No. 15-906

In The Supreme Court of the United States

DUNNET BAY CONSTRUCTION COMPANY,
an Illinois corporation,

Petitioner,

v.

RANDALL S. BLANKENHORN,
in his official capacity as
Secretary of Transportation, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Road & Transportation Builders Association ("ARTBA") is a nonprofit trade organization that represents the transportation construction industry before the federal executive, legislative, and judicial branches.* ARTBA's membership structure includes nearly three dozen affiliated chapters comprising more than 6,000 members from all sectors of the transportation construction industry, including roads, public transit, airports, and waterways. As a whole, the transportation construction industry—including ARTBA's members—sustains 3.9 million American jobs and generates more than $500 billion in total economic activity in the United States each year.

As a national organization whose members include both Disadvantaged Business Enterprises ("DBEs") and others, ARTBA has a vital interest in ensuring that prompt and meaningful judicial review is available to remedy constitutional errors in government contracting. The decision of the court of appeals, in conflict with decisions of several other

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* All parties have consented to the filing of this brief, and the parties' written consents are submitted with this brief. ARTBA provided notice of its intent to file this brief to all parties more than ten days in advance of its filing. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

circuits, threatens that interest by placing a broad range of race-based government conduct beyond the reach of federal courts. ARTBA therefore urges this Court to grant review to resolve the circuit conflicts identified by petitioner and to correct the court of appeals' erroneous decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a challenge to the State of Illinois' rejection of petitioner's bid for a federal-aid construction project on Chicago's Eisenhower Expressway. Petitioner was the low bidder for the project, but the bid was rejected because it did not comply with the 22 percent participation goal for DBEs that the State had established for the project.

As a condition of receiving federal highway funding, the States are required to implement a program to encourage participation by DBEs in highway construction projects. Federal regulations define a DBE as a for-profit entity that is at least 51 percent owned and controlled by individuals who are "socially and economically disadvantaged," and the regulations create a rebuttable presumption that members of a racial minority are socially and economically disadvantaged. 49 C.F.R. § 26.5. The regulations require States to set an overall percentage goal for funds paid to DBEs. 49 C.F.R. § 26.45. The State must first attempt to meet that goal through race-neutral means (such as outreach to minority-owned contractors), and may employ DBE participation goals for specific contracting projects only if those race-neutral means prove unsuccessful. See *id.* § 26.51(a). Even when States are permitted to use specific DBE goals, they may not impose rigid

quotas: A contract must be awarded to the low bidder if the bidder either subcontracts the designated percentage of work to DBEs *or* demonstrates that it has made a good-faith effort to do so. *Id.* § 26.53(a).

In this case, petitioner challenges the State's application of its 22 percent DBE participation goal on the grounds that the goal was set arbitrarily, for essentially political reasons, and that the State had adopted a rigid (albeit informal) policy of denying good-faith waivers of its participation goals. The court of appeals rejected petitioner's claim on two bases. First, the court held that petitioner lacked standing to challenge the State's application of its preference for minority-owned subcontractors, because the DBE goal had not put petitioner at any competitive disadvantage in bidding for the Eisenhower project. But that holding ignores the common-sense reality that being compelled by the government to discriminate against others on the basis of race is itself an Article III injury, independent of the injury experienced by those who are disadvantaged by the discrimination. Second, the court of appeals held on the merits that the State's decision satisfied strict scrutiny so long as it complied with the federal government's statutes and regulations governing the DBE program. But there is no basis for the court of appeals' conclusion that compliance with statutes and regulations (which confer substantial discretion on state decision makers) can substitute for compliance with the Constitution's requirements, and as a practical matter the effect of the court of appeals' approach will be to cut off claims at the core of the Equal Protection Clause's protections. Neither of these unjustified

limitations on the availability and scope of judicial review of race-conscious decision making in the context of government contracting can be squared with the fundamental principle that *all* race-conscious government measures must be "justif[ied] * * * under the strictest judicial scrutiny." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 224 (1995).

The court of appeals' errors are also highly consequential. The inevitable effect of the court's limitations on who may challenge a State's DBE program and what aspects of the program are subject to challenge will be to leave constitutional violations uncorrected. Moreover, removing the prospect that state officials' decisions will be subjected to meaningful judicial review heightens the risk that they will use racial classifications for impermissible purposes in the first instance. That risk is particularly acute in the context of transportation contracting awards, where the vast sums of money involved lead to the possibility that state officials will use racial classifications to funnel resources to their political allies, rather than for permissible remedial purposes.

The court of appeals' decision applies directly to more than $40 billion in federal transportation funding, and its effects will extend far more broadly. The transportation construction industry is a vitally important component of the American economy, and participants in the industry should not be foreclosed from meaningful judicial review when the government uses racial classifications to decide who will receive valuable contract awards.

ARGUMENT

CERTIORARI SHOULD BE GRANTED TO ENSURE THAT RACE-CONSCIOUS GOVERNMENT CONTRACTING DECISIONS RECEIVE MEANINGFUL JUDICIAL REVIEW

A. The Decision Below Improperly Constrains Judicial Review Of Race-Conscious State Action

No matter how well intentioned, "[r]acial classifications of any sort pose the risk of lasting harm to our society." *Shaw* v. *Reno*, 509 U.S. 630, 657 (1993). For this reason, this Court has long held that race-conscious government measures must be "justif[ied] * * * under the strictest judicial scrutiny." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 224 (1995). Such searching scrutiny, of course, is impossible in the absence of meaningful and consistent judicial review.

In the decision below, however, the court of appeals sharply restricted judicial review of race-conscious state decision making in two important respects. First, the court held that a requirement that general contractors extend a preference to minority owned subcontractors may be challenged only by non-minority owned small businesses who lose work as a result of the preference. That standing rule erects a total barrier to claims brought by general contractors who, like petitioner, allege that a preference program coerces them to engage in racial discrimination. Second, the court held, on the merits, that "[a] state is insulated from a constitutional challenge as to whether its [DBE] program is narrowly tailored * * * absent a showing that the

state exceeded its federal authority" by breaching the federal government's regulations for the DBE program. Pet. App. 39a (brackets and quotation marks omitted). These limitations on the availability and scope of judicial review are in conflict with the decisions of other courts of appeals and constitute profound departures from the settled principle that, when the government employs racial classifications, its action "must necessarily receive a most searching examination." *Adarand*, 515 U.S. at 223 (quoting *Wygant* v. *Jackson Bd. of Ed.*, 476 U.S. 267, 273 (1986)). This Court's review is warranted.

1. The court of appeals held in this case that being forced by a State to discriminate against others on the basis of race is not an injury in fact that can support standing under Article III. Pet. App. 30a-33a. In the court of appeals' view, standing is available only to a party that itself was "denied equal treatment." *Id.* at 32a.

As the petition explains (at 19-22), the court of appeals' standing holding creates a square conflict with three other circuits. The Sixth, Ninth, and D.C. Circuits have held that "[a] person required by the government to discriminate by ethnicity * * * against others has standing to challenge the validity of the requirement." *Monterey Mech. Co.* v. *Wilson*, 125 F.3d 702, 707 (9th Cir. 1997); see also *Safeco Ins. Co. of America* v. *City of White House*, 191 F.3d 675, 689 (6th Cir. 1999); *Lutheran Church–Missouri Synod* v. *FCC*, 141 F.3d 344, 386-387 (D.C. Cir. 1998). In the decision below, however, the court of appeals rejected that conclusion, reasoning instead that petitioner had asserted only a "generally available grievance

about government." Pet. App. 32a (quotation marks omitted).

That crabbed view of Article III standing does not withstand scrutiny. As this Court has explained, whenever a State employs racial classifications, "the costs are undeniable." *Parents Involved in Cmty. Sch* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 705 (2007). Indeed, "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people." *Adarand*, 515 U.S. at 214 (quoting *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)). It follows that, when a general contractor is forced to engage in what it may perceive as—and what the law has pronounced to be—"odious" discrimination in order to obtain a government contract, it "suffers injury in fact, albeit of a different kind, as does the person suffering the discrimination." *Monterey Mech.*, 125 F.3d at 708. That is so "[e]ven if [the] general contractor suffers no discrimination itself," because the general contractor "is hurt by a law requiring it to discriminate, or try to discriminate, against others on the basis of their ethnicity." *Id.* at 707; see also *Safeco Ins. Co.,* 191 F.3d at 689; *Lutheran Church–Missouri Synod*, 141 F.3d at 350-351.

Petitioner's claim thus sought to remedy the injury petitioner experienced in being compelled to participate in the State's DBE program, which petitioner alleged had been implemented as an impermissible quota. It did not invoke a generalized "right to a government that does not deny equal protection of the laws." Pet. App. 32a-33a (quotation marks omitted).

The individualized nature of petitioner's injury also highlights the pernicious consequences of the court of appeals' erroneous standing holding. Although the court of appeals stressed that it saw no evidence "that a non-minority-owned small business could not challenge IDOT's DBE program on equal protection grounds," *id.* at 37a, any such hypothetical challenge would not vindicate petitioner's separate interest in avoiding coerced participation in racial discrimination. The effect of the court of appeals' decision is to close the courthouse doors to general contractors who have been compelled to participate in racial discrimination and to deny them any avenue for redressing their particular injury.

A simple hypothetical helps illustrate the point that the party forced to discriminate at the direction of the State is harmed just as much as—albeit in a different way than—the party that is denied a particular benefit. Suppose a State directed its most prominent private university to admit only students of a particular race. The university would thus be compelled to participate in a regime that plainly violates the Constitution, which would be wholly inconsistent with its mission (not to mention the possibility that it would be exposed to direct liability). By the logic of the decision below, however, the university has no cognizable interest in avoiding coerced participation in the State's discriminatory regime.

Moreover, the court of appeals was wrong to assume that non-minority owned subcontractors will always be well situated to challenge a State's implementation of its DBE program. In some circumstances, to be sure, subcontractors may possess

both the incentives and necessary information to challenge the State's DBE program. For example, if the express terms of the State's program suggest that it operates as an impermissible quota, subcontractors may well be able to mount an effective challenge. The circumstances of this case, however, illustrate the difficulties subcontractors may face in uncovering less obvious violations of the Equal Protection Clause.

Here, petitioner alleged that, although the State had formally announced a DBE participation "goal" of 22 percent, which was subject to waiver based on the general contractor's substantial efforts to satisfy it, the State had in fact adopted a rigid "no-waiver" policy that converted the goal into a prohibited quota. As the petition recounts (at 10-14), petitioner's efforts to prove that the State had applied such a policy to its bid required evidence of its own good-faith efforts to meet the DBE goal, as well as evidence concerning the State's evaluation of petitioner's administrative appeal. It is unlikely that the subcontractors who lost out on work because of the State's rejection of petitioner's bid—the parties whom the court of appeals viewed as the only possible plaintiffs—could have marshaled the same evidence in challenging the State's decision.

As a practical matter, therefore, the court of appeals' standing holding is likely to foreclose any meaningful challenge to a State's imposition of a de facto quota by improperly withholding waivers in its DBE program. Only the general contractor whose bid is rejected is likely to have the information necessary to support such a challenge. Under the rule adopted below, however, the general contractor

will lack standing to raise it. This result, under which racial discrimination in violation of the Equal Protection Clause will go entirely unremedied, cannot be squared with this Court's repeated admonitions that a State's use of racial classifications must be subjected to demanding judicial scrutiny. See, *e.g.*, *Fisher* v. *University of Texas*, 133 S. Ct. 2411, 2419 (2013); *Parents Involved*, 551 U.S. at 701; *Adarand*, 515 U.S. at 223; *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

2. The decision below also unduly circumscribes the substantive scope of review in challenges to a State's implementation of federal grant programs, including the federal-aid highway program, of which the DBE program is a part. Although the court of appeals purported to apply strict scrutiny in resolving petitioner's claim, see Pet. App. 38a, the court asked only whether the State's implementation of its DBE program complied with federal standards. In the court of appeals' view, the State's program would necessarily satisfy strict scrutiny so long as it complied with the federal statutes and regulations that govern the DBE program. See Pet. App. 38a-39a.

As the petition explains (at 27-29), the standard of review applied by the court of appeals conflicts with the approach taken on the same subject by the Eighth and Ninth Circuits. Although those courts have upheld the *facial* validity of the federal DBE program and have agreed that a State may rely on Congress's determination that there is a nationwide compelling interest in remedying the effects of discrimination in the construction business, they have also permitted state-specific, narrow-tailoring

challenges to proceed. See *Sherbrooke Turf, Inc.* v. *Minnesota Dep't of Transp.*, 345 F.3d 964, 971 (8th Cir. 2003) (holding that "a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed," and that "a State's implementation becomes critically relevant to a reviewing court's strict scrutiny"); *Western States Paving Co.* v. *Washington State Dep't of Transp.*, 407 F.3d 983, 997 (9th Cir. 2005) (agreeing that "it is necessary to undertake an as-applied inquiry into whether Washington's DBE program is narrowly tailored"). In those two circuits, a State's DBE program cannot be upheld "simply because the State complied with the federal program's requirements." *Western States Paving Co.*, 407 F.3d at 997. Only the Seventh Circuit has reversed that rule by holding that "[a] state is insulated from a constitutional challenge as to whether its [DBE] program is narrowly tailored * * * absent a showing that the state exceeded its federal authority." Pet. App. 39a (brackets and quotation marks omitted).

The court of appeals' narrow approach is incompatible with strict scrutiny. Properly applied, that standard requires the reviewing court to determine that, when the government has drawn racial distinctions, there is no "nonracial approach" that "could promote the [government's] interest about as well." *Fisher*, 133 S. Ct. at 2420; see also *ibid.* ("The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the [same] benefits." (internal quotation marks omitted)). But the rule applied by the court of appeals skips the narrow-tailoring step entirely. In the court of appeals' view, if the State's action complies with the federal statutes and

regulations, then a constitutional challenge is impossible. Pet. App. 38a-39a.

The court of appeals sought to justify its novel version of equal protection review by suggesting that, "[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations." Pet. App. 39a (quoting *Milwaukee Cty. Pavers Ass'n* v. *Fiedler*, 922 F.2d 419, 423 (7th Cir. 1991)). But under well-established principles of judicial review, even if the federal DBE program were implemented directly by federal officials, the program's *facial* validity would not insulate the implementation of the program from as-applied constitutional challenges in individual cases. A conclusion of facial validity certainly does not imply that any particular application of a program is constitutional: Because "all agree that a facial challenge must fail where the statute has a plainly legitimate sweep," *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 (2008), it is clear that a facially valid program may have numerous unconstitutional applications. See also, *e.g.*, *Gonzales* v. *Carhart*, 550 U.S. 124, 168 (2007) (rejecting facial challenge, but noting that "[t]he Act is open to a proper as-applied challenge in a discrete case."). The implementation of the program thus must be subject to as-applied challenge, and a successful challenge is in no way equivalent to an injunction against the drafters of the regulation.

Because the federal DBE regulations leave the States with broad discretion in implementing their DBE programs, the court of appeals' holding that

compliance with the regulations implies compliance with the Equal Protection Clause insulates a broad swath of state action from constitutional review. This case again illustrates the point. Petitioner sought to challenge the State's selection of a 22 percent DBE participation goal for the Eisenhower project on the ground that the figure had been set arbitrarily in order to match a preordained objective. Pet. App. 40a-41a. The court of appeals rejected that challenge on the ground that petitioner had not demonstrated any violation of the federal regulations. *Ibid.* The court acknowledged that, "because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority." *Id.* at 41a. In other words, precisely because the federal government has left the State with apparently standardless discretion in the critical task of selecting DBE participation goals for individual construction projects, *any* conceivable choice the State could have made would have been immune from constitutional challenge. The court of appeals' approach thus substitutes absolute deference for the "searching examination" required by the strict scrutiny standard. *Adarand*, 515 U.S. at 223; see also *Croson*, 488 U.S. at 501 (observing that, in light of the "the history of racial classifications in this country," "blind judicial deference to legislative or executive pronouncements of necessity has no place").

The court of appeals' remarkable inversion of strict scrutiny is perhaps best demonstrated by the court's response to petitioner's claim that the process by which the State selected its DBE participation goal was driven by political considerations. The

court held that this challenge failed because petitioner "ha[d] not identified any regulation or other authority that suggests that the political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal." Pet App. 40a. Under this Court's cases, however, the basic point of subjecting racial classifications to strict scrutiny is to determine whether they are "motivated by * * * simple racial politics," rather than permissible remedial considerations. *Croson*, 488 U.S. at 493; see also *Adarand*, 515 U.S. at 226 ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." (quotation marks omitted)). The court of appeals' approach thus undermines the fundamental purpose of strict scrutiny review.

B. The Questions Presented Are Exceptionally Important To Participants In The Transportation Construction Industry

Notwithstanding the federal DBE program's worthy goals, the States' implementation of their DBE programs inevitably invites potential abuse. Without a "searching judicial inquiry into the justification for * * * race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493. It is therefore critically important for participants in the transportation construction industry that state DBE programs be subject to meaningful judicial review in federal court.

To state the obvious, it is virtually certain that the court of appeals' unduly circumscribed understanding of strict scrutiny will allow injustices to persist in individual cases. Consider *Monterey Mechanical*, *supra*. In that case, a general contractor challenged a California statute that (much like the federal DBE program) required general contractors to either subcontract a certain percentage of work to minority-, women-, or disabled-veteran-owned firms or demonstrate a good faith effort to do so. See 125 F.3d at 704. When the Ninth Circuit turned to the merits of the general contractor's Equal Protection claim, it concluded that the State could "offer[] no evidence whatsoever to justify the race and sex discrimination," *id.* at 713, and ultimately held that the State's program could not satisfy strict scrutiny. See *id.* at 714-715. Under the decision below, however, the general contractor's claim would have failed at the outset for lack of standing, and the constitutional violation would have continued undisturbed.

The same is true of the Ninth Circuit's decision in *Western States*, *supra*. There, after holding that a state DBE program must satisfy a state-specific narrow-tailoring requirement, see 407 F.3d at 997-998, the court invalidated Washington's DBE program because the State had failed to identify evidence that the groups that benefited from preferences under the program "currently suffer—or have ever suffered—discrimination in the Washington transportation contracting industry," *id.* at 1002. If an identical case had been brought in the Seventh Circuit, the challenge would have been rejected on the ground that the State's program need not satisfy a narrow tailoring requirement at all. See Pet. App. 39a. The constitutional violation that the Ninth Cir-

cuit corrected in *Western States* would thus persist under the rule applied below.

Quite apart from the possibility of correcting results in individual cases, moreover, the availability of meaningful judicial review also helps to prevent injustices from occurring in the first place. That is so because "[t]he *prospect* of review increases the likelihood of fidelity to substantive and procedural norms" in administrative decision making. Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. Chi. L. Rev. 653, 656 (1985) (emphasis added)). Thus, when meaningful judicial review is available, it is likely to impose discipline on the decisions of the state officials charged with implementing the DBE program, and to encourage them to comply with constitutional restrictions on the official use of racial classifications. By contrast, when administrative decision makers understand that meaningful judicial review is unlikely, they face no such constraints, and the risk that they will act for impermissible reasons is heightened accordingly.

That risk is particularly acute in the context of the transportation construction industry, where the large sums of money associated with contract awards mean that the stakes are extraordinarily high. As the record compiled by petitioner in this case illustrates, there is a serious risk that state officials will treat their control over these funds as an opportunity to secure political support, and will use preferences for minority-owned contractors to funnel work to their political allies. See Pet. 5-10 (summarizing evidence that state officials manipulated DBE participation goals and adopted a no-waiver policy to help secure political support for

Governor Quinn's reelection campaign); Pet. 11-14 (summarizing evidence of political influences in State's response to petitioner's reconsideration request). That strong incentive for States to use racial classifications for political reasons—whether or not they can be justified as permissible remedies for discrimination—makes searching review in federal court absolutely necessary. See, *e.g.*, *Adarand*, 515 U.S. at 226; *Croson*, 488 U.S. at 493.

As the petition correctly explains (at 25-26, 32-33), the effects of the decision below extend to a broad and important sector of the American economy. Every State has created a DBE program to remain eligible for federal-aid highway funding under a succession of federal surface transportation authorization laws. These DBE programs apply to approximately $40 billion in federal-aid highway construction funding annually, and similar preferences for minority-owned contractors apply to state-funded transportation projects in many States. See Fed. Hwy. Admin., *Moving Ahead for Progress in the 21st Century Act (MAP-21)* (July 17, 2012) <http://tinyurl.com/fhwastudy> (reporting $41 billion in federal highway spending in FY 2014); Cheryl H. Lee *et al.*, U.S. Census Bureau, *State Government Finances Summary: 2013*, at 9 (2015) <http://tinyurl.com/censusstudy> (total state spending on highways in 2013 was $112 billion). A single State's DBE program, moreover, may apply to hundreds or even thousands of transportation contractors, and as a whole the transportation construction industry sustains roughly 3.9 million jobs and generates over $500 billion in total economic activity in the United States each year. See ARTBA, *2015 U.S. Transportation Construction Industry Profile* 7

(2015) <http://tinyurl.com/artbastudy>. This Court's review is warranted to ensure that the court of appeals' errors do not foreclose participants in this critically important industry from obtaining meaningful judicial review of race-conscious state action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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