No. 97-1304

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ADARAND CONSTRUCTORS, INC.,

Plaintiff-Appellee

v.

RODNEY E. SLATER, Secretary of Transportation, et al.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Judge John L. Kane, Jr.

THE FEDERAL APPELLANTS' REPLY TO APPELLEE'S SUPPLEMENTAL BRIEF

NANCY E. McFADDEN
General Counsel

PAUL M. GEIER
Assistant General Counsel
for Litigation

EDWARD V. A. KUSSY
Deputy Chief Counsel
Federal Highway
Administration

PETER S. SMITH
Trial Attorney

Department of Transportation
Washington, D.C. 20590

BILL LANN LEE
Acting Assistant Attorney General

MARK L. GROSS
LOUIS E. PERAERTZ
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 616-2013

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THE FEDERAL APPELLANTS' REPLY TO APPELLEE'S SUPPLEMENTAL BRIEF

In our Supplemental Brief, we contend that the case should be remanded to the district court, because Congress reauthorized the federal-aid Disadvantaged Business Enterprise (DBE) program, and the Department of Transportation (DOT) has promulgated new regulations that have significantly changed and more narrowly tailored the DBE program. Those changes address many of the concerns the district court raised in striking down the program in 1997. Further, that court has not had an opportunity to review those changes. Remand is particularly appropriate since the trial court is currently addressing a challenge by the same plaintiff to both the constitutionality of the new statute reauthorizing the DBE program and how the new regulations implement the revised DBE program in Adarand Constructors, Inc. v. Owens, No. 97-K-1351 (D. Colo.). The district court should also address whether the cessation of the Subcontracting Compensation Clause (SCC) program renders any portion of Adarand's claim moot.

1. Adarand urges this Court to decide this case without addressing the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107 (1998), the successor statute to the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919-1921 (1991), TEA-21's legislative history or the new regulations. In support of this request, Adarand begins with the baseless assertion that the Supreme Court "directly rejected the possibility that TEA-21 or the regulations thereto are relevant to this case" (Sup. Br. 1).[1/]

a. The language in the Supreme Court's judgment, upon which Adarand relies, does not support that contention. The Supreme Court wrote in a footnote, while discussing the history of the case, that "it is technically the provisions of ISTEA that apply to funding obligated in prior fiscal years but not yet expended." Adarand Constructors, Inc. v. Slater, 120 S. Ct. 722, 723 n.1 (2000).[2/] That language says nothing about whether a court is prohibited from considering the new regulations or the legislative history concerning the reenactment of the DBE program

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1/ "Sup. Br. __" refers to Adarand's Supplemental Brief. "U.S. Sup. Br. __" refers to the Federal Appellants' Initial Supplemental Brief. "U.S. Br. __" refers to the Federal Appellants' Initial Brief filed before the Supreme Court's January 12, 2000, order reversing the judgment that the case was moot.

2/ ISTEA and TEA-21 are re-authorization acts, not appropriation measures. The preamble to TEA-21 says it is an act to authorize funds. See Pub. L. No. 105-178, 112 Stat. 107; see also S. Rep. No. 226, 106th Cong., 1st Sess. 2000 ("Report on Surface Transportation Act of 1999" describing TEA-21 as an authorization act).

in TEA-21.

To read into that footnote a judgment prohibiting this Court from addressing either the legislative history of TEA-21 or the new regulations contradicts the well-established principle that the Supreme Court addresses only issues decided by the lower courts or addressed by the parties below. For instance, in Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 379 n.5 (1996), the Supreme Court refused to address an issue both because it was "outside the scope of the question presented in this Court" and because the Court "generally do[es] not address arguments that were not the basis for the decision below." See also Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121, 136 (1997) (declining to resolve issues not addressed by the parties).

Whether TEA-21 or the new regulations are relevant to this case was not the reason this Court held the case moot and Adarand did not raise this issue in the questions it presented to the Supreme Court. Indeed, Adarand listed TEA-21 as one of the statutes involved in the case.[3/] Furthermore, although the federal government had informed this Court about the new regulations and the reauthorization of the DBE program in TEA-21, neither party had briefed the question before the Supreme Court's January 12, 2000, judgment. Thus, there is no basis to hold that the Supreme Court's judgment prohibits consideration of the new regulations or TEA-21's

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3/ Excerpts from Adarand's Petition for Certiorari in Adarand Constructors, Inc. v. Slater, No. 99-295 (Issues Presented and Statutes Involved) are attached to this brief in the addendum as Attachment 2.

legislative history.

b. Nor is there any basis to conclude that if ISTEA funds are available, then only the old regulations should be considered.[4/] Adarand offers no authority for such a suggestion; nor are we aware of any. Indeed, the new regulations expressly state that they are applicable to funds expended either through ISTEA or TEA-21. 49 C.F.R. 26.3. Thus, since March 4, 1999, when the new regulations became effective (64 Fed. Reg. 5096), those regulations govern the expenditure of ISTEA funds.

Furthermore, Adarand seeks prospective relief (an injunction against the DBE program). Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 212-213 (1995). When considering whether there remains a need for injunctive relief, courts are required to review significant changes to the law or facts. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992). TEA-21, its legislative history, and the new DBE regulations must be reviewed by the district court to determine if there is justification for continuing the court's injunction against the DBE program. In this case, the district court should first address the changes to the DBE program, as it is best equipped to address factual issues that

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4/ The Federal Highway Administration (FHWA) Office of Budget and Finance has determined that as of March 31, 2000, the unobligated balance of pre-TEA-21 federal-aid highway funds available in Colorado is $13,531,697. That is 4.74 percent of the total available Colorado federal-aid highway funds ($285,511,333). The Colorado federal-aid highway funds available as of March 31, 2000, that were authorized under TEA-21 is $271,979,636, or 95.26 percent of the total FHWA funds available in Colorado." See Attachment 1. Thus, an injunction against only ISTEA has little practical effect.

may arise in determining how the DBE regulatory scheme is now implemented.

2. Adarand next claims (Sup. Br. 1-10) that neither the old DBE regulations, found at 49 C.F.R. Pt. 23, nor the new regulations, 49 C.F.R. Pt. 26, are relevant to the district court's judgment holding that the DBE statutory program in ISTEA is unconstitutional. That contention is legally incorrect. Both ISTEA and TEA-21 expressly make the Secretary's regulations relevant to the implementation of the DBE program. Furthermore, the Supreme Court, in Adarand, 515 U.S. at 237, ordered the lower courts to consider the regulations in determining the constitutionality of the DBE program. Although, in our view, the district court did not properly consider the regulations, it is not true, as Adarand asserts (Sup. Br. 1-4), that the court did not consider the old regulations at all.

a. TEA-21 and ISTEA both require the DBE program to be implemented under the Secretary of Transportation's guidance. For instance, TEA-21 says "except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts made available * * * shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." TEA-21, Pub. L. No. 105-178, §§ 1101(b)(1) and (b)(4), 112 Stat. 107 (1998). See also ISTEA, Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919-1920 (1991) (emphasis added). Thus, Congress fully expects its statutory program to be implemented through the Secretary's regulations. Indeed, as we point out in

our initial Supplemental Brief (U.S. Sup. Br. 9 & n.3), the new DBE regulations were important to several legislators' determinations that the DBE program was constitutional and should be reenacted in TEA-21.

As described in our supplemental brief, the Supreme Court ordered the lower courts to review the regulations that are pertinent to all of the factors of narrow-tailoring. In Adarand, 515 U.S. at 237-238 (citations omitted) (emphasis added), the Court said:

> The Court of Appeals did not * * * address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was "any consideration of the use of race-neutral means to increase minority business participation" in government contracting, or whether the program was appropriately limited such that it "will not last longer than the discriminatory effects it is designed to eliminate * * * Moreover, unresolved questions remain concerning the details of the complex regulatory regimes implicated by the use of subcontractor compensation clauses."

We contend (U.S. Br. 42-44) that the district court did not properly consider how the old regulations address the five narrow-tailoring factors the Supreme Court articulated in cases such as United States v. Paradise, 480 U.S. 149, 187 (1987).[5/] Since the regulations have changed, it is all the more important for the

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5/ We contend that the district court should not have reviewed the DBE program in the first place, because, inter alia, this case concerns only the SCC program, and the SCC is different from, and not even involved in, the federal-aid DBE program (U.S. Br. 40). The district court's review of the DBE program went further than the Supreme Court's remand order which asked "whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny." Adarand, 515 U.S. at 238.

district court to review those changes when it conducts its narrow-tailoring inquiry.

The new DBE program is more narrowly tailored as to each of the five factors the Court articulated in Paradise. The district court was particularly concerned with how the statutes and regulations presume certain individuals to be DBEs even though those individuals may not be truly disadvantaged. Adarand Constructors, Inc. v. Peña, 965 F. Supp. 1556, 1580 (D. Colo. 1997). The new program has enhanced safeguards to ensure that benefits flow only to those truly disadvantaged. For the first time, the DBE program contains economic eligibility limitations. Owners of a firm applying for certification as a DBE, including minorities presumed to be disadvantaged, must submit a signed, notarized statement of personal net worth, with appropriate supporting documentation. 49 C.F.R. 26.67. If the individual owner's personal net worth exceeds $750,000, the presumption of economic disadvantage for the minority owner is conclusively rebutted and the individual and firm are not eligible to participate in the DBE program. Ibid. When a firm's receipts exceed the small business standards, it can no longer participate in the program, regardless of its owner's personal net worth. 49 C.F.R. 26.65. The district court should first consider the important changes to the standards in determining DBE eligibility.

Under the new regulations, 49 C.F.R. 26.45, recipients are required to set goals based on local market conditions. Individual recipients are not required to meet the national ten percent annual

goal or to employ special measures if their goals are below ten percent. 49 C.F.R. 26.41(c). Moreover, recipients must choose their own method for goal setting and should base their goal on the evidence that best reflects their market conditions. 49 C.F.R. 26.45. The new requirement that recipients may not even consider using race-conscious means until they have determined that they cannot meet their expected levels of DBE participation though race-neutral means strengthens the race-neutral aspect of the program. 49 C.F.R. 26.51(a). The new regulations permit a recipient to seek waivers (as Colorado has) if the recipient chooses to operate its DBE program differently from the way recommended in the DOT regulations. Waiver requests can pertain to subjects such as the use of a race-conscious measure other than a contract goal, different ways of counting DBE participation in certain industries, or the use of separate goals, as Colorado has proposed, for specific categories of individuals who have suffered discrimination.[6/] Preamble to 49 C.F.R. 26.15, 64 Fed. Reg. 5105.

The new regulations also add requirements to ensure that non-minorities are not unduly burdened. For the first time, the DBE program requires recipients to determine if DBE firms are over-concentrated in a certain type of work. If so, recipients must take steps to ensure no over-concentration of DBEs. 49 C.F.R. 26.33.

Since the new regulations have made changes that are directly

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6/ DOT granted Colorado's waiver request as to the use of separate goals on March 28, 2000.

relevant to the narrow-tailoring inquiry, and the district court has not reviewed the changes, the case should be remanded to the district court with instructions to consider the new regulations as to every relevant narrow-tailoring factor.

b. To be sure, the district court held that the statutory presumptions of social and economic disadvantage were over- and under-inclusive. Adarand, 965 F. Supp. at 1580. As we explain in our initial briefs (U.S. Br. 17, 24-25), the Supreme Court rejected the idea that "strict scrutiny is 'strict in theory, but fatal in fact.'" Adarand, 515 U.S. at 237. The district court's conclusion, 965 F. Supp. at 1580, that statutory presumptions are per se unlawful is inconsistent with the Supreme Court's ruling; it is, therefore, important that the trial court make a full and proper review of the new statute and the new DBE regulations before ruling on the DBE program.

In its 1995 opinion, the Supreme Court asserted that the "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." Adarand, 515 U.S. at 237. Prior to reauthorizing the DBE program in TEA-21, Congress had an extensive debate about the persistent effects of past discrimination, the constitutionality of the DBE program, and the issue of presuming social disadvantage for particular groups. See 64 Fed. Reg. 5097-5099 (1999). Before ruling upon the constitutionality of the new statutory provision, the district court should have the opportunity

to consider the extensive legislative record on this issue, as well as Congress's ultimate judgment that those presumptions, implemented through the new regulations, are an appropriate method to remedy discrimination. Contrary to Adarand's claim, the new DBE regulations, as described below, dictate when and how the presumptions apply. For this reason as well, the district court should have the opportunity to consider the presumption in light of the new regulations.

c. A full review of the new DBE regulations is also necessary because this case is a facial challenge to the federal aid DBE program (see U.S. Br. 41-43). As Adarand concedes (Sup. Br. 8), under United States v. Salerno, 481 U.S. 739, 745 (1987), it is a fundamental principle that a court cannot strike down a statute as facially invalid unless there is "no set of circumstances * * * under which the Act would be valid." Since the DBE program operates through states which certify DBEs, it is important for the court to consider whether the new waivers and increased flexibility that the new DBE program affords states allows a state to operate a narrowly tailored DBE program.

The district court will have an opportunity to make such a record in the related case of Adarand v. Owens. It would be imprudent to decide the facial constitutionality of the new congressionally mandated federal aid DBE program without the factual record that is being developed in Owens. This Court should remand the case and direct the district court to consolidate the two cases.

d. While we contend that the district court failed to conduct a proper review of the DBE regulations, it is not accurate to assert, as Adarand repeatedly does, that "the District Court never considered the old regulations because it declared the federal statutes facially unconstitutional" (Sup. Br. 2). This assertion is contrary to the district court's language as well as Adarand's prior assertions to the district court.

Indeed, the district court understood Adarand as arguing that the regulations were at issue: "[Adarand] maintains each of the statutes and regulations it cites in the Amended Complaint are at issue." Adarand, 965 F. Supp. at 1568. The district court then listed the various regulations Adarand was attacking. Id. at 1568-1569. Consequently, the district court stated that the "issue remains whether the statutes and regulations are narrowly tailored to serve such interest." Id. at 1577 (emphasis added). After the district court held the statutory presumptions unlawful, the court rejected the federal appellants' argument that the certification requirements, which the old regulations imposed, nonetheless narrowly tailored the SCC program. Id. at 1579-1580.

Moreover, the district court struck down the regulations and the statutes. Id. at 1584. The district court stated, "I issue an injunction enjoining the Defendants from administering, enforcing, soliciting bids for, or allocating any funds under the SCC program. This effectively precludes the implementation of the statutes or regulations that grant presumptive eligibility for government preference in contracting on the basis of race." Id. at 1558.

3. Adarand also makes inaccurate assertions about the federal appellants' position on mootness. Contrary to Adarand's interpretation (Sup. Br. 8, 13-15), the federal appellants did not state that this entire case is moot. We contended that this appeal is not moot because DOT will continue implementing the federal-aid DBE program (U.S. Sup. Br. 1). With regard to the SCC program, we argued only that the district court should determine if the federal government's cessation of this conduct has rendered that part of the case moot.

There is no merit to Adarand's contention (Sup. Br. 10-11) that the Supreme Court's judgment prohibits the lower courts from considering issues of mootness that may arise. The Supreme Court's judgment on mootness went to whether Adarand's voluntary application for certification, and the Colorado Department of Transportation's certification of Adarand as a DBE, mooted this case when the federal government had yet to approve Colorado's certification procedures. Adarand, 120 S. Ct. at 725-726.

Article III of the Constitution limits the jurisdiction of federal courts to actual cases and controversies. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 120 S. Ct. 693, 704 (2000). Although the Court held that, under Friends of the Earth, Inc., the federal government bears the burden of proving the case moot, Adarand, 120 S. Ct. at 725, the Court did not obviate the responsibility to consider mootness when necessary.

Moreover, the federal government's position is completely consistent with the spirit of the Supreme Court's mandate. The

government does not seek to avoid judicial review of the federal aid DBE program. We assert that, because there have been significant changes to the DBE program that are relevant to whether the new program satisfies strict scrutiny, it is appropriate to first litigate that issue in the district court, as that court did not have an opportunity to consider those changes and is best able to develop a factual record about the new DBE program.

CONCLUSION

This Court should remand the case to the district court with directions to consider: (1) whether the claim against the SCC program is moot; (2) the constitutionality of the DBE program in light of the changes to that program; and (3) whether its injunction against the old programs remains appropriate.

Respectfully submitted,

NANCY E. McFADDEN
General Counsel

PAUL M. GEIER
Assistant General Counsel
for Litigation

EDWARD V. A. KUSSY
Deputy Chief Counsel
Federal Highway
Administration

PETER S. SMITH
Trial Attorney

Department of Transportation

BILL LANN LEE
Acting Assistant Attorney General

MARK L. GROSS
LOUIS E. PERAERTZ
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-2173

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Fed. R. App. P. 32(c)(2). This brief has been prepared in monospaced typeface using Wordperfect 7.0, with courier typeface with ten characters per inch.

_____
LOUIS E. PERAERTZ
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2000, two copies of the Federal Appellants' Reply to Appellee's Supplemental Brief were mailed first-class, postage prepaid, to the following counsel of record:

J. Scott Detamore, Esq.
Mountain States Legal Foundation
707 17th St., Suite 3030
Denver, Colorado 80202

_____
LOUIS E. PERAERTZ
Attorney

CERTIFICATE OF SERVICE

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J. Scott Detamore, Esq.
Mountain States Legal Foundation
707 17th St., Suite 3030
Denver, Colorado 80202

_____
LOUIS E. PERAERTZ
Attorney