizen on grounds . . . of . . . caste . . . ," *id*. art. 15.

[3] Article 16(1) provides: "There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State." *India Const.* art. 16(1). Article 16(4) provides: "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. . . ." *India Const*. art. 16(4).

[4] Article 14 provides: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." *India Const*. art. 14.

striking down as impermissibly broad an affirmative action program by South African Department of Justice that prohibited consideration of white males for certain attorney positions). While post-apartheid South Africa faces more extreme lingering structures of discrimination than exist in the United States, the central challenge facing both nations is the same: the translation of formal guarantees of equality into actual substantive equality. The South African government has explained the need for affirmative action programs in civil service employment to benefit non-white citizens: "the repeal of discriminatory legislation has created the formal conditions for equality of all South Africans. But repeal in itself has not created the substantive conditions of real equality amongst all, because of the deep systemic roots of inequality inherited from the former era." Ministry for Public Service and Administration, Green Paper, *A Conceptual Framework for Affirmative Action and the Management of Diversity in the Public Service*. Notice 851/1997 in GG 18034 (May 31, 1997).

The Constitutional Court of South Africa has recognized, as has this Court, that formal legal equality does not automatically translate into actual equality of opportunity. As Justice Richard Goldstone has noted, courts must understand "that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical equal treatment in all circumstances before that goal is achieved." *President of S. Afr. v. Hugo*, 1997 (4) SALR 1, 41 (CC) (*quoted in City Council of Pretoria v. Walker*, 1998 (3) BCLR 257 (CC), 1998 SACLR LEXIS 27, *147). For South Africa, this affirmative action principle is a cornerstone of the strategy to transform post-apartheid society. The constitutionally-recognized compelling state interest reflected in that principle is expressed in the equal protection clause of the modern South African Constitution, which provides that "to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken." *S. Afr. Const*. art. 9(2).

Other racially diverse nations similar to the United States have also developed affirmative action programs in employment. Under Canadian law, eliminating contemporary racial and gender-based discrimination and ameliorating the lingering effects of past discrimination constitute interests sufficiently compelling to justify tailored affirmative action programs. Canadian courts have found that such programs are not inconsistent with equal protection norms. Indeed, under Canadian federal law, even private employers that are subject to federal regulation[5] face broad affirmative action obligations. Thus, the Employment Equity Act, 1995 requires that:

> Every employer shall implement employment equity by . . . instituting such positive policies and practices and making such reasonable accommodations as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation in . . . the Canadian workforce, or. . . those segments of the

[5] The Employment Equity Act applies to, *inter alia*, "private sector employers" engaged in a "federal work, undertaking or business" as defined in § 2 of the Canadian Labour Code. *See* Employment Equity Act, § 3. Canada Labour Code § 2 in turn defines "federal work, undertaking or business" broadly to include various industries of national importance, and all businesses "outside the exclusive legislative authority of the legislators of the provinces." Canada Labour Code. R.S.C. 1988, c. L-2, § 2.

> Canadian workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw employees.

1995 S.C., c. 44, § 5.[6] This Act recognizes that achieving true equality in a society in which women and members of minority groups have historically been subject to "disadvantage in employment" sometimes "means more than treating persons in the same way, but also requires special measures and the accommodation of differences." *Id.* § 2.

The European Court of Justice and the national courts of EU member states have faced similar questions concerning the permissibility of affirmative action policies. In Europe, affirmative action programs are most commonly designed to aid underrepresented groups in public employment. While both EU law and member state constitutional provisions guarantee equality and specifically prohibit discrimination based on gender, affirmative action policies nevertheless explicitly take gender into account in hiring and promotion decisions.[7] The equal protection jurisprudence in Germany is particularly well developed. While some German jurisdictions have begun to experiment with affirmative action in contracting programs, along lines similar to the DBE program at issue here,[8] most German affirmative action programs are concerned with hiring and promotion of women. Since 1989, 15 of the 16 German federal states have enacted affirmative action statutes seeking to promote the equality of women in state employment by increasing participation in civil service positions where women are underrepresented. The federal parliament enacted a similar statute in 1994.[9] These programs typically take gender explicitly into account in order to remedy society-wide discrimination against women. While the German Constitutional Court has not yet ruled on these affirmative action policies, the European Court of Justice has endorsed these policies because they promote actual equality by counteracting "prejudices and stereotypes concerning the role and capacities of women in working life." Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-6363, [1998] 1 C.M.L.R. 547, ¶ 29.

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[6] Designated groups" is defined as including "women, aboriginal peoples, persons with disabilities and members of visible minorities." S.C. 1995, c. 44, § 3. "Members of visible minorities," in turn, is defined as "persons, other than aboriginal peoples, who are non-Caucasian in race or non-white in colour." *Id.*

[7] *See* Council Directive 76/207, of Feb. 9, 1976, on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, art. 2(1) 1976 O.J. (L 39) 40 (establishing that "there shall be no discrimination whatsoever on grounds of sex either directly or indirectly"); Grundgesetz [Basic Law] art. 3(3) (F.R.G.) (establishing that "no one may be disadvantaged or favored because of their sex.").

[8] *See* Berlin Statute on Equal Standing (Landesgleichstellungsgesetzt) of April 13, 1993 GVBl, § 13. Berlin 1993, 184, as amended June 29, 1995, GVBl, Berlin 1995. To our knowledge, this regulation has not yet given rise to any case law.

[9] *See* Federal Statute on the Promotion of Women and the Compatibility of Family and Profession in the Federal Administration and the Federal Courts (Gesetz zur Foerderung von Frauen und der Vereinbarkeit von Familie und Beruf in der Bundesverwaltung und den Gerichten des Bundes) of June 24, 1994, BGBl, 1994 I, 1406. *See generally* Anne Peters, *Women, Quotas and Constitutions: A Comparative Study of Affirmative Action for Women under American, German, European Community and International Law* 130-131 (1999).

2. Other Jurisdictions Analyze Affirmative Action Measures to Ensure a Proper Fit Between Means and Ends and Have Endorsed Measures Analogous to the DOT Program

Numerous countries have examined affirmative action programs under their own laws—and have upheld programs benefiting members of disadvantaged groups— using balancing tests that embrace principles of narrow tailoring. Most notably, in circumstances akin to the DBE program's use of race as a factor in certifying contractors as DBEs, the Court of Justice of the European Union has endorsed affirmative action in employment as a remedy for societal discrimination. The framework permitting affirmative action policies in the European Union originated in the 1976 Equal Treatment Directive, which established the equality of men and women in access to employment, promotion, and working conditions.[10] The Directive is binding on all member states and supercedes conflicting national law. As in the United States, EU law does not mandate affirmative action, but the Equal Treatment Directive does permit regulations "without prejudice to measures to promote equal opportunity for men and women in particular by removing existing inequalities. . . ." 76/207. art. 2(4). 1976 O.J. (L 39). No fewer than three cases considering the permissibility of affirmative action under this article have been referred to the European Court of Justice.

The European Court of Justice has consistently held that affirmative action policies cannot give absolute and unconditional preference to members of disadvantaged groups, because such "hard quotas" violate equal protection guarantees. *See Marschall*, ¶¶ 23, 24. While the ECJ thus protects the individual right to remain free of discrimination as a core constitutional value, the ECJ has upheld affirmative action policies when protected class status is one of many factors in an employment decision that considers the relative disadvantage of applicants.

The policies permitted by EU law are analogous to the DBE program at issue in this case, insofar as they permit flexibility and case-by-case consideration of disadvantaged status. In the *Marschall* case, the European Court of Justice considered the acceptability under European law of a German national rule that permitted giving priority for promotions to equally qualified female candidates in civil service jobs where women were under represented. *See id.* The rule contained a "saving clause," which specifically allowed the promotion of the male competitor where non-discriminatory criteria tilted the balance in his favor. Such criteria could include, but were not limited to, the relative economic need of the applicants. While a German court referred this case to the ECJ, in the course of the proceedings the governments of other EU member states (including Austria, Finland, Norway, Spain and Sweden) formally endorsed the affirmative action policy at issue. *See Marschall*, ¶ 14. The European Court of Justice found that as long as the rule guarantees that "the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates," the affirmative action policy would prevail. *See Marshall*, ¶ 35.

The ECJ's recent decision in *Badeck* follows the same logic. Case C-158/97, *Badeck and Others, Proceedings for a Review of Legality,* [2001] 2 C.M.L.R. 6. The case underscores the

[10] Council Directive 76/207, art. 1(1), 1976 O.J., (L 39) 40. The European Council has continued to express its support of affirmative action policies. In the non-binding Recommendation of 13 December, 1984 (48/635/EEC) the European Council explicitly proposed that all member states adopt affirmative action policies to eliminate the negative effects of previous discrimination and to stimulate participation by women in all sectors of the economy.

similarity between affirmative action policies permitted under European law and U.S. affirmative action policies. In that case, the Court considered the legality under EU law of a civil service affirmative action program in the German state of Hesse, which included binding goals and timetables for the hiring of women. Building upon its judgment in *Marschall*, the Court concluded that the policy of granting preference to equally qualified female candidates over male candidates was lawful so long as the preference was not absolute. In other words, where a "saving clause" guarantees that the protected category of gender is one criterion among others in the overall evaluation of the candidates, and does not mandate success by the female candidate, the affirmative action policy is not incompatible with European law. *See id.* at ¶ 38.

This "saving clause" in the European legislation is thus similar to the rebuttable presumption of disadvantage in the regulations promulgated by the DOT. In neither case does membership in a statutorily-defined disadvantaged group automatically confer the benefit of the affirmative action program on an individual to the automatic exclusion of another competitor. Under European law, the candidate's gender is a factor—one of several—that may be considered in a hiring decision. The DBE program, however, does not even go that far. Under the rules of the DBE program, no person is conclusively deemed to enjoy DBE status: membership in a particular racial group merely creates a *presumption* of disadvantage that must be confirmed in evidence by actual disadvantage before any individual is ultimately entitled to DBE status. 49 C.F.R. § 26.67 (a)(1). Moreover, under both systems, the benefits to be conferred upon disadvantaged groups (women under the European legislation and DBEs in the United States) are not absolute. Thus, under the DOT rules, individuals who are not members of racial minorities may also be entitled to DBE status under certain circumstances.[11] 49 C.F.R. § 26.67 (d). Similarly, under the affirmative action policies permitted under European law, women are presumptively entitled to preference in the relevant employment decisions, but a male candidate may trump that presumption in cases where, according to criteria that may include economic need, the balance tips in his favor.

Significantly, in both *Badeck* and *Marschall* the European Court of Justice relied implicitly on a proportionality test that resembles the strict scrutiny analysis in United States jurisprudence.[12] As Advocate General Jacobs[13] advised the European Court in the *Marschall* case, "the principle of proportionality will, however require . . . [any affirmative action program pursuant to Art 2(4) of the Treaty of the European Union to] be both suitable and necessary for the achievement of its objective."[14] Under the traditional understanding of the four-pronged test in the German jurisprudence from whence it derives,[15] the statute must serve a constitutional

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[11] Indeed. Petitioner itself was certified as a DBE in this case. Pet. App. 7-9.

[12] Of course, in United States jurisprudence, such sex-based classifications would be subject to intermediate scrutiny. *See United States v. Virginia*, 518 U.S. 515 (1996).

[13] Under the procedure of the ECJ, Advocate General opinions serve as objective legal opinions about the case at bar, and are not intended to be partisan.

[14] *Marschall*, Adv. Gen. Op. ¶ 42.

[15] On the similarity of the European proportionality test (derived from German jurisprudence) to strict scrutiny, *see* Peters, *supra*, at 150-52. Peters notes that while the traditional test that was applied to the general equality clause was a test of arbitrariness derived from the United States's rational basis test, since the 1980s the German courts have "tended to scrutinize classifications [. . .] more closely by asking whether a differential treatment is proportionate." The closer the government classification comes to protected classes enumerated in art. 3(3) of the Basic Law, the stricter the scrutiny is. On the adoption of the proportionality test by European Union law, *see* Peters, at 203, n.478.

objective, be suitable and necessary to achieve the goal, and be equitable under due consideration of the conflicting rights in the situation. In the *Marschall* and *Badeck* cases, the European Court had to consider, first, whether there was a close fit between the affirmative action program and the goal of ameliorating discrimination, and second, whether male candidates were unfairly excluded from jobs because of their gender. The next questions concerned whether gender-conscious appointments and promotions pursued a legitimate social objective and utilized means that were proportionate "in relation to the real needs of the disadvantaged group." *Badeck*, Adv. Gen. Op. ¶ 29. Applying this standard in *Badeck*, the European Court of Justice concluded that a program including such discretion was sufficiently customized to pass muster under Community law. *Id*. ¶¶ 38, 46, 55, 63.

Indian courts have also analyzed affirmative action polices to ensure that these programs are closely tailored to target the truly disadvantaged. In *Sawhney*, A.I.R 1993 S.C. 477, the Supreme Court of India called for a holistic definition of "backward classes" that includes both caste and economic disadvantage as eligibility criteria, *Id*. at 562 (reviewing national standards developed by Mandal Commission for implementing affirmative action programs to benefit statutorily-defined "backward classes"). To ensure that affirmative action programs were well targeted, the Court further required affirmative action programs to use a "means test," in order to exclude advantaged individuals from the group of "backward classes" who benefit from such programs. *Id*. At 558-59. To this purpose, the Court directed the Government of India to set forth specific objective criteria (including economic, social, and educational position) for making an individualized determination of disadvantage for members within each "backward class." *Id*. at 560. The Court noted that in Indian society, it is exceptional yet possible for individuals from certain low-level castes to attain economic and social advancement sufficient to disqualify them as affirmative action beneficiaries. The "means test" approved by the Indian Supreme Court is thus similar to the rebuttable presumption of disadvantage in the DOT regulations, which require DBE applicants to demonstrate that their net worth does not exceed a specified level and that they are indeed actually disadvantaged. 49 C.F.R. § 26.67 (b).

Canadian law likewise imposes limits on the breadth of affirmative action programs. The Employment Equity Act, 1995, for example, precludes the imposition on an employer of an affirmative action program that would "cause undue hardship on an employer" or "require an employer to hire or promote unqualified persons." S.C. 1995. c. 44, § 3. Nevertheless, the Supreme Court of Canada typically has upheld programs that give employers far less discretion than the current DOT program. The leading affirmative action case before the Supreme Court of Canada addressing such programs is *Canadian National Railway v. Canada* (*Canadian Human Rights Commission*), [1987] 1 S.C.R. 1114 (Can.). At issue was a decree by the Canadian Human Rights Commission (the "Commission") concerning a finding that the Canadian National Railway (the "Railway") had discriminated against female employees and job applicants by barring them from blue-collar jobs. The decree required that one in four new hires by the Railway be women until a target percentage of women in the blue-collar workforce at the Railway had been reached. *See id*. at 1125-27. In ordering this relief, the Commission emphasized that it was limiting the scope of its decree in order to avoid imposing an undue burden on the employer. Thus, although the panel indicated its preference that the Railway be directed to make one in three new hires a woman, it ordered the less burdensome standard that one in four new hires be a woman. Moreover, the one in four target itself was to be assessed every four months, in order to allow for maximum flexibility in individual hiring decisions. On

review, the Supreme Court of Canada rejected the Railway's argument that specific hiring goals represented improper remedial relief under the Canadian Human Rights Act of 1976, noting that the Commission's order was "tailored specifically to address the problem of 'systemic discrimination.'" *Canadian Nat'l Ry.*, [1987] 1 S.C.R. at ¶ 45, (citations omitted). The Court emphasized that "there is evidence that when sufficient minorities/women are employed in a given establishment, the informal processes of economic life, for example, the tendency to refer friends and relatives for employment, will help to produce a significant minority or female applicant flow." *Id.*

* * *

In sum, international and comparative law provide useful and relevant sources of guidance for this Court in interpreting the affirmative action program at issue. International treaties ratified by the United States specifically permit race-based distinctions and, in fact, may require states to take affirmative action where failure to do so would perpetuate discrimination. Courts in other jurisdictions grappling with similar problems have upheld comparable programs as a means of furthering compelling government interests in promoting equality, analyzing such measures to ensure a proper fit between means and ends and concluding that flexible affirmative action programs help realize the principle of equality, rather than detract from it. As Justice Ginsburg has noted, we share with those nations the determination to eliminate social and economic disadvantages caused by society-wide discrimination. *See* Ginsburg & Merritt, *supra*, at 282. As such, this Court should draw upon the experiences of those nations when analyzing the constitutionality of the DBE program.

CONCLUSION

The DBE program is consistent with equal protection as understood in the United States and the larger global community, and, for the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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August 10, 2001

APPENDIX

APPENDIX:
ORGANIZATIONAL STATEMENTS
OF INTEREST

NOW Legal Defense and Education Fund (NOW Legal Defense) is a leading national non-profit civil rights organization that has used the power of the law to define and defend women's rights for thirty years. A major goal of NOW Legal Defense is the elimination of barriers that deny women economic opportunities, such as employment discrimination. NOW Legal Defense has participated as counsel and as *amicus curiae* in numerous cases in support of affirmative action. It is interested in this case because of the positive impact affirmative action programs have in promoting equality and eliminating barriers for women, particularly for racial minorities.

Lawyers Committee for Human Rights (Lawyers Committee) is a non-governmental organization that protects and promotes the rights to which everyone is entitled under international law. The Lawyers Committee works to hold all governments—including the United States—accountable to the standards articulated in the Universal Declaration of Human Rights and other international human rights instruments, including the U.N. Convention on the Elimination of Racial Discrimination. The Lawyers Committee has a particular focus on defending the rights of disadvantaged and vulnerable groups, including women and racial minorities. In recognition of the fundamental principle of non-discrimination, which underlies all human rights standards, the Lawyers Committee works to promote the equal enjoyment of the universal rights to which all people are entitled. In furtherance of this agenda, the Lawyers Committee will participate in the World Conference Against Racism in Durban, South Africa in September 2001 to work with governments and others towards the development of strategies to eliminate racial discrimination in the United States and around the world, of which affirmative action programs such as that at issue in this case are an important part.

Allard K. Lowenstein International Human Rights Clinic (the Clinic) is a Yale Law School program that gives students first-hand experience in human rights advocacy under the supervision of international human rights lawyers The Clinic undertakes numerous litigation and research projects each term on behalf of human rights organizations and individual victims of human rights abuses. The Clinic's work is based on the human rights standards contained in international customary and conventional law, at the core of which is the prohibition against discrimination. Since the Clinic began more than ten years ago, its students have worked on a number of lawsuits and other projects designed to combat racial, gender, ethnic and other kinds of discrimination. In recent years, the Clinic has focused increasing attention on efforts to ensure respect for international human rights standards in the United States.