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

BRIEF AMICUS CURIAE OF GEOD CORPORATION AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER AND URGING REVERSAL

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INTEREST OF *AMICI CURIAE*

GEOD Corporation is a closely held corporation, with its headquarters in New Jersey. Its principals are white males. GEOD has acted as a "sub-consultant," providing aerial photography, topographic mapping, surveying, and photogrammetric services to prime consultants and subconsultants on numerous large scale road, bridge, tunnel, airport and other infrastructure construction projects for the State of New Jersey, the New Jersey Department of Transportation, other New Jersey agencies, and agencies of other states and municipalities, as well as for the private sector. GEOD is currently suing the State of New Jersey, it officials, and the New Jersey Department of Transportation, claiming that New Jersey's public contracting affirmative action programs have unlawfully deprived GEOD of opportunities to work on state and federally-funded construction projects. Atlantic Legal Foundation (ALF) is a non-profit public interest law firm, whose mandate is to advocate principles of limited and responsible government and individual rights. It is representing GEOD in its lawsuit against New Jersey; in the past it has represented other firms suing other government instrumentalities in cases involving unlawful race-conscious "affirmative action programs. The staff of ALF is familiar with many of the "disparity studies" at issue in this case.[1]

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[1] Counsel for the parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court.
Pursuant to Supreme Court Rule 37.6, *amici curiae* state that this brief was not prepared, written, funded or produced by any person or entity other than *amici curiae* or their counsel.

Amici believe that the Court of Appeals for the Tenth Circuit improperly applied judicial notice in relying on a document prepared by one of the litigants as evidfence for the central issue in this case. *Amici* also believe that the document itself, if carefully examined, does not constitute the requisite "strong basis in evidence" required to support a government program that gives preferences to certain groups based on race, ethnicity and gender, and invidiously discriminates against others.

SUMMARY OF ARGUMENT

The Court of Appeals' sole basis for finding a compelling government interest in enacting the Department of Transportation's DBE program was "judicial notice" of Appendix A -- "The Compelling Interest,", a document prepared by one of the litigants. Appendix A consists entirely of hearsay, double hearsay and even more remote hearsay. The Court of Appeals did not examine the underlying documents on which Appendix A was purportedly based.

Appendix A is an insufficient basis in evidence on which to grant summary judgment in favor of Respondents.

The Court of Appeals' attempt to make Appendix A "evidence" by taking judicial notice of its contents should be reversed because the truth of the matters in Appendix A is the at the very heart of the issue in controversy and Appendix A is not a proper subject of judicial notice.

Even if Appendix A were properly susceptible of judicial notice, it does not support a finding that there is the "strong basis in evidence" required to uphold a racially discriminatory government program because its statistical and anecdotal bases are flawed. The Court of Appeals failed to analyze whether there was a valid basis for finding a statistical disparity, and whether a pattern of discrimination caused any disparity. The Court of Appeals also failed to inquire whether the government participated in discrimination, and Appendix A does not establish such government complicity.

ARGUMENT

I. The Court of Appeals Improperly Used "Judicial Notice" in Granting Summary Judgment to Defendants Based Solely On A Document Created By a Litigant During the Course of Litigation.

The Tenth Circuit Panel correctly recognized that, under *City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 486-92, 500 (1989), the critical inquiry for strict scrutiny purposes is whether there is a "strong basis in evidence" for the legislative conclusion that "remedial action was necessary," *see Adarand Constructors v. Slater*, 228 F.3d 1147, 1167 (10th Cir. 2000). However, rather than analyzing the evidence, as Justice O'Connor did in *Croson*, the Panel found the legislative conclusion by taking judicial notice of the ultimate fact raised by the summary judgment motions. 228 F.3d 1147 at 1168, n. 12.

The Panel took "judicial notice of the content of hearings and testimony before the congressional committees and

subcommittees cited by the government" and deemed "the disparity studies were . . . introduced into evidence . . . via [Appendix A]."[2] 228 F.3d 1147 at 1168, Pet. App. 33-34 & n.12, 47 n.14, 54. This single document of approximately 15 pages[3], was prepared, while this case was in litigation, by a

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[2] The Panel relied on Appendix A itself, not the studies, hearings and other materials Appendix A purports to summarize. This is obvious from a perusal of the Panel's opinion and its constant reference to "statistical and anecdotal evidence" as reported in "The Compelling Interest."

One example of the Panel's failure to search behind the self-serving Appendix is the Panel's reliance on an early draft of a study by the Urban Institute,which was completed in December 1997, more than 18 months after Appendix A was published. 61 Fed. Reg. 26061 n.128. The final Urban Institute study (Enchautegui, Maria E., *et al.*, *Do Minority Owned Businesses Get a Fair Share of Government Contracts?* (available online at www.urban.org/authors/enchautegui.html). The final Urban Institute study, issued more than two years before the Court of Appeal's opinion decision was handed down, concluded that there was no statistically significant underutilization of minority construction subcontractors. *Id*. at 15 and n.6. The final Urban Institute study also states that whatever disparities it did detect "do not necessarily translate into proof of discrimination on the part of state and local governments." *Id*. at xiv. This is itself a reason the Panel's reliance on the Appendix is incorrect: When the author of a study asserts that the data is not statistically significant, the study does not support the conclusion that this data is statistically significant. *See General Electric Co. v. Joiner*, 522 U.S. 136, 144 (1997).

[3] The Appendix is not particularly long (about 15 pages of three columns each), but in its footnotes it refers to an enormous amount and variety of hearings, reports, books and articles going back to 1964. These documents would certainly fill an entire bookcase, and it is doubtful that any single human being has read all of them. Indeed, that appears to be part of the Government's strategy: to overwhelm the reader with citation so much material that it convinces by its mere volume. Indeed, it is often difficult to trace the sources cited in the Appendix. For example, most references to Congressional documents do not contain page cites, as though the whole of a report or hearing was relevant to the specific assertion in the Appendix. So far, with the Panel, that tactic has been successful.

then unidentified employee of the Department of Justice.[4] This document, the "Appendix – The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey" (61 Fed.Reg. 26050 (1996))[5] early on states the conclusion of which the Panel took judicial notice: "In short, there is today a compelling interest to take remedial action in federal procurement." *Id*. (footnote omitted)[6] The Panel took

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[4] It has been subsequently learned in the course of discovery in other cases challenging the Department of Transportation's affirmative action programs, *Gross Seed Company v. Nebraska Department of Roads*, 4:00CV3073 (D.Neb.) and *Sherbrooke Turf v. Minnesota Department of Transportation*, 00-CV-1026 (JMR/RLE) (D. Minn.) that the document was prepared in less than two weeks by one Sean Flynn, a paralegal with four years experience, working with little supervision, and no review of the underlying documents to check Mr. Flynn's citations for accuracy, by attorneys at the Justice Department. The DoJ attorney listed in the Federal Register as the "contact person," Mark Gross, testified that the Appendix "was not intended to be comprehensive." (Deposition of Mark Gross, January 18, 2001, Tr. at 52, line 21 - 61, line 12, annexed to this brief as Appendix A). *See generally*, Roger Clegg and John Sullivan, "No Compelling Interest," in National Review Online, May 25, 2001, available online at www.nationalreview.com/contributors/clegg052501.shtml.

[5] The formal title is "Proposed Reforms to Affirmative Action In Federal Procurement, Appendix A, 'The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey.'" 61 Fed. Reg. 26041, 26050 (May 23, 1996).

[6] It appears that the Department of Justice no longer agrees with this sweeping conclusion. In a deposition given in two cases now pending in which the DOT program is being challenged, *Gross Seed Company v. Nebraska Department of Roads*, 4:00CV3073 (D.Neb.) and *Sherbrooke Turf v. Minnesota Department of Transportation*, 00-CV-1026 (JMR/RLE) (D. Minn.), the attorney listed in the Federal Register as the "contact person," Mark Gross, testified that the "we were presuming that Congress had compelling interest for enacting the [Federal Procurement] statute. What Sean [Flynn] did is compile a lot of reports and data which went to the various areas which the courts and Congress have said showed there was a discriminatory history that would effect DBE's ability t participate in federal

judicial notice of single and double (and likely even more remote[7]) hearsay, compiled, crafted and proffered by a litigant and its attorneys or employees. However, Appendix A is essentially a legal brief arguing obsolete theories, rather than a reflection of any new research or analysis in the post-*Croson* and post-*Adarand* era. Although the purported purpose of the Appendix is to establish a compelling interest for racial and ethnic preferences, there is an extraordinary lack of a discussion of judicial standards about the necessary factual predicate. Neither *Croson's* nor *Adarand's* statements about the evidence necessary to establish compelling are discussed in any detail. Many of the lower court cases about compelling interest and narrow tailoring are not mentioned at all. The many decisions in which race and ethnic conscious procurement

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contracting. So he [Flynn] was charged with finding whatever reports are out there that would support the compelling interest." (Deposition of Mark Gross, January 18, 2001, Tr. at 57, line 20 - 59, line 2, annexed to this brief as Appendix A). *See generally*, Roger Clegg and John Sullivan, "No Compelling Interest," in National Review Online, May 25, 2001, available online at www.nationalreview.com/contributors/clegg052501.shtml.

[7] The "disparity studies" which the Appendix cites typically rely on unsworn and unexamined "anecdotal" evidence." This often includes anonymous responses to survey instruments which are never verified by the authors of the study, and which often reflect subjective perceptions of discrimination by the respondents to the survey (who are often not a representative sample); there is usually no attempt by the studies' authors to question the survey respondent as to the basis for the perception of discriminatory treatment, and almost never any attempt to question the alleged perpetrator of discrimination about its version of the incident. Likewise, much of the "testimony" that forms another component of anecdotal "evidence" is usually not subject to cross-examination or rebuttal; and this testimony is itself often hearsay or double hearsay.

programs have been struck down as unconstitutional are neither cited, distinguished, nor even discussed.

Pursuant to Federal Rule of Civil Procedure Rule 56(c) and (e), on a motion for summary judgment, evidence in support of or in opposition to the motion must certain vital criteria: First, the evidence must be in the form of admissions, depositions, answers to interrogatories, affidavits, or other sworn testimony. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); second, any such sworn testimony "shall be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence . . . ." Fed. R. Civ. P. 56(e). Appendix A satisfies neither criterion. It was not submitted with an affidavit by anyone. It is not answers to interrogatories or deposition testimony. It was prepared by a party's attorneys (or the attorneys' employee) for the purposes of this very case. It was obviously not based on their personal knowledge. It consists entirely of hearsay within hearsay, all of which the Panel used for the truth of the matters asserted, and which therefore would be inadmissible.

We submit that the Panel's use of judicial notice under these circumstances disregarded not only the substantive rule of *Croson* but also well established rules of evidence. If this Court countenances such practice, the Government, anytime it is a litigant, can create evidence that will "prove" the essential elements of its case. That would be a clear miscarriage of justice.

Both at common law and under Rule 201 of the Federal Rules of Evidence, judicial notice, properly applied, is a procedural device for eliminating the need for formal proof. *See, e.g.*, *York v. American Telephone & Telegraph Co.*, 95

F.3d. 948, 958 (10th Cir. 1996); Weinsteins's *Federal Evidence* §§201.02 [1], [2] (2nd ed.); *Black's Law Dictionary* (7th ed.) ("A court's acceptance for purposes of convenience and without requiring a party's proof, of a well-know and indisputable fact.")

One noted commentator provides a succinct summary of the several applications of judicial notice:

> The scope of facts that may be noticed includes:
>
> (1) Matters which are actually so notorious to all that the production of evidence would be unnecessary;
>
> (2) Matters which the judicial function supposes the judge to be acquainted with, in theory at least;
>
> (3) Sundry matters not included under either of these heads; they are subject for the most part to the consideration that though they are neither actually notorious nor bound to be judicially known, yet they would be capable of such instant and unquestionable demonstration, if desired, that no party would think of imposing a falsity on the tribunal in the face of an intelligent adversary."

9 Wigmore, *Evidence* § 2571 (Chadbourn rev. 1981).

These parameters are codified in the Rule 201 of the Federal Rules of Evidence which, by its terms, operates only as to adjudicative facts. Fed R. Evid. 201(a), Advisory Committee Notes; *Siderius, Inc. v. M.V. Amilla*, 880 F.2d 662, 666 (2d Cir. 1989).

Adjudicative facts are "the ultimate facts in the case, plus those evidential facts that are sufficiently central to the controversy that they should be left to the jury unless clearly indisputable." 21 C. Wright & K. Graham, *Federal Practice and Procedure* §5103 (2001 supp.), cited in *Snell v. Suffolk Co.*, 782 F.2d 1094, 1105 (2nd Cir. 1986). Another description of adjudicative facts focuses on those facts which directly relate to the litigants: "when a court . . . finds facts concerning the immediate parties – who did what, where, when, how and with what motive and intent – the court. . . is performing an adjudicative function, and the facts are conveniently called adjudicative facts . . . ." Fed. Rule Evid. 201(a), Advisory Committee notes, citing 2 Davis, *Administrative Law* §353.

In taking judicial notice of adjudicative facts to establish the Respondents' compelling interest in remedying racial discrimination, the Court of Appeals panel disregarded straightforward language of Rule 201(b). Rule 201(b) permits judicial notice *only* of a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Neither "The Compelling Interest" nor the sources it catalogs meet the criteria of Rule 201(b).

First, the issue of Respondents' compelling interest here was the central fact in dispute. Judicial notice of the ultimate fact to be determined in the litigation, transforming the disputed into the conclusive by joint operation of Rule 201 (b) and (g) in a civil matter, is unprecedented.

Second, the Panel's resort to judicial notice cannot be saved because the "facts" taken out of contention were contained in statements or in documents which found their way into the legislative record. The Panel conceded as much: "We cannot merely recite statements made by members of Congress alleging a finding of discriminating effects . . . ." 228 F.3d. at 1167. The mere fact that a witness testifies in a congressional hearing or prepares a report that is filed with a government agency does not negate or dilute the purpose of judicial notice or the requirements of Rule 201. *See, e.g.*, *United States v. Bonds*, 12 F.3d 540, 553 (6th Cir. 1993); *Carley v. Wheeled Coach*, 991 F.2d 1117, 1126 (3rd Cir.), *cert. denied*, 510 U.S. 868 (1993); *Melong v. Micronesian Claims Commission*, 643 F.2d 10, 12 n.5 (D.C. Cir 1980); *Southern Louisiana Area Rate Cases v. Federal Power Commission*, 428 F.2d 407, 438 n. 98 (5th Cir. (1970).

The Panel evaded the "searching judicial inquiry into the justification for such race-based measures" required by *Croson* (488 U.S. at 493) by its misuse of judicial notice. If the Panel's misuse of judicial notice were countenanced by this Court, the Government could, in almost any civil case to which it was a party, create "facts" that would determine the outcome. This would be a serious threat to the independent adjudicatory role of the judicial branch.

II. Appendix A Does Not Constitute A "Strong Basis In Evidence" That There Was Racial Discrimination In Highway Construction Justifying A Race-Conscious Remedy.

It is settled law that the use of a racial classification by a governmental actor must be supported by a "strong basis in evidence" of a compelling governmental interest in remedying particularized discrimination in which that government somehow participated. *Croson*, 488 U.S. at 500. "[T]he true test of an affirmative action program is . . . the adequacy of the evidence of discrimination offered to show that interest." *Engineering Contractors of S. Fla.. v. Metropolitan Dade County,* 122 F.3rd 895, 906 (11th Cir. 1997)[8].

In this case, relying exclusively on the content of Appendix A, the Panel concluded that the following phenomena

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[8] In *Engineering Contractors*, the 11th Circuit continued:

> The existence of each [of] the programs, including all of its component parts, must withstand the appropriate level of constitutional scrutiny if that program is to be upheld. Either a *program* is grounded on a proper evidentiary factual predicate or it is not. If it is, then that program sails on to the next stage of the analysis, where each component contract measure is tested against the "narrow tailoring" and "substantial relationship" requirements. On the other hand, if a program is not grounded on a proper evidentiary basis, then all of the contract measures go down with the ship, irrespective of any narrow tailoring or substantial relationship analysis.
>
> *Id*.

constitute the required strong basis in evidence:[9]

- Ownership of companies is often inherited by family members. 228 F.3d 1147, 1168.
- Individuals with no experience have difficulty joining a union in order to gain the experience needed to compete with established non-minority companies. 228 F.3d 1147, 1169.
- Firms or individuals who have no credit history or collateral have difficulty of obtaining access to capital. 228 F.3d 1147, 1169.
- Prime contractors prefer to work with subcontractors they already know and trust because they previously worked with those subcontractors. 228 F.3d 1147, 1170.
- "Bid shopping," a practice by which prime contractors allow trusted subcontractors to see and beat any lower

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[9] The district court in this case found that the problems Congress was trying to remedy were:

> [D]eficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with the bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses.

965 F.Supp. at 1576.

bid from new, untested firms trying to replace the established subcontractors. 228 F.3d 1147, 1171.

- The inability of new market entrants to receive special pricing arrangements from suppliers with whom they have not previously dealt. 228 F.3d 1147, 1171.
- The inability of new enterprises to obtain bonding because they lack experience. 228 F.3d 1147, 1171-72.

However, these examples may constitute nothing more than normal commercial or social practices based on rational business or economic judgments; none are evidence of racial, ethnic or gender discrimination, let alone discrimination in which any governmental unit is implicated.[10]

If the purpose of the Appendix were only to demonstrate that there has been racial and ethnic discrimination in American society and the economy, this potpourri of documents would be sufficient, even redundant, because any basic knowledge of American history demonstrates historical "societal discrimination."[11] The necessary empirical support for the

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[10] These phenomena constitute nothing more than "societal discrimination" which is an inadequate basis for race-conscious classifications, and not the type of identified discrimination that can support and define the scope of race-based relief. *See Croson* at 497.

[11] As this Court stated in *Croson*, 488 U.S. at 496-497 referring to *Bakke* ". . . [T]he history of discrimination in society at large [cannot] justify a racial quota in medical school admissions. Justice Powell contrasted the "focused" goal of remedying "wrongs worked by specific instances of racial discrimination" with "the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past."

range of racial and ethnic preferences in federal procurement programs requires much more specificity and analytic rigor. This the Appendix, and the Panel's findings, lacks.

Problems of working capital, bonding, track record, and understanding the complexities of the procurement process affect many small and new firms. Whether these are currently distinctive problems for minority firms has not been subject to serious evaluation. If there are current examples of preselection or other types of discretion exercised by government procurement officers that exhibit bias against minority firms because of the race, ethnicity or gender of their owners, they have not been identified in the Appendix or by the Panel. If such practices exist, the first responsibility of DOT and state and local highway or other contracting agencies would be to correct them and, if they were purposeful, to punish those involved.

A legally adequate "strong basis in evidence" must consist of logically and mathematically sound analysis which demonstrates that there is a statistically significant disparity in the utilization of minority contractors or subcontractors in highway construction, traces that disparity to deliberate discrimination, and demonstrates at that government was at least a "passive participant" in that discrimination. *See Croson* at 492.[12]

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[12] Because DOT's program is national in scope, DOT needed statistical evidence that racial discrimination caused nationwide underutilization of minority contractors. The only nation-wide study ever published shows minority highway contractors underutilized in only eight states, of which Colorado was not one. *See United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 1759 (2000) in which this Court made it clear that

Neither the Appendix nor the Panel have demonstrated the requisite "strong basis in evidence."

A. The Respondents Did Not Show That Discrimination Caused Any Observed Disparity In Highway Construction.

Croson teaches that a "gross statistical disparity," if properly calculated, can raise an inference of racial discrimination, but that statistical disparity alone, is not a sufficient strong basis in evidence. 488 U.S. at 501. As the Panel recognized, anecdotal evidence of discrimination may be considered only after a the necessary statistical showing.[13] In order to conclude that there is a compelling interest, a court must have valid statistical evidence of "patterns of deliberate

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"congruence" requires a match between the geographic area in which the race-based solution is applied and the geographic area in which government participation in discrimination is found. . When "Congress' findings indicate that the problem of discrimination . . . does not exist in all States," the solution cannot apply to all states, either. *Id.* Congress instead has the power to direct a remedy for discrimination "only [in] those States in which Congress found that there had been discrimination." *Id.*; *see also Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

[13] The Panel also recognized "Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not." 228 F.3d 1147 at 1166. As the Eleventh Circuit noted in *Engineering Contractors Association of South Florida v. Metropolitan Dade County, supra*, "Several circuits . . . have discussed the value and significance of anecdotal evidence in evaluating whether the government established a sufficient factual predicate to justify a race conscious or gender-conscious affirmative action program. We have found that kind of evidence to be helpful in the past, but only when it was combined with and reinforced by sufficiently probative statistical evidence."

exclusion." *Croson*, 488 U.S. 509. The statistical evidence must meet at least four criteria.

Statistical evidence must be derived from the proper sample pool. That pool consists of those contractors who have the necessary expertise and experience to perform the work in question and who meet any legitimate qualifications, such as bonding requirements and capitalization, and who are not otherwise engaged at the time. *Croson*, at 502, 509. This Court called such contractors "qualified," "willing and able." *Croson* at 509. In the absence of statistical evidence derived from the proper pool, this Court found, any finding of racial animus would rest on only "the completely unrealistic assumption that minorities will choose to enter construction in lockstep proportion to their representation in the local population." *Croson* at 507. In this case, the Panel did not even inquire whether the statistics it relied on from Appendix A (which in turn were derived from untested and unexamined variety of "disparity studies") were derived from the proper pool of qualified, willing and able contractors. The General Accounting Office, in its Report to Congressional Committees required by TEA-21[14], "Disadvantaged Business Enterprises: Critical Information Is Needed to Understand Program Impact," GAO-01-586 (June 2001) (hereafter the "GAO Report"), commented that

> Taken as a whole, these [disparity] studies suggest that disparities exist; however, we found significant weaknesses in the disparity studies we reviewed. For example, the studies consistently overstated the

[14] Pub. L. 105-178 § 1101(b)(6); 112 Stat. 107, 114-15 (1998).

> number of qualified, willing and able firms or understated firms' utilization in transportation contracts. The weaknesses we have identified create uncertainties about the studies' findings . . . .

GAO Report at 6.

Disparity studies conducted for state and local governments usually rely on census data for calculating the number of "available" minority or woman-owned businesses. These census-based headcounts, however, provide no information about the qualification, ability, or willingness of the minority or woman-owned firms to perform work on government contracts in general or the particular public works projects "on offer." Other sources of "headcounts" of minority and woman-owned firms have similar or other serious problems. *See* GAO Report at 30-31.

Statistical evidence must also contain detailed explanation of the methods by which it was derived. Numerous "disparity studies" manipulate the census or other data in ways that are far from "transparent," and often not consistent with the realities of the particular industry segment involved, with the apparent goal of inflating the "availability" of minority or woman-owned firms, As the Seventh Circuit observed, "an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (1989). As this Court has said "[N]othing in . . . the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert." *General Electric Co. v. Joiner*, 522 U.S. 136, 140 (1997). The

Panel merely parroted the conclusions of the Appendix, without inquiring into its methods or the methodology of the underlying studies cited in the Appendix.

Statistical evidence must also utilize proper analytical tools to account for all the major variables, so that deliberate discrimination, if actually involved, may be identified as the cause of any calculated disparity. This Court has held that "[t]o draw an inference of discrimination from statistical disparities, while all 'measurable variables' need not be accounted for, all 'major variables,' must be controlled and accounted for." and that an analysis that does not control for at least major variables may be inadmissible. *Bazemore v. Friday*, 478 U.S. 385 at 400 and n.10 (1986). "[I]n order for statistical evidence to create an inference of discrimination, the statistics must show a significant disparity and eliminate nondiscriminatory explanations for the disparity . . . . statistical evidence *must* focus on *eliminating nondiscriminatory explanations* for disparate treatment between *comparable* individuals." *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 746 (10th Cir. 1991) (italics in original); *accord*, *Koger v. Reno*, 98 F.3d 631, 637 (D.C. Cir. 1996). "*Croson* . . . reaffirmed the Court's longstanding teaching that we must staunchly resist attempts to substitute speculation and correlation for evidence of causation." *Wessmann v. Gittens*, 160 F.3d 790, 804 (1st Cir. 1998); *accord Assoc'd Gen. Contractors of Ohio v. Drabik*, 214 F.3d 730, 736 (6th Cir. 2000); *Walker v. City of Mesquite*, 169 F.3d 973, 985 n.33 (5th Cir. 1999), *cert. denied,* 120 S.Ct. 969 (2000). The Panel's most glaring failure in this case was not to make any attempt whatsoever to investigate whether the

statistical data in the Appendix was the product of proper analyses to account for causes other than discrimination and deliberate exclusion. The Panel made no effort to ensure that the Appendix and the underlying studies considered relevant non-discriminatory factors.

The statistics must be collected separately for prime contracts and subcontracts. Unless subcontracting statistics are collected and analyzed separately it is impossible to discern whether there was in fact underutilization or whether the government passively participated in discrimination, because minority representation in subcontracts could make up for any observed disparity in prime contracts. In this case, the Panel not inquire, and Appendix A does indicate, whether subcontractor statistics were collected separately from prime contractor statistics. As the GAO Report noted:

> [S]everal studies we reviewed did not include any analyses of subcontracting and therefore may understate the utilization of [MBE/WBE] firms. Because MBE/WBEs are more likely to be awarded subcontracts than prime contracts, MBE/WBEs in particular may appear underutilized when the focus remains on prime contract data. Furthermore, although some studies did include calculations based on the number of contracts, all but two based their determination of disparities on only the dollar amounts of contracts. Because MBE/WBEs tend to be smaller than non-MBE/WBEs, they are often unable to perform larger contracts . . . . A more complete indicator of utilization would consider both the dollar amount and the number of contracts awarded or to control for differences in contract dollar amounts.

GAO Report at 32. *See also Engineering Contractors of S. Fla.. v. Metropolitan Dade County,* 122 F.3rd 895 (11th Cir. 1997).

The panel's failure to investigate whether Appendix A met these four criteria is, we submit, both apparent and fatal.[15]

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[15] Respondents and the Panel rely on discredited disparity studies. One example the Brimmer & Marshall study of disparities in Atlanta. Pet. App. 43. The Panel characterized that study as "particularly striking" evidence of deliberate discrimination, apparently ignorant of the fact that the study had been thoroughly discredited. As the court in *Webster* v. *Fulton County*, 51 F.Supp.2d 1359, 1368-70 (N.D. Ga. 2000), *aff'd* 218 F,2d 1276 (11th Cir. 2000) noted, the "study proceeds on the premise that a statistical showing of underutilization of minorities in the marketplace as a whole is sufficient proof of discrimination to justify a program of racial preferences . . . in whatever area is involved." The study contained "no statistical analysis of other factors that may affect minority business enterprise availability and utilization." *Id*. The Eleventh Circuit affirmed the district court's holding that "the Brimmer-Marshall Study fails to provide a strong basis in evidence of discrimination against [D]BEs to justify [a] racial and ethnic preference program." 218 F.3d at 1267.

A number of other disparity studies on which the Appendix relies (because they were surveyed in the Urban Institute report - an prime example of double or triple or even more remote hearsay) have been found invalid as a predicate for local or state race-conscious remedies and have been heavily criticized by the courts that have reviewed them. For example, three months before the Urban Institute's report was issued, a federal district court in Columbus, Ohio overturned a proposed MWBE ordinance, finding that the disparity study was not only flawed conceptually, but was an example of research aimed at proving a particular result the City desired in commissioning the study. *(AGC v. Columbus,* 936 F.Supp. 1363, 1431 (S.D. Ohio 1996)). Nevertheless, the Urban Institute's report, and by extension the Appendix and the Panel, relied on the Columbus study, as well as 14 other studies completed by the same disparity study contractor, BBC, and which used essentially the same flawed methodology. A month before the Urban Institute report was released, a federal court in Miami struck down a Dade County MWBE program and criticized the disparity study produced by MRD Consulting, which is also relied on in the Urban Institute report. The Court said:

B. The Appendix Fails to Demonstrate That Government Participated In The Discriminatory Pattern of Exclusion.

In order to conclude that there is strong evidence of a compelling interest, a court must find evidence that the

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> Plaintiffs have produced both evidence of race-neutral explanations for the disparities reflected in defendants' statistical analyses and evidence of flaws in the data and methodology that underlie defendant's statistics and make the numerical disparities neither significant nor actionable.

(Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County, 943 F.Supp. 1546, 1584 (S.D. Fla. 1996), *aff'd* 122 F.3rd 895 (11th Cir. 1997). Many other disparity studies are currently the focus of litigation.

For discussions of post-Croson disparity studies *see* Mitchell Rice, Government Set-Asides, Minority Business Programs and the Court, *Public Administration Review,* March/April, 1991, 114-122; Patrick D. Halligan, "Minority Business Preferences and Ad Hoc Hypotheses: A Comment on *Coral Construction V. King County."* 10 *Construction Law* 26 (November 1990); John Lunn and Huey L. Perry, "Justifying Affirmative Action: Highway Construction in Louisiana," 46 *Industrial and Labor Relations Review,* 464-479 (April 1993); George R. LaNoue and John Sullivan. "But for Discrimination How Many Minority Businesses Would There Be?" 24 *Columbia Human Rights Law Review* (Winter 1992); George R. LaNoue, "Local Officials Guide to Minority Business Programs and Disparity Studies: Responding to The Supreme Court's Mandate in *City of Richmond v. Croson,"* published by the National League of Cities (1st ed. 1991, 2nd ed. 1994) and George R. LaNoue, "Standards for the Second Generation of *Croson* Inspired Disparity Studies," 26 *The Urban Lawyer* 485 (Summer 1994). Neither the Urban Institute's report's nor the Appendix cite any of these works, which critique the methodology of almost all of the disparity studies so far completed, and the Panel seems to have been blithely ignorant of them.

government participated, actively, or at least passively, in the any deliberate patterns of racial exclusion it finds. *Croson*, 488 U.S. at 492. The Appendix does not provide any evidence that DOT had "essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the . . . construction industry.

Although the Panel stated, for example, that "subcontractors' unions place before minority firms a plethora of barriers to membership," (for which it relied on testimony before a Congressional Committee by civil rights activists and the Appendix[16], which refers to that problem existing in "several cities and states" (but not nationwide)) 228 F.3d 1147 at 1168, Pet App. 35, it failed to indicate how government was involved with that discrimination. Indeed, the Panel seems to

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[16] While the Appendix makes reference to 29 Congressional hearings held between 1980 and 1995, and occasionally quotes testimony at those hearings, the Appendix makes no distinction between findings that represent a Congressional consensus, the views of a single committee or the partisan majority on a particular committee or subcommittee, the views of a single Congressman representing constituents who are not objective or disinterested, or the views of advocacy organizations and individuals. No attempt was made, either by the author of the Appendix or the Panel, to verify the accuracy of the statement when made. Nor does the Appendix or the Panel distinguish between statements that may have been accurate 15 years ago, but are no longer correct.

Uncritical deference to Congressional statements, apparently a pillar of the reasoning underlying the Appendix, is not consistent with the skepticism required by *Adarand,* where constitutional rights are concerned. Moreover, the Appendix seems to rely on cases, such as *Fullilove v. Klutznick*, 448 U.S. 448 (1980) and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which are no longer good law. This Court said in *Adarand* " . . . to the extent (if any) that *Fullilove* held federal racial classifications to be subjected to a less rigorous standard, it is no longer controlling." *Adarand III*, 515 U.S. 200, 235.

have ignored efforts by the federal government, through legislation, regulations, executive orders, litigation and other enforcement action, to open union apprenticeship programs to participation by minorities. The Panel also ignored this Court's statement in Croson that "the exclusion of blacks from skilled construction trade unions and training programs . . . . [which] past discrimination has prevented them 'from following the traditional path from laborer to entrepreneur' . . . .that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts. . . ." *Croson* at 498-499.

Instead, the Panel relies on the circular reasoning that because the federal government funds the vast majority of highway projects, and that the bulk of the contract dollars were paid to non-minority firms, this "is in and of itself a form of passive participation in discrimination that Congress is entitled to seek to avoid." 228 F.3d 1147 at 1182. By that reasoning, all government activities involving interaction with the public could be deemed "participation" in a pattern of discriminatory exclusion.

CONCLUSION

Amici respectfully submit that the Appendix utterly fails to provide the required "strong basis in evidence" and that the Panel's reliance on the Appendix was wrong as a matter of evidentiary principles and as a matter of allocation of the burden of persuasion.

The judgment of the Court of Appeals for the Tenth Circuit should be reversed.

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APPENDIX