IN THE
COURT OF APPEALS OF MARYLAND

TERM 2009/2010

PETITION DOCKET NO. _____

DAVID A. BRAMBLE, INC., *et al.*

PETITIONERS

v.

DEPARTMENT OF
GENERAL SERVICES, *et al.*

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS

Petitioners David A. Bramble, Inc. ("Bramble") and John W. Tieder, Inc. ("Tieder"), through their undersigned counsel respectfully pray that a Writ of Certiorari be issued to the Court of Special Appeals ("CSA") in the case of *David A. Bramble, Inc., et al. v. Department of General Services, et al.*, No. 51, September Term, 2009.

On February 27, 2009, the Circuit Court of Kent County (Judge J. Owen Wise, *specially assigned*) dismissed the complaint in the case of *David A. Bramble, Inc., et al. v. Department of General Services, et al.*, CN 14-C077350 (Docket No. 122, Appendix 1). CSA affirmed the dismissal. On May 18, 2010, CSA denied Petitioners' Motion for Reconsideration and issued the Mandate.

INTRODUCTION

This is a discrimination case involving implementation of Md. Code Ann., *State Fin. & Proc.* § 14-302(a), under which the Department of General Services ("DGS") must "try to structure its procurement, directly or indirectly," so that:

i. 7% of its total dollar value of procurement contracts is made from African American-owned business;
ii. 10% of its total dollar value of procurement contracts is made from women-owned businesses; and
iii. 25% of its total dollar value of procurement contracts is made from minority business enterprises ("MBEs"), which include African American and Women-owned businesses.

DGS solicited bids for asphalt paving and installation of new parking lot lighting at Sandy Point State Park. The solicitation required bidders to achieve certain percentage goals for participation of minority business enterprises ("MBEs") subcontracting or else obtain a waiver of the goals; it thereby required the use of race and gender in awarding a government contract. In particular, a prime contractor's bid could be rejected for failing to reach those goals, unless the prime contractor obtained a waiver. *See* COMAR 21.11.03.11.

Bramble submitted the low bid of $807,485. The bid was based, in part, on the subcontract quote from Tieder, a non-MBE. Tieder quoted $163,500 for parking lot lighting subcontract. This was $88,900 less than the lowest quote ($252,400) from a responsible MBE who tendered a quote to Bramble.

Bramble requested a partial waiver of the MBE goals. DGS rejected Bramble's request for waiver and rejected Bramble's bid on the ground that DGS did not believe

that Bramble had made sufficient efforts to obtain minority subcontractors. Petitioners sued, alleging, among other things, that their equal protection rights under the United States Constitution and federal civil rights statutes were violated when DGS withheld the waiver. Petitioners claimed that withholding the waiver was not narrowly tailored to achieving a compelling government interest, as required by the standard of strict scrutiny.

The circuit court dismissed the case and CSA affirmed the circuit court's dismissal. CSA, however, did not do so by applying heightened scrutiny -- strict scrutiny for race-based actions and intermediate scrutiny for gender-based actions -- which is the long-settled standard applicable to race- and gender-based government conduct. *City of Richmond v. J. A. Croson.*, 488 U.S. 469, 493 (1989); *U.S. v. Virginia*, 518 U.S. 515, 533 (1996). Rather than applying the heightened standards of review that are required in a case like this, CSA applied one of the most flexible and forgiving standards of review -- arbitrary and capricious review -- that applies to ordinary administrative actions that have *no* race- or gender-based component implicating equal protection of the laws.

Use of the arbitrary and capricious standard, outlined below, contradicts settled law as announced in a long line of U.S. Supreme Court decisions. Those decisions require strict scrutiny in all discrimination cases. For example, in *Adarand v. Peña,* 515 U.S. 200 at 227 (1995), brought by a non-MBE subcontractor in a position comparable to Petitioner Tieder, the Supreme Court stated: "We have held that "*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny." *Id.* at 227 (emphasis added). Under strict scrutiny, the government has the

burden of proving that racial classifications are "narrowly tailored measures that further compelling governmental interests." *Id.* at 227.

In *Croson.*, 488 U.S. 469 at 508-09, brought by a disappointed prime contractor in a position comparable to Petitioner Bramble, the Supreme Court struck down an ordinance that granted a race-based MBE preference in award of contracts based on strict scrutiny review. The Supreme Court concluded the preference was not narrowly tailored to remedy the effects of past discrimination by the City or its contractors. *Id.* at 508-09.

The Supreme Court has thus made clear (1) that *all* race- and gender-based government actions are subject to strict (or intermediate) scrutiny; (2) that measures favoring minority groups are subject to those standards just as are measures favoring non-minorities; and (3) that strict scrutiny requires courts to engage in very rigorous review that is the polar opposite of the relaxed arbitrary and capricious standard that applies to review of government action that is *not* based on race or gender.

CSA's unprecedented use of arbitrary-and-capricious review in this case disregards settled Supreme Court precedent and threatens to undermine settled law in an area of enormous public importance. The racial struggles of the twentieth century in this country established the overwhelmingly important principle that governmental use of race/gender for contract award or other purposes is legitimate only in the "extreme case" where some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion. *Croson*, 488 U.S. 469 at 509. Petitioners do not believe that any exception to that rule is warranted. But if it is, it should be decided after full and careful

consideration by this Court. For that reason, further review is warranted.

STATEMENT OF THE CASE

DGS denied Bramble's request for partial waiver of the MBE goals on the grounds that Bramble did not demonstrate that it made a reasonable effort to obtain sufficient MBE participation to meet the goals. DGS then rejected Bramble's bid.

In December 2007, Petitioners filed suit in the Circuit Court for Kent County. They sought declaratory and injunctive relief to protect Petitioners' equal protection rights guaranteed, among other laws, by the Fourteenth Amendment of the United States Constitution, 42 U.S.C. §§1981 and 1983, and 42 U.S.C. §2000d (collectively "federal civil rights claims"). In circuit court, Bramble argued that the proper scope of judicial review, based on *Adarand* and *Croson*, is strict scrutiny. The Second Amended[1] Complaint (the "Complaint") prayed for damages as well as equitable relief.

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[1] Petitioners amended the Complaint to articulate their federal civil rights claims, including par. 56, which reads:

DGS' refusal to grant the partial waiver and the rejection of its bid constituted a violation of Bramble's civil rights under the Fourteenth Amendment of the United States Constitution, the Maryland State Constitution, 42 U.S.C. Sections 1981 and 1983, and 42 U.S.C. Section 2000d. DGS violated Bramble's individual civil rights largely because DGS' MBE preference program, as applied to Bramble in denial of Bramble's waiver request, was not narrowly tailored; because of, but not limited to, the following reasons:

(a) insufficient consideration and implementation of race-neutral methods.
(b) insufficient flexibility, including availability of waivers and individualized assessments of discrimination.
(c) insufficient relationship between MBE goal setting to the relevant business market.
(d) insufficient consideration of the rights of third parties.

DGS filed a motion *in limine*.[2] The circuit court granted the motion *in limine,* which effectively barred Petitioners' evidence relevant to the issue of whether the MBE preference, as applied, was narrowly tailored to achieve a compelling governmental interest. There was a two-day trial in November 2009, during which the circuit court rejected evidence to support Petitioner's federal civil rights claims.

In its February 27, 2009, Memorandum Opinion and Order, the circuit court dismissed the Second Amended Complaint for failure to exhaust administrative remedies, apparently under the impression that such remedies were available at the Maryland State Board of Contract Appeals ("MSBCA"). The circuit court adjudicated all claims by way of dismissing the Complaint.

Petitioners appealed to the CSA on March 28, 2009. In deference to (but not in agreement with) the circuit court's ruling that they must first exhaust administrative remedies, Petitioners pursued such administrative remedies. Petitioners appealed to the MSBCA, which concluded, on June 16, 2009, that it lacked jurisdiction over complaints about waivers of MBE goals and dismissed the appeal.[3]

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[2] The Motion sought to preclude any evidence that DGS did not have before it when it made the determination to reject Bramble's waiver request and bid. This, in effect, precluded evidence learned during discovery that supported Petitioner's federal civil rights claims.

[3] Petitioners' complaints that DGS misapplied regulations providing for waiver of MBE goals pursuant to COMAR 21.11.03.11 are not in the jurisdiction of the MSBCA pursuant to COMAR 21.11.03.14, which provides that MSBCA has jurisdiction to review agency final action in denying a bid protest involving issues *other than* "any act or omission by a procurement agency under [COMAR 21.11.03]." COMAR 21.11.03.14.

Petitioners presented three questions for review on appeal to CSA.

The first question was whether the circuit court erred when it dismissed the Complaint because Petitioners failed to exhaust administrative remedies. CSA held there were no administrative remedies to exhaust, so the circuit court's dismissal on *this* ground was improper. Petitioners do not seek, but do not oppose, certiorari on this issue.

The second question was whether the circuit court erred, procedurally and substantively, because it failed to rule favorably on Petitioners' federal civil rights claims. For its part, CSA reviewed this issue based on the arbitrary and capricious scope standard of review, as noted, en route to dismissal of the complaint.

The third question was whether the Circuit Court erred when it granted DGS' Motion in *limine,* which effectively excluded evidence showing DGS' actions did not satisfy strict scrutiny. Such evidence -- which became known mostly during discovery -- was not among the information before the DGS official(s) who denied the waiver request. This evidence would be relevant to a reviewing court applying strict scrutiny but might not be relevant to a court applying the arbitrary and capricious standard.

On March 22, 2010, CSA filed its unreported decision styled *David A. Bramble, Inc., et al. v. Department of General Services, et al.*, No. 51, September Term, 2009. CSA concluded that there is nothing on the record to indicate that the "goals for the project were arbitrary or that the finding of lack of reasonable effort [by Bramble] was arbitrary." CSA affirmed the dismissal of the complaint. (p. 22).

On April 21, 2010, Petitioners submitted a Motion for Reconsideration.[4] Petitioners sought reconsideration on the grounds that (a) Petitioners' federal civil rights claims under the Fourteenth Amendment to the United States Constitution and under 42 U.S.C. Sections 1981 and 1983, and 42 U.S.C. Section 2000d, must be reviewed under strict scrutiny standard rather than the arbitrary and capricious standard, and (b) it was improper to affirm the granting of DGS' Motion *in limine*.

By order dated May 18, 2010, the CSA denied the Motion for Reconsideration and issued the Mandate. CSA rejected the request of the Office of the Attorney General for the opinion to be published.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER ALL GOVERNMENTAL DECISIONS BASED ON RACE (AND GENDER) ARE SUBJECT TO STRICT (OR HEIGHTENED) SCRUTINY?

II. DID THE CIRCUIT COURT ERR WHEN IT GRANTED RESPONDENTS' MOTION *IN LIMINE*?

THIS COURT SHOULD ISSUE THE WRIT OF CERTIORARI.

A. The Court of Appeals should order, based on US Supreme Court decisions, that Maryland courts must use strict scrutiny and intermediate scrutiny judicial review when a State agency grants or denies a benefit based on MBE/WBE goals because these acts are race and gender based.

This case presents the important question of whether waiver determinations of race-based (or gender-based) affirmative action goals are subject to strict (or

[4] Petitioners incorporate by reference the Motion for Reconsideration, which more fully articulates the reasons why arbitrary and capricious review does not apply in this case.

intermediate) scrutiny. The requirement for waivers has its origin in the U.S. Constitution and has strong support in Supreme Court jurisprudence. *See Croson*, 488 U.S. 469 at 508; *See also Fullilove v. Klutznick,* 448 U.S. 448, 469-71 (1980). Flexibility in granting waivers is a necessary threshold to the constitutionality of the Maryland MBE preference, as applied to Petitioners as well as other bidders. *See Croson*, 488 U.S. at 508. Significantly, in the absence of flexible availability of a waiver, the state government could not use race/gender as a factor in the award of its contracts without running afoul of the U.S. Constitution. *See Id.* For this reason, the Court of Appeals should grant the writ.

CSA may be the only court in the United States that uses arbitrary and capricious judicial review of a state agency application of race/gender preferences in the award of its contracts. We are not aware of any reported rulings in Maryland that endorse such a lax standard of judicial review. It is well established by the Supreme Court that strict scrutiny review must always be applied when the "government distributes burdens or benefits on the basis of individual racial classifications." *Parents Involved in Cmty. Sch's. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2751-52 (2007) (citing *Johnson v. Cal*, 543 U.S. 499, 505-06 (2005)); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand*, 515 U.S. 200 at 224.

Although it seems obvious that the challenged government action in this case was race and gender based, it can be proven in the following hypothetical case: Suppose that a racist administrator refuses to award a contract to the low bidder (who is white) because

that bidder will be using "too many" *African-American* subcontractors; instead, the administrator awards it to the second low bidder (who is also white), because the second low bidder will be using fewer African-American subcontractors. The administrator' act should not be deferentially approved merely because his/her decision was not arbitrary and capricious; instead, the administrator would have to show that his/her decision to award the contract to the second low bidder on that basis (*i.e.*, because the low bidder included "too many" African-Americans) would satisfy strict scrutiny.

For another example, suppose a racist DGS administrator routinely grants requests for waiver of the 7% goal for African-American MBE participation but the same official never grants waivers where the low bidder falls short of the 10% goal for women-owned businesses. The official believes goals should be strictly enforced to make sure women get 10% of the procurement dollars but feels the 7% goal for African-American MBE participation should not be strictly enforced. The scope of judicial review would be strict scrutiny, the same as is required for Petitioner's claims under the Equal Protection Clause of the U.S. Constitution. *Croson*, 488 U.S. 469 at 493.

It is settled law that *all* government decisions based on racial categories are equally subject to strict scrutiny, regardless of whether those decisions favor or disfavor minority or majority races. *Adarand*, 515 U.S. 200 at 224. Accordingly, just as the hypothetical decision to reject a low bidder because it used more African-American subcontractors than the administrator preferred would be subject to strict scrutiny, so would a decision to reject a low bidder because it used more non-minority subcontractors

than the administrator preferred.

Strict and intermediate scrutiny must always apply when the government grants or denies benefits based on race and gender, however, not all of the decisions which DGS officials make implementing the State MBE program implicate such constitutional factors. State officials who implement the MBE preference program make numerous decisions that would fall outside of the factors outlined in *United States v. Paradise*, 480 U.S. 149, 171 (1987).

These other *non-racial/gender based actions* may be subject to the arbitrary and capricious test reserved for deferential judicial review. Strict scrutiny may not apply, for example, to review of DGS decisions (i) to reject a bidder that fails to submit the MBE participation schedule in a timely manner (*See* COMAR 21.11.03.09 (C) (3) (b) or (ii) to discontinue the requirement that bidders must attend pre-bid meetings, to meet potential MBEs, pursuant to COMAR 21.11.03.09 (C) (2) (e).

CSA's use of the arbitrary and capricious standard of review is in direct contravention with longstanding precedent. The denial of a governmental benefit (e.g. contract award) based on race and gender must be reviewed under strict scrutiny and intermediate review, respectively. In all such cases, noted in footnote 3 below, courts used strict scrutiny review and none used arbitrary and capricious scope of judicial review.[5]

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[5] *Croson*, 488 U.S. 469, 493 (1989); *U.S. v. Virginia*, 518 U.S. 515, 533 (1996); *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Assoc. Gen. Contractors of Ohio, Inc. v.*

B. The Court of Appeals should establish that strict scrutiny is the proper scope of judicial review in cases where plaintiffs challenge the constitutionality of a law as applied irrespective of whether the plaintiffs challenge the law on its face.

The standards for judicial review of claims to enforce equal protection guaranteed under the U.S. Constitution are the same whether the plaintiff challenges the MBE laws on their face, whether the plaintiff challenges the government's application of the laws, or both. There are numerous cases where plaintiffs challenge various MBE laws. Often these cases present facial claims along with claims challenging how the law is applied by government agencies; however, none of the reviewing courts utilizes arbitrary and capricious review.[6] Strict scrutiny requires courts to determine whether otherwise legitimate racial classifications are being implemented in a narrowly tailored manner by

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Drabik, 214 F.3d 730, 734 (6th Cir. 2000); *Monterey Mech'l v. Wilson*, 125 F.3d 702, 712-13 (9th Cir. 1997); *W.H. Scott Constr. Co., Inc. v. City of Jackson, Miss.*, 199 F.3d 206, 216 (5th Cir. 1999); *Coral Constr. Co. v. King Cty.*, 941 F.2d 910, 916 (9th Cir. 1991); *Hershell Gill Consulting Eng'rs, Inc. v. Miami-Dade Cty., Fla.*, 333 F. Supp. 2d 1305, 1316 (S.D. Fla. 2004).

[6] *See, e.g., Rothe VII*; *W. States Paving Co. v. Wash. State Dep't of Transp.*, 407 F.3d 983 (9th Cir. 2005); *Assoc. Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730 (6th Cir. 2000); *Eng'g Contractors Assoc. of S. Fla. Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Assoc. of E. Penn., Inc. v. City of Philadelphia*, 91 F.3d 586 (3rd Cir. 1996); *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991); *Hershell Gill Consulting Eng'g, Inc. v. Miami-Date County, Fla.*, 333 F. Supp. 2d 1305 (S.D. Fla. 2004); *Builders Assoc. of Greater Chicago v. City of Chicago*, 298 F. Supp. 2d 725 (N.D. Ill. 2003); *Webster v. Fulton County, Ga.*, 51 F. Supp. 2d 1354 (N.D. Ga. 1999), *aff'd*, 218 F.3d 1267 (11th Cir. 2000); *Phillips & Jordan, Inc. v. Watts*, 13 F. Supp. 2d 1308 (N.D. Fla. 1998); *Houston Contractors Assoc. v. Metro. Transit Auth. of Harris County*, 993 F. Supp. 545 (S.D. Tex. 1997); *Assoc. Gen. Contractors of Am. v. City of Columbus*, 936 F. Supp. 1363 (S.D. Ohio 1996), *vacated on other grounds*, 172 F.3d 411 (6th Cir. 1999); *Concrete Gen., Inc. v. Wash. Suburban Sanitary Comm'n*, 779 F. Supp. 370 (D. Md. 1991). Note: None of these cases utilize arbitrary and capricious review.

government officials. This Honorable Court should not endorse the idea of "carving-out" an exception to avoid review based on strict scrutiny merely because the plaintiffs' complaint is confined to the misapplication of law independent of whether it is facially valid.

In the instant case, DGS purports to carry out the legislative mandate, pursuant to Md. Code Ann., *State Fin. & Proc.* § 14-302(a) (2009), which requires state agencies to structure procurement "to try to achieve" among other things" . . . an overall minimum of 25 percent of the unit's total dollar value of all procurement contracts from certified minority business enterprises." DGS purported to follow the regulations, at COMAR 21.11.03.11, which establish the circumstances for granting a waiver where, as here, the bidder is unable to obtain sufficient MBE participation at a reasonable price. Perhaps there are lawful ways for DGS to carry out this mandate (e.g. through use of race-neutral measures, per COMAR 21.11.03.07).

As this Honorable Court has recognized, "it is imperative that the inherent power of a court not be limited to ascertain whether [a statute] is constitutional on its face, but may be properly invoked to determine whether it is constitutional as applied." *SDAT v. Clark*, 281 Md. 385, 404-05 (1977). It is inconsequential that the Petitioners, in this case, do not challenge the legislative enactment of the State MBE laws and promulgated regulations. Similar to the petitioners in *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Petitioners in this case challenge the government's failure to implement affirmative action policies in a manner that individually determines the necessity of granting a benefit to

one individual and denying the benefit to another individual based on race.

C. There is great public interest in protecting equal protection rights under strict scrutiny.

There is a great public interest in protecting equal protection rights. There is great public interest in the legal standards governing the grant and denial requests for waivers of MBE goals. The grant and denial of waiver requests affects two kinds of governmental benefits. First, are the numerous contracts and subcontracts that are awarded to contractors and subcontractors. Second, are the preferences given to MBE/WBEs because of their minority or gender status. Clarity on the standard of review when these benefits are granted or denied based on race or gender will have great impact to both contractors and MBEs in the State of Maryland.

Bramble sued DGS because it could not get DGS to tell it what it needed to do to compete. Bramble has a long history of working under the current MBE laws and using the same procedure for every contract it performs in the State of Maryland. Every agency has accepted Bramble's methodology except for DGS under a new policy. [E-1199-1201]. If DGS, and other agencies, are now implementing the MBE laws differently -- to achieve some political or socioeconomic policy -- it is necessary for the judiciary to review implementation of the MBE laws to ensure government actors are not granting and denying government contracts unconstitutionally.

Under strict scrutiny review, DGS has the burden of showing how denial of Bramble's waiver request, and subsequently giving a preference to EMS (the electrical

subcontractor proposed by the second low bidder) over Tieder, serves the compelling governmental interest of remedying past discrimination. *Croson,* 488 US 469 at 508. In *Croson,* under a similar MBE scheme, a successful black entrepreneur who had never been a victim of past discrimination by the City enjoyed the preference over non-MBEs. Justice O'Conner observed, "We think it obvious that such a program is not narrowly tailored to remedy the effects of past discrimination." DGS officials never made such an individual assessment of whether EMS (or any MBE/WBEs obtaining a preference) truly suffers from the effects of prior discrimination, but this would be highly relevant to a court analyzing DGS's actions under strict scrutiny. *Johnson*, 543 U.S. 499 at 505-506 ("Under strict scrutiny, the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.'" (citing *Adarand*, 515 U.S. 200 at 227.)).

D. The Court, on remand, should admit evidence to determine whether denial of Bramble's waiver request was necessary to meet the compelling governmental interest in remedying the effects of past discrimination.

Petitioners sought to introduce factual evidence to prove DGS did not apply the MBE preference consistent with the "narrowly tailored" factors set forth in *Paradise*, 480 U.S. 149 at 171[7]. The Supreme Court set forth several factors and, as applied in this instant case, Petitioners sought to prove the following points: (a) DGS insufficiently

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7 *Paradise* at 171 provides: "In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties."

considered race-neutral methods to increase MBE participation prior to implementing race-conscious goals; (b) DGS was insufficiently flexible in administering its MBE program, especially because it withheld the waiver and gave no individualized assessments of discrimination suffered by MBE/WBEs receiving a preference, to determine whether a preference was necessary; (c) DGS improperly established MBE goals for this project without properly considering the numerical relationship between MBE goal and the relevant business market conditions; and (d) DGS did not consider of the rights of innocent third parties, such as the Petitioner Tieder, who competed for subcontracts.

Evidence supporting DGS' failure to implement these factors was excluded from evidence per DGS' motion *in limine*. Such a determination cannot stand. "[R]ights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Id.* at 493 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)). *Croson*, 488 U.S. 469 at 493. It is the role of the judiciary to safeguard individual rights afforded under the United States Constitution and this court should not defer to the decisions of the agency that is the alleged wrongdoer.

E. Petitioners are entitled to strict scrutiny, and not arbitrary and capricious review, even if it may affect the "workability" of the MBE preference program.

If CSA's reasoning becomes law, any time the government denies a governmental benefit based on race or gender, an agency can avoid strict or intermediate scrutiny review as soon as the court finds such scrutiny might make the program "unworkable."

This cannot stand. As the Supreme Court explained,

> "the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." *Croson*, 488 U.S. 469 at 508.

There is an analogous discrimination case, *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), in which non-minority students alleged violation of their individual constitutional rights. The prospective students were denied admission to a university that automatically awarded minority applicants preference in a point-based admissions program. The Supreme Court determined that the use of race in admitting students triggered strict scrutiny. The Court stated: "'[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny'." (citing *Adarand*, 515 U.S. 200 at 224) (emphasis added).

The Supreme Court determined that the petitioner's constitutional rights were violated because the admissions program did not give individualized review in granting preferences to minorities. There, as in the instant case, there was concern that the bureaucratic effort to individually assess the necessity of remedial relief was too demanding. The Supreme Court discounted such a defense.

> Respondents contend that "the volume of applications and the presentation of applicant information make it impractical for [LSA] to use the . . . admissions system" upheld by the Court today in *Grutter*. Brief for Respondents 6, n 8. But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise

problematic system. See J. A. Croson Co., 488 U.S., at 508 ...

As explained in the plurality opinion of Justice Brennan in *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973), "[w]hen we enter the realm of 'strict scrutiny' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality."

Judging by the opinion below, CSA considers that the alleged "unworkability" of judicial review under the strict scrutiny justifies a less searching inquiry. In *Johnson v. Cal*, 543 U.S. 499 (2005), Johnson sued the California Department of Corrections ("CDC") because the CDC had an unwritten policy of segregating prison cellmates by race to prevent racial gang violence. *Id.* at 502-03. The CDC urged that Johnson's claims be reviewed under the traditional deferential standard, which is usually afforded to correctional facilities. *Id.* at 504-05. In response to CDC's argument that deferential review should be afforded, the Supreme Court explained:

> We have held that "*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995) (emphasis added). Under strict scrutiny, the government has the burden of proving that racial classifications "are narrowly tailored measures that further compelling governmental interests." *Ibid.* We have insisted on strict scrutiny in every context, even for so-called "benign" racial classifications, such as race-conscious university admissions policies, [Citations omitted].
>
> The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and again that, "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate

> notions of racial inferiority or simple racial politics." *Richmond* v. *J. A. Croson Co.*, 488 U.S. 469, 493, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989) (plurality opinion).

Id. at 505-06.

The Supreme Court, in *Johnson*, did not ultimately determine whether the race-based policy was justified. Instead, it remanded the case so that the determination could be made whether the "policy is narrowly tailored with regard to new inmates as well as transferees." *Id.*

CSA erroneously failed to remand the case so the circuit court could determine whether DGS implemented the MBE program in a narrowly tailored manner. CSA disregarded the long history and clear articulation of the law in this area by holding that an obvious governmental use of race -- the decision whether to grant Petitioner Bramble a waiver for its inability to meet a race-based goal -- is not subject to strict scrutiny. Remarkably, CSA did not even apply intermediate scrutiny, but instead held that one of the most lenient standards available to reviewing courts -- the "arbitrary and capricious" standard that generally governs review of administrative action -- is the correct standard. That decision is unprecedented.

Neither the State of Maryland in its brief nor the CSA in its opinion cited any decision from any court in which a race-based government action was reviewed under such a lenient standard. Further review by this Court is warranted to correct this erroneous departure from hitherto settled principles that have governed the review of

race-based government action for over 40 years and whose application to all race-based government action has been repeatedly reaffirmed by the Supreme Court.

DGS' failure to grant a waiver to Bramble was a race-based action. It was based on an administrative determination of whether Bramble had taken sufficient efforts to find and utilize minority subcontractors. DGS' failure to grant the waiver was a race-based action because Tieder, a non-MBE, was denied a government contracting opportunity for a single reason: because DGS determined it should award the contract to a contractor that would use a minority subcontractor to install parking lot lighting and thereby achieve the MBE goal.

The "arbitrary and capricious" standard of review is a very lenient and flexible one -- the polar opposite of strict scrutiny. Also, Maryland courts by tradition and law give deference to administrative fact finding. In fact, this court has equated arbitrary and capricious review to determining whether an administrative act was "rational" or "inconsistent with prior administrative precedents." *Harvey v. Marshall*, 389 Md. 243, 303-04 (2005). Still, the determination of whether to grant a waiver cannot be classified as a simple administrative act and thereby afforded deference when race and gender discrimination are at issue. The Supreme Court stated that "rational" basis review of race-based acts is "inimical to the Constitution and to this [Supreme] Court's precedents." *Parents*, 127 S. Ct. 2738 at 2774.

The rationale behind judicial restraint when reviewing administrative agency decisions is that the executive and judicial branches are independent and equal branches

of government. Courts generally should not substitute their judgment and should defer to the technical expertise of administrative agencies. *Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509, 528-30 (2003). DGS, nor any agency, has expertise, superior to the judiciary, in deciding whether denial of a race/gender based MBE goal violates a contractor's equal protection rights. Traditionally courts – not administrators – are entrusted with defining and protecting constitutional rights. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 502 (1984) ("The constitutional values protected by the rule make it imperative that judges--and in some cases judges of this Court--make sure that it is correctly applied"). In other words, "Judges. . . must exercise such [independent] review in order to preserve the precious liberties established and ordained by the Constitution." *Bose*, at 510-511. *See also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995).

Further, as stated in *Colburn v. Dep't of Pub. Safety & Correctional Serv's*, 403 Md. 115, 128 (2008):

> With regard to legal issues before the administrative agency, we addressed the deference afforded to administrative agencies in Schwartz v. Maryland Dep't of Natural Resources, 385 Md. 534, 554, 870 A.2d 168, 180 (2005): With respect to an agency's conclusions of law, we have often stated that a court reviews *de novo* for correctness. We frequently give weight to an agency's experience in interpretation of a statute that it administers, but it is always within our prerogative to determine whether an agency's conclusions of law are correct, and to remedy them if wrong.

Accordingly, this Court should not defer to DGS' interpretation of federal constitutional law. In effect, DGS argues that its adherence to the State MBE statute and

regulations can be implemented with disregard to well-established constitutional law. The Court should grant the petition so that DGS cannot use race/gender factors in contract award, unless it is narrowly tailored—as applied—in the implementation of the MBE program as required by the Supreme Court. *See Paradise,* 480 U.S. 149 at 171. *See also, N. Contracting, Inc. v. State of Ill. Dept. of Transp.*, No. 00 C 4515, 2005 U.S. Dist. LEXIS 19868, at *62 (N.D. Ill. 2005), *aff'd*, 2007 U.S. App. LEXIS 320 (7th Cir. 2007); *Assoc. Gen. Contractors of Ohio, Inc. v. Drabik*, 50 F. Supp. 2d 741, 763 (S.D. Ohio 1999); *Concrete Gen., Inc. v. Washington Suburban Sanitary Comm'n*, 779 F. Supp. 370, 379 (D. Md. 1991).

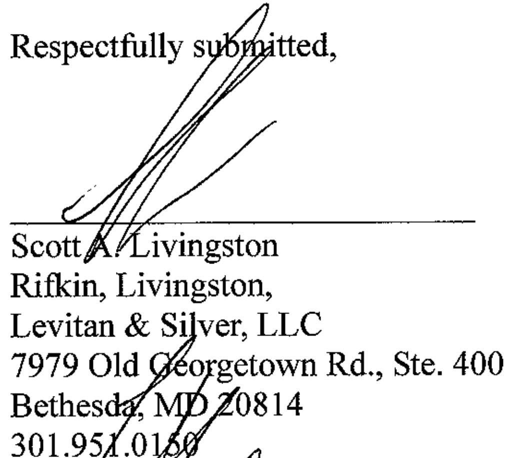
All race-based actions are subject to strict scrutiny review. *Parents*, 127 S. Ct. 2738 at 2751-52. Our nation has *not* struggled with a long history of oppression caused by administrative action (despite sporadic error); such actions are, therefore, not inherently suspect. By contrast, racial distinctions are "inherently suspect" and call for "the most exacting judicial examination." *Md. Troopers Assoc., Inc. v. Evans*, 993 F.2d 1072, 1076 (4th Cir. 1993).

Given generally open and fair administrative processes, there is no reason to suspect that most administrative actions are based on prejudice or illegitimate stereotypes or generalizations. DGS' process for denying waivers, however, is not open. DGS' wholesale failed to make individualized assessments of discrimination when considering Bramble's waiver request.

CONCLUSION

CSA erred in affirming the circuit court's dismissal of Plaintiff/Petitioner's Second Amended Complaint. For the reasons set forth above, CSA's decision should be reversed and this case should be remanded with instructions to (1) admit evidence relevant to Petitioner's federal civil rights claims and (2) use strict scrutiny to determine whether DGS' actions, including denial of the waiver request and other factors set forth in *Paradise,* 480 U.S. 149 at 171, were narrowly tailored to remedy the effects of past discrimination by DGS or its contractors.

Respectfully submitted,



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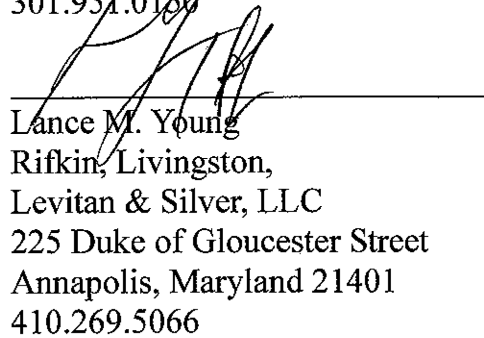

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 2nd day of June, 2010, I mailed two copies of Petition for Writ of Certiorari to the Court of Special Appeals, via first-class mail, to:

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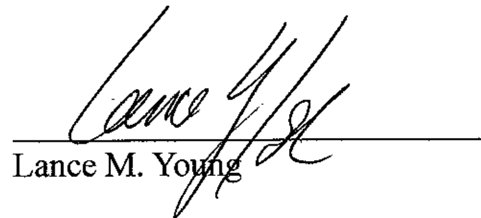

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Times New Roman, 13 pt.