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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Court Filing	[Adarand Contructors Inc. v. Norman Y. Mineta - Brief for the United States] [78 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	78	N.D.	
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COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
Adarand Constructors

FRC ID:
9121

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
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1) not a racial classification at all b/c discrim against

No. 00-730

IN THE SUPREME COURT OF THE UNITED STATES

ADARAND CONSTRUCTORS, INC., PETITIONER

v.

NORMAN Y. MINETA, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the court of appeals misapplied the strict scrutiny standard in determining whether Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-98) is reported at 228 F.3d 1147. The memorandum opinion of the district court (Pet. App. 128-201) is reported at 965 F. Supp. 1556.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2000. The petition for a writ of certiorari was filed on November 3, 2000. The Court granted certiorari on March 26, 2001, and on April 13, 2001, limited the grant to two reformulated questions presented. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, and relevant portions of the Fifth, Fourteenth, and Fifteenth Amendments to the Constitution, U.S. Const. Amends. V, XIV, XV, are

reproduced at App., infra, __-__. Relevant provisions of the Transportation Equity Act for the Twenty First Century, Pub. L. No. 105-178, 112 Stat. 113-115, are reproduced App., infra, __-__, and provisions of the Small Business Act, 15 U.S.C. 631 et seq., are reproduced App., infra, __-__. Relevant portions of the Department of Transportation regulations, 49 C.F.R. Pt. 26, are reproduced App., infra, __-__; the Department of Justice's proposed guidelines for the use of race-conscious remedies in federal spending programs, 61 Fed. Reg. 26042 (1996), are reproduced App., infra, __-__; and provisions of the Federal Acquisition Regulations are reproduced App., infra, __-__.

STATEMENT

This case concerns the Department of Transportation's (the DOT's) efforts to implement a statutory directive to provide opportunities for businesses owned by socially and economically disadvantaged individuals to participate in federally funded highway and transit construction projects. As petitioner concedes (Br. 15), there has been considerable confusion over precisely which aspects of that program (if any) petitioner is challenging. The subcontractor compensation clause ("SCC") that petitioner originally challenged has been discontinued; the district court held that the SCC, as applied to petitioner, was unconstitutional, Pet. App. 200; the court of appeals affirmed that conclusion, id. at 59-60; and the DOT has not sought further review. The regulatory provisions that this Court considered in Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (Adarand I), moreover, have been replaced with new regulations designed to

respond to that decision, 64 Fed. Reg. 5096, 5101-5103, 5129 (1999); 49 C.F.R. Pt. 26, and those new regulations have never been applied to respondent.

Consequently, what remains in controversy in this case is quite narrow; at this point, the case at most concerns petitioner's facial challenge. Petitioner, however, purports to limit that challenge further, asserting (Pet. Br. 15-16, 27) that it is not challenging any of the conditions DOT places on aid to the States and localities through its Disadvantaged Business Enterprise (DBE) program. Instead, petitioner now claims that it is challenging the statutes and regulations relating to the DOT's direct procurement of highway construction on federal lands, which represent only a small fraction (less than 1 percent) of total federal highway and transit construction spending.[1] The DOT, however, does not employ any race-conscious measures (such as DBE certifications) for direct federal procurement in any jurisdiction in which petitioner operates; the court of appeals held that petitioner lacks standing to challenge the direct federal procurement provisions that petitioner now targets; and petitioner never sought review of that holding. Thus, to the extent there remains any cognizable controversy before the Court, it concerns the constitutionality of the DOT's DBE regulations, which govern the DOT's aid program for States and localities. An understanding of those regulations helps

[1] The DOT disburses more than 99 percent of its highway and transit construction funds ($19 billion in 1999) as aid to States and localities. See Pub. L. No. 105-178, Tit. I, § 1101(a), 112 Stat. 111-113. The DOT spends the remainder ($ 0.17 billion in 1999) on direct procurement of highway construction on federal lands.

to frame both this case's tortuous procedural history, and more importantly, informs what remains of the controversy between the parties.

1. The DOT's Current DBE Program. In response to this Court's decision in Adarand I, the DOT in February of 1999 issued new regulations revamping and refining its DBE program. Consistent with the Act of Congress authorizing that program, see Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, Tit. I, § 1101(b)(1)(B), 112 Stat. 113, the DOT's DBE program still employs the definitions of "social" and "economic" disadvantage contained in the Small Business Act (SBA), 15 U.S.C. 631 et. seq.[2] Thus, for purposes of the DBE program, an individual is "socially disadvantaged" if he or she has been "subjected to racial or ethnic prejudice or cultural bias because of" his or her "identity as a member of a group without regard to * * * individual qualities." 15 U.S.C. 637(a)(5). An individual is "[e]conomically disadvantaged" if his or her "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. 637(a)(6).

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[2] The definitions of social and economic disadvantage, including the racial presumptions, have remained essentially unchanged from the Surface Transportation Assistance Act of 1982 (STAA), Pub. L. No. 97-424, § 105(f), 96 Stat. 2100, the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, § 106(c)(2)(B), 101 Stat. 146; the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919-1921, to the currently the currently effective law, the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, Tit. I, § 1101(b)(1), 112 Stat. 113.

Those basic definitions, notably, are race-neutral. The hallmark of disadvantage is not the individual's race. Rather, it is having suffered discrimination on account of race, ethnicity or cultural bias -- without regard to what that race, ethnicity or culture might be -- and having impaired capital and credit opportunities compared to those who have not suffered such discrimination. The Secretary's regulations thus make it clear that the DBE program is open to everyone, regardless of race or ethnicity, who meets the statutory criteria for social and economic disadvantage based on individual experience. See 49 C.F.R. Pt. 26, App. E; 49 C.F.R. 26.61(b).

As required by TEA-21, the Secretary's regulations also incorporate a race-based presumption from the SBA. Adarand I, 515 U.S. at 204 (similar requirement in predecessor statute). In particular, contractors must "presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act," 15 U.S.C. 637(d)(3)(C). See 49 C.F.R. 26.67(a). As required by statute, the Secretary's regulations also establish a presumption that women are disadvantaged in the highway and transit construction industry. See 49 C.F.R. 26.67(a); see TEA-21, § 1101(b)(1)(B), 112 Stat. 113. The DOT's regulations, however, make the presumption of social and economic disadvantage rebuttable. See 49 C.F.R. 26.67(d).

because they personally have suffered discrimination, not simply because ~~for reasons beyond the mere fact that~~ they are members of particular racial or ethnic groups

Moreover,

Pursuant to his authority to "establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies" as a DBE, TEA-21, § 1101(b)(4), 112 Stat. 114; Adarand I, 515 U.S. at 208, the Secretary has issued regulations designed to limit DBE certification to firms owned and controlled by individuals who are, in fact, socially and economically disadvantaged. The DOT requires that all applicants for DBE certification, including those who are statutorily presumed to be disadvantaged, submit a signed and notarized statement affirming that they have suffered social and economic disadvantage. 49 C.F.R. 26.67(a)(1). Applicants seeking DBE certification thus must certify that they have been "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," 15 U.S.C. 637(a)(5), and that their "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged," 15 U.S.C. 637(a)(6)(A). The regulations warn that the DOT "may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program." 49 C.F.R. 26.107(e). Applicants for DBE certification, moreover, must disclose their owners' personal net worth, with appropriate documentation. 49 C.F.R. 26.67(a)(2)(i). If the owner's covered assets exceed $750,000, the presumption of economic disadvantage is conclusively rebutted and the individual

is ineligible for the DBE program, regardless of his race or ethnicity. 49 C.F.R. 26.67(b)(1). The Secretary's regulations also provide that anyone may challenge DBE certifications. 49 C.F.R. 26.87. If a state or local grant recipient has a reasonable basis to believe that the owner of a DBE in fact is not socially and economically disadvantaged, it may commence an investigation. 49 C.F.R. 26.67(b)(2).

To ensure that remedies for the effects of discrimination are developed in light of local market conditions, the Secretary's regulations require States and localities receiving federal aid to establish numerical measurements to identify the effects of discrimination in their own jurisdictions. In particular, state and local recipients must estimate "the level of DBE participation [the recipient] would expect absent the effects of discrimination." 49 C.F.R. 26.45(b). Recipients are expressly prohibited from establishing a reflexive figure based on past goals, a flat 10 percent goal, or the racial composition of the local populace. Ibid. Instead, recipients must first consider "demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses willing, ready and able to participate on DOT-assisted contracts." 49 C.F.R. 26.45(b), (c). Then recipients must "examine all of the evidence available within the jurisdiction" to determine what adjustments, if any, should be made to ensure that the resulting yardstick realistically reflects the level of DBE participation that would be expected absent the effects of discrimination. 49 C.F.R. 26.45(d).

With respect to remedies, the Secretary's regulations provide

that aid recipients, even after identifying discriminatory effects, must seek to eliminate them through race- and gender-neutral means to the maximum feasible extent. 49 C.F.R. 26.51(a). Recipients thus must attempt to arrange solicitations in ways that facilitate participation by small businesses, including DBEs; provide race-neutral assistance in overcoming limitations such as the inability to obtain bonding or financing; offer technical assistance and services to small businesses; and engage in outreach efforts. 49 C.F.R. 26.51(b). Race- and gender-conscious measures, such as DBE goals for individual contracts, may be used only if race- and gender-neutral means are insufficient to eliminate the effects of discrimination. 49 C.F.R. 26.51(d). Quotas are specifically prohibited. 49 C.F.R. 26.43. Finally, if recipients use DBE-conscious measures during a particular year, they must discontinue those measures if at any point it appears that they can achieve adequate DBE participation through race-neutral means. 49 C.F.R. 26.51(f)(1).

Recipients of DOT financial assistance may apply to the DOT for waivers that will release them from almost any DOT regulation if they can achieve or have achieved equal opportunity through other approaches, or if special circumstances make compliance impractical. 49 C.F.R. 26.15. Moreover, no penalty is imposed on contractors or recipients for failing to meet annual goals. 49 C.F.R. 26.47. When a recipient establishes goals for DBE participation for a particular contract (a mechanism that can used only where race- and gender- neutral means have proven inadequate), contractors subject to that goal need only pursue it in good faith;

they are not required to achieve it. 49 C.F.R. 26.53(a). If "a bidder/offeror does document adequate good faith efforts," a State or locality "must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal." 49 C.F.R. 26.53(a)(2).

2. Direct Federal Procurement. Although the above-described regulations are the only provisions properly at issue before the Court, petitioner purports to challenge the statutory and regulatory provisions that govern the DOT's direct procurement of highway construction on federal lands, and only those provisions. The procedures and standards for certifying DBEs in the state and local aid program (described above, pp. __-__, supra), and those used for purposes of direct federal procurement are, for the most part, the same, and the same entities conduct certification proceedings. See Pet. Br. 10; see note __, infra. Nonetheless, the DOT's direct procurement of highway construction is generally governed by a different statute and different regulations. In particular, while the DOT's state and local aid program is governed by the DOT's DBE regulations, issued by the Secretary of Transportation under TEA-21, direct federal procurement is governed by Section 8(d)(4)-(6) of the SBA, 15 U.S.C. 637(d)(4)-(6), and the regulations promulgated thereunder. Those provisions are not specific to the DOT; they apply government-wide.[3]

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[3] The court of appeals held that petitioner lacks standing to

challenge those provisions, Pet. App. 14; id. at 86 n.35; Pet. Br. 6 n.2, and petitioner has never challenged that holding before this Court.

The SBA broadly seeks to promote contracting opportunities for small businesses, including small disadvantaged businesses or "SDBs" (a subset of DBEs),[4] HUBZone small businesses, veteran-owned businesses, service-disabled veteran-owned businesses, and women-owned businesses. Section 8(d)(1) of the SBA establishes a policy of ensuring that such businesses have opportunities to participate in the performance of federal contracts. 15 U.S.C. 637(d)(1). Consistent with that policy, Section 8(d)(4) of the SBA requires businesses seeking federal contracts to adopt, and make a good faith effort to comply with, a subcontracting plan. 15 U.S.C. 637(d)(4); 48 C.F.R. 19.702. Under Section 8(d)(6), the subcontracting plan must describe the efforts the business will undertake to ensure "that small business concerns" including SDBs, women-owned businesses, HUBZone businesses, and veteran-owned businesses, "will have an equitable opportunity to compete for subcontracts." 15 U.S.C. 637(d)(6)(C). Although the subcontracting plan must establish "percentage goals" for the use of such businesses, 15 U.S.C. 637(d)(6)(A); 48 C.F.R. 19.704, no penalty may be imposed on any prime contractor that fails to meet the goals established by a subcontracting plan, so long as the

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[4] The standards for SDB certification are comparable to those used for DBE certification. The Small Business Administration's regulations recognize a rebuttable presumption of disadvantage (13 C.F.R. 124.103(b)(1), 124.1008(e)(1)); require a statement of social disadvantage (13 C.F.R. 124.103, 124.1008(e)), impose a cap of $250,000 or $750,000 for determining economic disadvantage (13 C.F.R. 124.104(c)(2), 124.1008(e)(1)), and allow any person to challenge a certification of disadvantage (13 C.F.R. 124.103(b)(3), 124.1008(e)(1)(ii), 124.1017). Women-owned businesses are not presumed to be SDBs under the SBA, but they are presumed to be DBEs under TEA-21 and the Secretary's regulations.

prime contractor has made "good faith efforts," 48 C.F.R. 19.705-7. Finally, the SBA authorizes federal agencies to use financial or other incentives as the agency "may deem appropriate in order to encourage" subcontracting with such small businesses. See 15 U.S.C. 637(d)(4)(E).

Following this Court's decision in Adarand I, the Justice Department issued proposed guidelines to govern the use of race-conscious remedies under the SBA, such as contract goals and financial incentives, to ensure compliance with constitutional requirements. See 61 Fed. Reg. 26,042 (1996); 48 C.F.R. 19.201. Those guidelines in some respects parallel the DOT's DBE program. For example, the Department of Commerce now performs market-specific benchmark studies to estimate "the level of" SDB/DBE "contracting that one would reasonably expect to find in a market absent discrimination or its effects." 61 Fed. Reg. 26,045. Compare pp. __-__, supra (DOT requirement for federal aid recipients). The Department of Commerce begins by calculating the capacity of SDBs/DBEs available and qualified to perform government contracts in the relevant region and industry, and then compares that to the capacity of non-SDB/DBE contractors, accounting for additional factors such as age and size. See id. at 26,045-26,046. The Department then may make adjustments based on relevant data and regression analysis that "hold[s] constant a variety of variables that might affect business formation so that the effect of race can be isolated." Ibid. Where the comparison between the benchmarks and actual SDB/DBE utilization do not indicate a disparity suggesting discrimination or its continuing effects,

federal agencies are prohibited from using race-conscious mechanisms to promote SDB/DBE participation. See id. at 26,046-26,047; 28 C.F.R. 19.201(b).

If the benchmark study reveals disparities suggesting that discrimination or its effects still influence the allocation of federal opportunities and funds, the guidelines "require[] that agencies at all times use race-neutral alternatives," such as technical assistance and outreach, "to the maximum extent possible." See 61 Fed. Reg. 26,049. For example, agencies must consider eliminating surety costs from bids where bonding presents a barrier to entry, and must ensure that SDBs/DBEs are not excluded from mailing lists, and eliminate practices that disproportionately disadvantage SDBs/DBEs. Ibid. See also 48 C.F.R. 19.202-2. Contracting officers also must consider dividing contracts into reasonably small lots, adjusting delivery schedules, or altering contract structures to facilitate small business participation. 48 C.F.R. 19.202-1. Only "where those efforts are insufficient to overcome the effects of past and present discrimination can race-conscious efforts be invoked." 61 Fed. Reg. 26,049. Even then, agencies may not "set contracts aside for bidding exclusively by" SDBs/DBEs. Id. at 26,048. The system thus represents "a good faith effort to remedy the effect of discrimination," but without guaranteeing any particular level of SDB/DBE contracting. Ibid.

The Department of Commerce has completed one benchmark study. See 64 Fed. Reg. 52,806 (1999); 63 Fed. Reg. 35,714 (1998). As a result of that study, the use of race-conscious criteria in direct

federal procurement of highway and transit construction is proscribed in a majority of regions. See 64 Fed. Reg. at 52,807 (for SIC major industry group 16, racial criteria proscribed except in the East and West South Central regions). Consequently, as petitioner concedes, the DOT is prohibited from using financial incentives to encourage the use of DBE subcontractors in direct procurement contracts in States "such as Colorado, Adarand's area of operations." Pet. Br. 14.

3. This case arose out of the DOT's former use of Subcontractor Compensation Clauses (SCCs), a now-rescinded device the DOT used under the statutes that preceded TEA-21, see note __, supra. SCCs provided bonus payments as a financial incentive to prime contractors for subcontracting with DBEs on federal highway construction projects. See Adarand I, 515 U.S. at 209. The district court declared the SCC program, as previously administered, unconstitutional, Pet. App. 200; the court of appeals affirmed that conclusion, id. at 59-60; and the DOT has not sought review of that ruling. As a result, the now-rescinded SCC, the only feature of DOT's former regulatory regime ever allegedly applied to petitioner's detriment, is no longer at issue in this case. This lawsuit, however, has outlived the program that originally provoked it.

a. In 1989, the Colorado Federal Lands Highway Division of the DOT awarded a prime contract to construct a highway on federal land in West Dolores, Colorado, to Mountain Gravel & Construction Company. Pet. App. 132. The contract contained an SCC, Pet. App. 132, and Mountain Gravel selected a certified DBE (Gonzales

Construction) to be a subcontractor on a portion of the job, Pet. App. 132-133. On August 10, 1990, petitioner brought this action for declaratory and injunctive relief, claiming that Mountain Gravel had rejected its lower bid for the West Dolores subcontract because of the SCC. Adarand I, 515 U.S. at 205. The complaint alleged that the SCC violated 42 U.S.C. 1983, 42 U.S.C. 2000d et seq. (Title VI), and the Fifth and Fourteenth Amendments.

The district court initially upheld the SCC under intermediate scrutiny, Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240, 244-245 (D. Colo. 1992), and the Tenth Circuit affirmed, Adarand Constructors, Inc. v. Peña, 16 F.3d 1537, 1539 (10th Cir. 1994). This Court, however, vacated the court of appeals' judgment, holding that the strict scrutiny standard governs whether race-based classifications violate the equal protection component of the Due Process Clause of the Fifth Amendment. Adarand I, 515 U.S. at 227. The Court remanded the case for a determination of "whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny." Id. at 238.

Following remand, petitioner filed a First Amended Complaint, seeking, inter alia, a declaration that "§ 105(f) of the STAA, § 106(c) of the STURAA, § 1003(b) of ISTEA, § 8(d) of the SBA (15 U.S.C. § 637(d)) and 15 U.S.C. § 644(g), the regulations promulgated thereunder, and the contract provisions promulgated pursuant to those statutes and regulations are unconstitutional as applied to highway construction in the State of Colorado." Pet. App. 141. In June of 1997, before the Secretary's revised regulations (described pp. __-__, supra) took effect, the district

court granted petitioner's motion for summary judgment. Pet. App. 128-201. The court found that the DBE program met the compelling interest requirement of the strict scrutiny test. The court was "unpersuaded by [petitioner's] argument that the vast body of evidence before Congress as it considered the challenged enactments, and the numerous studies compiled more recently," are insufficient. Id. at 177. Congress, the court concluded, had "a strong basis in evidence from which it could conclude there were significant discriminatory barriers facing minority businesses." Id. at 178. The district court, however, concluded that the SCC program was not narrowly tailored. Id. at 181-200. The court declared unconstitutional Section 106 of STURAA and Section 1003(b) of ISTEA, which authorized the DBE program for federally aided state and local projects, as well as the SCC, which was used in direct federal procurement of highway construction on federal lands. Id. at 200-201. The DOT moved for the court to clarify the scope of the order, arguing that the federal aid program was not at issue, but the court denied the DOT's motion. R. 109 (June 23, 1997).

b. In 1998, while the case was pending on appeal before the Tenth Circuit, Congress reconsidered the DBE program and determined that remedial measures remained necessary to address the effects of discrimination and, accordingly, authorized those measures in TEA-21. During the debates, both houses of Congress considered and rejected two amendments that would have eliminated the DBE program. 144 Cong. Rec. S1496 (Mar. 6, 1998), H2011 (Apr. 1, 1998). Congress considered evidence of overt discrimination in the

awarding of subcontracts; pay disparities unexplained by other factors; discrimination in the provision of business loans and bonding; and the adverse consequences of an "old-boy" network and bid-shopping practices that continued the exclusion of certain groups. 144 Cong. Rec. S1409, S1413, S1422, S1429-S1430. See 64 Fed. Reg. at 5100-5102 (summarizing). Congress also considered studies of DBE participation in several States showing that, where the States had terminated their DBE programs, DBE participation in the state-funded portion of the highway program fell to nearly zero. See 144 Cong. Rec. S1404, S1409-1410, S1420 (Mar. 5, 1998); id. at S1482 (Mar. 6, 1998).

Congress also considered the DOT's proposed revisions to its DBE regulations. The DOT, Congress understood, was revising its regulatory program in light of this Court's decision in Adarand I, to address outstanding legislative and practical concerns, and to ensure that the program more narrowly benefits small firms owned by individuals who truly have suffered the effects of discrimination. 144 Cong. Rec. S1409, S1423-1425, S1430-1431 (Mar. 5, 1998); id. at S1485-1486 (Mar. 6, 1998); id. at S5413-5414 (May 22, 1998). In particular, the House Report noted that the DOT would continue its review of "the DBE program in light of recent court rulings" and noted that the DOT had "proposed new regulations to ensure that the program withstands constitutional muster." H. Rep. No. 550, 105th Cong., 2d Sess. 409-410 (1998). In February of 1999, the DOT issued the anticipated regulations, described above, pp. __-__, supra.

c. Shortly thereafter, in March of 1999, the court of

appeals held the case moot because Colorado had certified petitioner as a DBE. Adarand Constructors, Inc. v. Slater, 169 F.3d 1292 (10th Cir. 1999). This Court reversed. Adarand v. Slater, 528 U.S. 216 (2000) (per curiam) (Adarand II). Around that time, the DOT eliminated the SCC, the financial incentive program the Court had considered in Adarand I and that had been the subject of petitioner's original complaint. See Pet. App. 97 ("Adarand does not dispute" that "the SCC, which spawned this litigation in 1989, is no longer in use.").

4. After supplemental briefing in light of those developments, the court of appeals unanimously affirmed in part and reversed in part. Pet. App. 1-81.

a. The court of appeals first identified the statutory and regulatory provisions properly at issue in this case. The court of appeals concluded that petitioner had standing to challenge the SCC program, which had formed part of the contract petitioner had been denied, and to raise a facial challenge to "the race-based rebuttable presumption used in some certifications under the Subcontracting Compensation Clause" and incorporated from the SBA into TEA-21. Pet App. 13. The court of appeals, however, concluded that petitioner lacks standing to challenge the presumption of disadvantage for women-owned enterprises. Id. at 13-14. The court further held that petitioner lacks standing to challenge any provision of the SBA other than the definitions that are incorporated into TEA-21. Thus, the court concluded that petitioner cannot challenge the SBA's "generalized policy" regarding contracting opportunities for small disadvantaged

businesses, or "paragraphs (4)-(6) of 15 U.S.C. 637(d)," i.e. Sections 8(d)(4)-(6) of the Small Business Act, which address subcontracting plans. Pet. App. 14. See also id. at 86 n.35.

b. Turning to the constitutionality of the statutes and regulations properly at issue, the court of appeals agreed with the district court that the government had established a compelling interest in "eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies," Pet. App. 54, and in "remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups," id. at 25. The court of appeals found "a strong basis in [the] evidence" before Congress for concluding "that racial discrimination and its continuing effects have distorted the market for public contracts." Pet. App. 24-49. For example, the court noted evidence before Congress showing that prime contractors refused "to employ minority subcontractors due to 'old boy' networks," id. at 34-35. See also id. at 40-41 (noting that the evidence "strongly supports the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms"). The evidence was "particularly striking in the area of race-based denial of access to capital." Id. at 34. See also id. at 34-38 (reviewing the evidence). Minority subcontractors also confronted "overt racial discrimination" in areas such as the provision of performance and payment bonds needed to compete for government contracts. Id. at 42-43. Further, the court explained, there was evidence of

discrimination in pricing by suppliers, under which "nonminority subcontractors receive special prices and discounts from suppliers not available to minority subcontractors," a practice that makes minority subcontractors less competitive. Id. at 44.

The court also relied on local disparity studies conducted by numerous state and local governments. Pet. App. 44-48. Although conceding the limits of those sources, the court concluded that the consistent disparity between the use and availability of qualified DBE subcontractors "raises an inference that the various discriminatory factors" Congress had identified in fact had "created that disparity." Pet. App. 46. The significance of the studies, the court explained, was increased by specific evidence showing that discrimination reduced the opportunities of existing minority enterprises and prevented the formation of new ones. Id. at 48. Finally, the court noted that, when States discontinued their own DBE programs, DBE participation dropped dramatically or disappeared altogether. Id. at 49. "Although that evidence standing alone is not dispositive, it supports the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination." Ibid.

The court declined to entertain petitioner's "vague urgings" that the studies were unreliable, id. at 46-47 n.14, or petitioner's "highly general criticism" of methodology, id. at 51. Petitioner, the court explained, had failed both to identify specific flaws in the studies and to introduce studies or evidence of its own in district court, despite opportunities to do so.

Ibid. In sum, the court concluded, the evidence "demonstrates both that the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises * * * are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market." Id. at 52. "The Constitution does not obligate Congress to stand idly by and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of racial prejudice." Ibid.

c. The court of appeals also concluded that the DBE program is, as currently administered, "narrowly tailored." The court first found that certain provisions of the prior DBE certification process failed the narrow-tailoring test. Pet. App. 72-74. Specifically, it held that the automatic use of financial bonuses to encourage use of DBEs, as originally contemplated by the SCC, could not pass constitutional muster. Pet. App. 79-80. But the court concluded that the new DOT regulations cured the constitutional deficiencies. Ibid. The court of appeals explained that petitioner had not challenged the district court's finding that Congress had unsuccessfully tried to cure the effects of discrimination through race-neutral means. Pet. App. 57-58. Moreover, the court pointed out, the DOT's regulations require recipients to exhaust race-neutral means before resorting to race-conscious methods, 49 C.F.R. 26.51(a), helping to ensure narrow tailoring. Pet. App. 59-60.

The court of appeals also stressed the program's durational limits. The presumption of social and economic disadvantage for certain specified minority groups would cease to apply to any certified DBE three years after the initial certification, and the DOT DBE program itself expires at the end of three years, together with TEA-21. Pet. App. 62-63. And Congress's extensive debate regarding whether to renew the DBE program before passing TEA-21, the court held, underscored Congress's view that there was a continuing remedial need for the DBE program. Ibid.

The court of appeals held that the DBE program complied with the four narrow tailoring considerations discussed in United States v. Paradise, 480 U.S. 149, 171 (1987). First, the court found that 49 C.F.R. 26.15's express waiver provision, which allows recipients to seek exemption from DBE requirements "despite the already non-mandatory nature of DBE programs," afforded appropriate flexibility. Pet. App. 63-64. Second, each state and local recipient of federal funds must establish its own numerical yardsticks based on local circumstances. Id. at 66. Third, the court of appeals concluded that the DBE program does not impose an undue burden on third parties. Id. at 69-71. For example, the new regulations "require recipients to ensure that DBEs are not 'so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate.'" Id. at 70 (citing 49 C.F.R. 26.33(a)). Finally, the court of appeals rejected petitioner's argument that Congress must inquire into discrimination against each particular minority group in each State's construction industry, so as to ensure that the DBE program

is not over- or under-inclusive. Id. at 71-79.

SUMMARY OF ARGUMENT

I. The DOT's current DBE regulations are not unconstitutional on their face. The DOT has discontinued the SCC program that caused petitioner's alleged injury, and petitioner alleges no specific injury from the DOT's current regulations. Accordingly, petitioner can mount only an abstract facial challenge, and cannot prevail unless it can demonstrate that TEA-21's DBE provisions and DOT's regulations are incapable of constitutional application. Petitioner also has narrowed his challenge to the DOT's direct federal procurement activities. However, in direct procurement, the DOT does not make any use of DBE certifications or employ any race-conscious measures in any jurisdiction in which petitioner does business. Accordingly, petitioner lacks standing to challenge the only program it purports to challenge. Indeed, the court of appeals specifically held that petitioner lacks standing to challenge the statutory provisions petitioner now targets, and petitioner has never challenged that holding. It is hard to imagine a more abstract vehicle for this Court to address the serious constitutional issues raised by petitioner.

II. A. The DOT's DBE program promotes the "compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private discrimination." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 482 (1989) (plurality). Petitioner concedes (Br. 22) that the use of race-conscious measures as "a last resort to

'remedy private discrimination'" constitutes a "possible justification" for race-conscious government action. Petitioner, therefore, concentrates its attack not on the sufficiency of the government's interest, but on the adequacy of the record before Congress. But Congress authorized the Secretary to adopt a DBE program against a backdrop of extensive findings of public and private discrimination in highway contracting. Congress likewise authorized the DBE program only after race-neutral efforts to improve access to capital and ease bonding requirements had proven inadequate. Congress then reauthorized the DBE program on three separate occasions, each time after further investigation. Whatever the methodological shortcomings of some of the studies before Congress, Congress had a sufficient evidentiary basis to enact legislation designed to ensure that federal funds do not reinforce observed patterns of discrimination. This is true even though Congress did not have evidence of discrimination in every jurisdiction across the Nation. Congress is not limited to remedying discrimination that is geographically uniform, especially where the implementing regulations limit race-conscious remedies to jurisdictions where discrimination remains a problem.

B. Congress, as part of its effort to address the lingering problem of discrimination in the distribution of federal highway funds, granted substantial discretion to the Secretary. Although Congress's authorization of the DBE program does not itself incorporate the safeguards required by this Court's precedents, the DOT regulations defeat petitioner's claim that the program is unconstitutional on its face; similar rules operate in the context

of direct federal procurement. First and foremost, those regulations are designed to limit DBE status to firms that have suffered the effects of discrimination. Discrimination, not race, is the key to DBE status. For example, if a firm's owner exceeds regulatory net-worth limits, the firm cannot qualify as a DBE, no matter what the owner's race. Second, state and local recipients of federal aid must conduct studies to identify whether there are disparities in DBE utilization in the local market suggesting that the effects of discrimination persist. Even where such disparities are identified, aid recipients may use race-conscious remedies only as a last resort. Furthermore, the regulations have built-in flexibility to allow aid recipients to address the specific problems confronted in a particular jurisdiction. For example, the regulations make every aspect of the program waivable. Although petitioner suggests that certain aspects of the regulations will prove ineffectual and that others deviate from the statutory design, neither of these concerns is properly presented in this facial challenge.

Finally, petitioner argues that, even with these regulatory safeguards, the use of the statutory race-based presumption of disadvantage is by itself enough to render the entire program unconstitutional. But this Court has never suggested that the government may not take race into account in attempting to identify racial discrimination. In jurisdictions where race-neutral remedies suffice, the statutory presumptions of disadvantage only serve that limited function. In other jurisdictions, they may result in providing contracting opportunities to businesses that

have suffered discrimination, but that is not a basis for striking down the statute and the Secretary's regulations on their face.

ARGUMENT

I. PETITIONER CANNOT PREVAIL ON ITS FACIAL CHALLENGE AND IN FACT LACKS STANDING TO CHALLENGE THE STATUTORY AND REGULATORY PROVISIONS IT NOW PURPORTS TO CHALLENGE

In this case, petitioner seeks a declaration that the Disadvantaged Business Enterprise (DBE) program is unconstitutional "on its face," Pet. 9, to the extent it borrows a racial presumption from Section 8(d)(3) of the Small Business Act (SBA) to identify socially and economically disadvantaged individuals. Because petitioner challenges the statute and regulations on their face, petitioner cannot prevail merely by asserting that they might be applied in an unconstitutional manner. Instead, petitioner may prevail only if it "[i]s apparent that" the statute and regulations "could never be applied in a valid manner." Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 797-98 (1984) (emphasis added). A facial challenge thus is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid. The fact that [the law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." United States v. Salerno, 481 U.S. 739, 745 (1987). Accordingly, the narrow issue before the Court is whether the statutory DBE presumption and the DOT DBE regulations are incapable of constitutional application.[5]

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[5] No as applied challenge is properly before this Court. The

Petitioner purports to narrow the issues before this Court by further limiting its challenge to the statutory provisions that govern direct federal procurement. As petitioner concedes (Br. 15), this case has been plagued by confusion regarding the precise statutory and regulatory provisions petitioner is challenging. Petitioner always has sought to challenge the constitutionality of the statutory definitions of "socially and economically disadvantaged," which Congress incorporated into the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, Tit. I, § 1101(b)(1)(B), 112 Stat. 113, from Sections 8(d)(3) of the SBA, as well as the certification standards and procedures employed to identify DBEs. Those standards and procedures apply both to DOT's aid program, which provides federal funds to state and local governments, and to the DOT's direct spending of federal money for

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only feature of the Secretary's program ever applied to petitioner was the SCC that petitioner originally challenged. The district court, however, held that the SCC, as applied to petitioner, was unconstitutional, Pet. App. 200; the court of appeals affirmed that conclusion, id. at 59-60; the DOT has not sought further review of that holding; and the SCC program has been discontinued.

highway construction on federal land. See pp. __-__, supra; Pet. Br. 7, 9, 16.

Purporting to clarify the scope of its challenge, petitioner now declares that it is not challenging any aspect of the DOT's state and local aid program. "[T]his case," petitioner declares, "involves only" the DOT's direct federal contracts. Pet. Br. 15-16, 27. Petitioner thus does not ask this Court to review the Secretary of Transportation's DBE program, which was upheld by the court of appeals. Rather, petitioner focuses on the government-wide "goal setting" and "goal achievement mechanisms" implemented under Subsections 8(d)(4) through 8(d)(6) of SBA, 15 U.S.C. 637(d)(4)-(6), and the Federal Acquisition Regulations (FAR), 48 C.F.R. Pt. 19. See Pet. Br. 13-14; see also pp. __-__, supra. Indeed, petitioner now claims that it is injured, not by anything TEA-21 requires, but by the subcontracting plan requirement found in Section 8(d)(4)(B), 15 U.S.C. 637(d)(4), under which prime contractors must submit plans setting goals for DBE participation. Pet. 13.

Petitioner, however, did not properly challenge Sections 8(d)(4) through 8(d)(6) of the SBA in the courts below, and those courts did not address them. Indeed, the court of appeals found "no indication from any of the parties in their briefs or elsewhere that the particular requirements of paragraphs (4)-(6) of § 8(d) are at issue in the instant lawsuit." Pet. App. 86 n.35. Nor were those provisions ever part of this case. The "scope of this case," petitioner admits, "includes all of the statutory definitional underpinnings, goal setting, and goal achievement mechanisms that

gave rise to the terms of the * * * contract" petitioner was denied in 1989. Pet. Br. 15 (emphasis added). But Subections 8(d)(4) through (6) of the SBA did not "g[i]ve rise to" any part of that contract. Instead, the now-discontinued Subcontractor Compensation Clause (SCC) that allegedly harmed petitioner was established by the Secretary directly under one of TEA-21's predecessors, the STAA; it was not a product of the SBA. See Pet. App. 63 n.24 ("None of the parties in this case contend that SBA § 8(d)(4), 15 U.S.C. 637(d)(4), pertains to the SCC."). Nor did any other provision of the SBA petitioner now purports to challenge appear in that 1989 contract.[6]

Petitioner's failure to mount a proper challenge to Subsections 8(b)(4) through (6) below and the court of appeals' refusal to address those provisions bar their consideration here. E.g., National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 470 (1999); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). The court of appeals, moreover, specifically held that petitioner lacks "standing to challenge paragraphs (4)-(6) of 15 U.S.C. 637(d)," Pet. App. 14; id. at 86 n.35. See also Pet. Br. 6 n.2 ("The panel denied Adarand standing to challenge 15 U.S.C.

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[6] In fact, petitioner's contract specifically stated that it did not include the subcontractor plan requirement under Section 8(b)(4). See App., infra, __a (stating that subcontractor plan requirement does not apply). Petitioner's extensive discussion of subcontractor plans, Pet. Br. 13, and its speculation that they are "coercive," Pet. Br. 14, are thus beyond the scope of this case. Petitioner's claim that the provisions are applied in a coercive manner, moreover, cannot be raised in a facial challenge unsupported by a record that might show how, in fact, those provisions are applied.

§§ 637(a), 644(g), and 637(d)(4-6)"). In light of petitioner's failure to challenge that holding in its petition, its attempt to raise Sections 8(d)(4)-(6) of the SBA for the first time in its brief on the merits is unavailing. See Hagen v. Utah, 510 U.S. 399, 409 (1994).

Petitioner's belated attempt to "smuggl[e] additional questions" into this lawsuit, Kaisha v. U.S. Philips Corp., 510 U.S. 27, 32 n.6 (1993), is particularly problematic, because petitioner has not shown any realistic possibility that it will be injured by an application of paragraphs 8(d)(4) through (6). Those paragraphs are implicated only by the DOT's direct contracting, not the DOT's state and local aid program. But the Department of Commerce, based on its benchmark studies, has precluded the use of racial criteria (and therefore the application of paragraphs 8(d)(4)-(6)) in direct contracting in every area in which petitioner does business, as petitioner concedes. Pet. Br. 14; pp. __-__, supra. Petitioner thus cannot show any threatened injury from those provisions, much less one that might excuse its dual failures properly to raise those provisions below and to challenge the court of appeals' unequivocal holding that it lacks standing to raise them.

Petitioner's submission also casts serious doubt on the extent to which there remains a real and substantial controversy of any sort. With respect to petitioner's past injury in direct federal procurement, the court of appeals held that the SCC was unconstitutional as applied; the government did not seek review of that decision; the DOT has discontinued use of the SCC nationwide; and the issue thus is not before this Court. See pp. __-__, supra.

With respect to petitioner's claim for forward-looking relief, any continuing injury in direct federal procurement is foreclosed by the DOT's termination of the SCC program and the Department of Commerce's benchmark study, which precludes the DOT from using race-conscious remedies in any area in which petitioner does business. See pp. __-__, supra; Pet. Br. 14. Yet petitioner now asserts that this "case deals exclusively with direct federal procurement," and "has nothing to do with financial assistance." Pet. Br. 27. Accordingly, there is no basis for prospective relief with respect to the aspects of the program petitioner purports to challenge.

II. TEA-21 AND THE SECRETARY'S DBE REGULATIONS ARE NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENT INTEREST

Eliminating racial discrimination and its effects remains one of the Nation's great challenges. "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 Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995) (plurality opinion of O'Connor, J.) (Adarand I). Congress has found that many Americans, because "of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control," lack equal "opportunity for full participation in our free enterprise system," and thus are "socially and economically disadvantaged" on account of race or ethnicity. 15 U.S.C. 631(f)(1). See also Pub. L. No. 95-507, § 201, 92 Stat. 1760 (1978). Congress therefore has attempted to

ensure that past discrimination and present bias do not "cause federal funds to be distributed in a manner" which reflects and "reinforce[s] prior patterns of discrimination." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989). E.g., Fullilove v. Klutznick, 448 U.S. 448, 465 (1980) (plurality opinion) (upholding spending legislation addressing the "effects of past inequalities stemming from racial prejudice" that continue to "adversely affect our present economic system" (quoting H.R. Rep. 468, 98th Cong., 1st Sess., 1-2 (1975))); id. at 466 n.48 ("past overt social and economic discrimination is presently operating, in effect, to perpetuate past inequities").

The Secretary's DBE program, which Congress reauthorized in TEA-21, is one such effort. To the extent that program relies on race-based criteria, it is subject to strict scrutiny. Racial classifications -- even if employed to combat discrimination and its effects -- are constitutional only if they serve a compelling government purpose and are narrowly tailored to achieve that end. Adarand I, 515 U.S. at 227. Although that standard is demanding, this Court has gone out of its way "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" Id. at 237. "When race-based action is necessary to further a compelling interest," the Court has stated, "such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out" in its cases. Ibid.[7] As explained

[7] Petitioner's argument that racial classifications are per se unconstitutional, Pet. Br. 18-23, is thus inconsistent with this Court's precedents.

below, petitioner has not shown that the Secretary's DBE program is incapable of meeting that exacting standard.

A. CONGRESS HAS A COMPELLING INTEREST IN ELIMINATING DISCRIMINATION AND ITS EFFECTS ON GOVERNMENT SPENDING AND PROCUREMENT

In the context of national appropriations legislation, Congress has a compelling interest in ensuring that public monies and the opportunities they create are not allocated based on, and do not reinforce, patterns of racial discrimination. "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." Croson, 488 U.S. at 492 (plurality opinion) (O'Connor, J.). Congress thus may take steps to avoid "becom[ing] a 'passive participant in a system of racial exclusion practiced by elements of the local construction industry." Ibid. (plurality opinion). And Congress may legitimately invoke its constitutional powers to ensure that such a system does not "cause federal funds to be distributed in a manner" which reflects and "reinforce[s] prior patterns of discrimination." Croson, 488 U.S. at 504. Petitioner, in fact, concedes that the use of racial preferences as "a last resort to 'remedy private discrimination'" is a "possible justification" for race-conscious government policies. Pet. Br. 22 (quoting Croson, 488 U.S. at 509). See also id. at 26 ("compelling interest is always 'remedying past or present discrimination'"). Accordingly, rather than focus on the strength of Congress's interest, petitioner primarily argues that Congress did not have a "strong basis in evidence" for finding a national problem of

discrimination in highway contracting. The district court and the court of appeals both properly rejected that argument.

1. Congress Had Ample Evidence Of Discrimination When It Enacted TEA-21

Treating the compelling interest inquiry as a question of fact, petitioner argues (Pet. 23-28) that the court of appeals erred in relying on legislative and administrative materials that identify the effects of discrimination in the highway and transit construction industry. Such sources, petitioner asserts, are neither "sworn testimony from personal knowledge" nor otherwise admissible. Pet. Br. 23-26. That argument -- which was not properly raised below -- betrays a misunderstanding of the compelling interest inquiry, which is, after all, a legal inquiry. Federal courts do not measure the substantiality of Congress's interests by requiring Congress to prove its interest in a de novo trial. Instead, federal courts properly "examine first the evidence before Congress," and then review any "further evidence" necessary to resolve the matter. Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 196 (1997). The court of appeals and district court followed that methodology and correctly concluded, as a matter of law, that Congress had a compelling interest in enacting TEA-21's contracting provisions and their predecessors. Moreover, even if one were to accept petitioner's effort to recharacterize that legal conclusion into a factual finding, petitioner's request that this Court reconsider the findings of the district court and court of appeals would run afoul of this Court's traditional "reluctan[ce] to disturb findings of fact in which two courts below have concurred." United States v. Doe, 465 U.S. 605,

614 (1984).[8]

The enormous body of evidence before Congress, accumulated over 30 years, establishes the compelling nature of Congress's

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[8] Petitioner's contention (Pet. Br. 27) that the court of appeals did not review the legislative record and instead "rel[ied] exclusively on the content of Appendix A," -- Proposed Reforms to Affirmative Action In Federal Procurement: A Preliminary Survey, 61 Fed. Reg. 26,041, 26,050 (May 23, 1996) -- is incorrect. The court of appeals, after conducting its own searching review of the legislative record, concluded "that there is an even more substantial body of legislative history supporting the compelling interest in the present case than that cited by" the government's submission, Pet. App. __a, and cited materials not mentioned in Appendix A, e.g., Pet. App. 36-37 (statements of Toni Hawkins, M. Harrison Boyd, and Anthony Robinson.

interest. Throughout the 1970s, the permanent select committee of the House of Representatives conducted extensive hearings on the effects of past and present discrimination on the distribution of contracting opportunities in a variety of industries. See App. __a-__a, infra (listing relevant select committee hearings). Based on its investigation, the Committee concluded that past discrimination disproportionately hindered the participation of minority-owned businesses in federal procurement projects. See Summary of Activities, A Report of the House Committee on Small Business, 94th Cong., 2d Sess. 182 (1977). Congress responded by enacting the Public Works Employment Act of 1977, 42 U.S.C. 6705(f)(2), which this Court upheld in Fullilove v. Klutznick, 448 U.S. 448 (1980). "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." Id. at 477-478 (plurality); accord id. at 458-467, 473; id. at 503, 505-506 (Powell, J., concurring); id. at 520 (Marshall, J., concurring in judgment). See also H.R. Rep. No. 468, 94th Cong., 1st Sess. 1-2, 11-12, 28-30, 32 (1975); U.S. Comm'n on Civil Rights, Minorities and Women as Government Contractors 20-22, 112, 126-127 (May 1975).

Congress's investigations throughout the 1980s and 1990s, see App., infra, __a-__a, documented that minority-owned firms continue to suffer discrimination and its effects in a variety of industries -- in obtaining bonding, in securing adequate financing, and in receiving prompt payment for completed work. See, e.g., Small and

Minority Business in the Decade of the 80's (Part 1): Hearings Before the House Comm. on Small Business, 97th Cong., 1st Sess. 106, 241 (1981) (1980s Hearings); Hearings on Minority Business and its Contributions to the U.S. Economy of the Senate Comm. on Small Business, 97th Cong., 2d Sess. 44-45, 50, 88, 95 (1982). The hearings showed that public and private contracting officers alike retained a negative perception of the skills and competence of minorities. See 1980s Hearings, supra, at 106, 114, 118, 241. They included statistical analyses demonstrating gross disparities in contracting. For example, in 1986, minority-owned businesses accounted for only 2.7% of the total prime contract revenue, receiving $5 billion out of almost $185 billion. H.R. Rep. No. 460, 100th Cong., 1st Sess. 18 (1987). The House Report observed that such a disparity could "not [be] the result of random chance," and concluded that "past discrimination has hurt the socially and economically disadvantaged individuals in their entrepreneurial endeavors." H.R. Rep. No. 460, 100th Cong., 1st Sess. 18 (1987).

The Small Business Administration's annual reports to Congress, throughout the 1990s, showed gross disparities between the numbers of available minority businesses and their participation in federal procurement. See, e.g., The State of Small Business: A Report of the President to Congress 362 (1994) (minority owned businesses represent 9 percent of total business community but receive 4.1 percent of federal procurement dollars); The State of Small Business: A Report of the President to Congress 323 (1995) (4.7 percent of procurement dollars). See also Minority Construction Contracting: Hearing Before the Subcomm. on SBA, the General

Economy, and Minority Enterprise Development of the Comm. on Small Business, 101 Cong., 1st Sess. (1989).

Congress likewise gathered extensive evidence of the incidence of discrimination in the specific context of highway contracting. After having collected such evidence for a decade, Congress in 1982 amended the Surface Transportation Assistance Act of 1982 (STAA), Pub. L. No. 97-424, § 105(f), 96 Stat. 2100, to add a 10 percent nationwide aspirational goal for DBE participation on federally funded mass transit and highway construction projects. For two years, through at least eight hearings, Congress then investigated and evaluated the effect of those provisions before renewing them for four years in the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, § 106(c)(2)(B), 101 Stat. 146. See App., infra, at __-__ (listing hearings). The Senate Report accompanying STURAA explained Congress's decision:

> The Committee has considered extensive testimony and evidence on the bill's DBE (disadvantaged business enterprise) provision, and has concluded that this provision is necessary to remedy the discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway and mass transit construction industry.

S. Rep. No. 4, 100th Cong., 1st Sess. 11 (1987). Following that renewal, Congress continued reviewing the program, holding hearings and gathering evidence. See App., infra, __a-__a (listing hearings). Each time, the evidence showed that discrimination, past and present, continued to deny socially and economically disadvantaged business owners from participating in and competing for work on federal and federally aided highway construction

contracts. Pp. __-__, infra. As a result, Congress reauthorized the DBE program in the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919-1921, and in TEA-21, Pub. L. No. 105-178, Tit. I, §§ 1101(b), 112 Stat. 113.

Congress heard specific evidence of the problems confronted by DBEs. With respect to access to necessary capital, minority applicants generally -- and minority applicants in the construction industry in particular -- were denied bank loans at a higher rate than non-minorities with identical collateral and credentials. Pet. App. 35-39. A study of the construction industry supported by the U.S. Bureau of the Census and National Science Foundation found that "blacks, controlling for borrower risk, are less likely to have their business loan applications, approved than other business borrowers," and generally receive smaller loans when approved. Caren Grown & Timothy Bates, Commercial Bank Lending Practices and the Development of Black Owned Construction Companies, 14 J. Urban Affairs 25, 26, 39 (1992) (Grown & Bates) (discussed by Rep. Norton, 144 Cong. Rec. H3958 (1998)) (Gov't Lodging __-__).[9] A survey of 58 state and local studies of disparity in government contracting found that "African Americans with the same level of financial capital as whites receive about a third of the loan dollars when seeking business loans." Maria E. Enchautegui et al., Urban Institute, Do Minority-Owned Businesses Get a Fair Share of Government Contracts? 36 (Dec. 1997) (Urban Institute Report)

[9] For the convenience of the Court, we have lodged copies of the studies upon which Congress and the court of appeals relied.

(citations omitted) (discussed by Rep. Norton, 144 Cong. Rec. H3959 (1998))(Gov't Lodging __). Congress, moreover, heard first-hand accounts of subtle and not-so-subtle discrimination in the provision of needed capital.[10]

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[10] For example, one bank denied a minority-owned business a loan to purchase new vans to bid on a public contract worth $3 million, but offered a loan for the same purpose to a non-minority-owned firm, even though that firm had an affiliate in bankruptcy. See Availability of Credit to Minority-Owned Small Businesses: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking, Finance, and Urban Affairs, 103d Cong., 2d Sess. 20 (1994) (Toni Hawkins).

Discrimination and entrenched patterns resulting from years of exclusion also prevent minority business owners from obtaining surety bonds, which generally are required by state and federal procurement rules. The "inability to obtain bonding is one of the top three reasons that new minority small businesses have difficulty procuring U.S. Government contracts." Problems Facing Minority and Women-Owned Small Businesses, Including SBA Section 8(a) Firms, in Procuring U.S. Government Contracts: An Interim Report, H.R. Rep. No. 103-870, 103d Cong., 2d Sess. 15 (1994) (cited by Rep. Norton, 144 Cong. Rec. H3958); see also Surety Bonds and Minority Contractors: Hearing Before the House Subcomm. on Commerce, Consumer Protection and Competitiveness of the Comm. on Energy and Commerce, 100th Cong., 2d Sess. 8-9 (1988). A survey by the National Association of Minority Contractors indicated that, as DBEs and their needs grow, surety companies "put caps and growth limitations on the larger DBEs which were not placed on white contractors." Id. at 9. Again, Congress heard from individuals who had encountered difficulties created by discrimination and its lasting effects on the availability of bonding.[11]

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[11] See H.R. Rep. No. 103-870, supra, at 9, 16-17 (1994) (noting generalized negative perception of black contractors, and

explaining that one black contractor was forced to seek bonding from out of state after local non-minority competitors told local sureties not to underwrite him). See also State of Louisiana Disparity Study, Vol. II 91 (June 1991) (Gov't Lodging __) (cited by Sen. Kennedy, 144 Cong. Rec. S1482) (significant number of minority-owned businesses interviewed for the disparity study stated that they had difficulty obtaining bonding, including bid performance and payment bonds).

The evidence showed that some prime contractors engaged in discriminatory bid-shopping, allowing a preferred subcontractor to match any low bid submitted by a minority-owned contractor. See, e.g., How State and Local Governments Will Meet the Croson Standard: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 54 (1989); see also State of Colorado and the Colorado Department of Transportation Disparity Study, Final Report, 5-56, 5-59 (Jan. 1, 1998) (Gov't Lodging __) (Colorado Study) (cited by Sen. Chafee, 144 Cong. Rec. S1493, S5413); State of Louisiana Disparity Study, Vol. II, 69, 73 (June 1991) (Gov't Lodging __) (Louisiana Study) (cited by Sen. Kennedy, 144 Cong. Rec. S1482).[12] Some suppliers charge higher prices to minority customers, raising their costs and rendering them less competitive. See, e.g., Colorado Study at 5-78 (Gov't Lodging __-__); Louisiana Study 89 (Gov't Lodging __); Ray Marshall & Andrew Brimmer, Public Policy & Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia,

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[12] See also Associated General Contractors v. Coalition for Economic Equity, 950 F.2d 1401,1416 (9th Cir. 1991) (citing reports that minority firms were "denied contracts despite being the low bidder," and "refused work even after they were awarded the contracts as low bidder"); Cone Corp. v. Hillsborough County, 908 F.2d 908, 916 (11th Cir. 1990).

Part II, 72 (June 29, 1990) (Brimmer-Marshall Report) (Gov't Lodging __-__) (Gov't Lodging __) (minority firm in Georgia found problem so pronounced that it sent white employees to purchase supplies).

Congress also heard evidence that black, Hispanic, Asian, and Native-American-owned businesses were underutilized in government contracts. E.g., Urban Institute Report, supra, at 11, 13, 19-20, 63 (Gov't Lodging __, __, __-__, __). For example, the Urban Institute Report found that minority-owned businesses received only 57 cents out of every state and local contracting dollar that they should have received based on the proportion of "ready, willing, and able" firms that were minority-owned. Id. at v-vi, 1, 19-22, 61 (Gov't Lodging __-__, __, __-__, __). Throughout the debates on TEA-21, members of Congress noted study after study, incident after

incident, showing gross disparities in utilization.[13]

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[13] Hispanic firms received .26% and women-owned firms received .18% of the state-funded highway construction contracts in Colorado, while over 99% of the state contracts went to white-owned firms, 144 Cong. Rec. S5414; in the United States as a whole, minorities own 9% of construction companies but receive only 4% of construction receipts, id. at S1403; white-owned construction firms receive 50 times as many loan dollars as African-American-owned firms with identical equity, id. at S1422; African-Americans were three times more likely and Hispanics 1.5 times more likely to be rejected for business loans than whites, according to a Denver study, id. at S1493. Finally, Senator Lautenberg also spoke of the continuing effects of past discrimination:

> Transportation construction has historically relied on the old boy network which, until the last decade, was almost exclusively a white, old boy network * * * * This is an industry that relies heavily on business friendships and relationships established decades, sometimes generations, ago -- years before minority-owned firms were even allowed to compete.

Id. at S1490.

Finally, the evidence showed that, although programs like the DOT DBE program were often effective, premature termination of similar state and local programs had almost always caused inordinate disparities to return. DBE participation in the state-funded portion of a Michigan highway program fell to zero nine months after that State's DBE program ended, while the federally funded portion (which continued to operate under the DOT's DBE program) had a 12.7% participation rate. 144 Cong. Rec. S1404. In Tampa, after the city discontinued its DBE plan in 1989, the number of contracts awarded to Latinos was suddenly cut in half, while the number of contracts awarded to African-Americans fell by 99%. Similarly dramatic drops in DBE participation resulted in Richmond Virginia, Hillsborough County, Florida, and Philadelphia. See U.S. Comm'n on Minority Business Development, Final Report 99 (discussed by Rep. Norton, 144 Cong. Rec. H3858). See also 144 Cong. Rec. S1409-1410, S1420-1421, S1429-1430.

Indeed, the recent GAO Report upon which petitioner places great reliance, Disadvantaged Business Enterprises (June 2001) (GAO Report), found that DBE contracting had "dramatically declined" when, in the two States it examined, local DBE programs were terminated. See GAO Report 40-41 (Gov't Lodging __).[14] As TEA-21's floor manager, Senator Baucus, explained to his colleagues, such "dramatic decreases in DBE participation in those areas in which DBE programs have been curtailed or suspended" show not merely

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[14] Because petitioner reproduces only part of the GAO Report in its appendix and omits charts and methodology, we have included a complete copy in the lodging (at __-__).

"underutilization of women- and minority-owned business in the industry," 144 Cong. Rec. S5414 (1998) (Sen. Baucus), but that race-neutral alternatives sometimes cannot level the playing field.[15]

In view of that record, both houses of Congress in 1998 rejected two amendments to TEA-21 that would have eliminated the DBE program. See 144 Cong. Rec. S1496 (1998), H2011 (1998). Even opponents of the DBE program agreed that there was evidence that discrimination impaired the ability of DBEs to compete for government contracts. As Representative Roukema, the sponsor of an unsuccessful amendment to repeal the DBE program, explained, the program's opponents "were not suggesting that there is no discrimination." 144 Cong. Rec. H2001.

2. Petitioner's Objections To The Evidence Before Congress Are Unsubstantiated and Insubstantial

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[15] This Court often accords the views of a bill's floor managers particular weight in determining legislative intent. See generally United States v. Emmons, 410 U.S. 396, 405 n.14 (1973); United Steelworkers of America v. Weber, 443 U.S. 193, 233-255 (1979) (Rehnquist, J. dissenting); Monell v. Dep't of Social Servs., 436 U.S. 658, 686-87 (1978).

Responding to the vast body of evidence before Congress, petitioner principally argues that the court of appeals did not review the evidence under the proper standard. The court of appeals, petitioner argues, failed to ensure that the statistical evidence before Congress "was drawn from the proper sample pool," Pet. Br. 29-30; did not scrutinize the studies' methodologies, id. at 30; and did not ensure that they conclusively eliminated all nondiscriminatory explanations for disparities, id. at 30-31.

Petitioner misunderstands the judicial role in evaluating the existence of a compelling interest. Courts of appeals do not sit as peer review boards to conduct sua sponte review of congressional findings and methodologies for scientific accuracy. In this case, petitioner failed to identify the specific evidence it believes unreliable, explain the reasons for that concern, or explain how the voluminous evidence remaining could conceivably be insufficient. Nor did petitioner, despite the opportunity to do so, introduce its own evidence to show that racial discrimination in the highway construction industry has ceased to exist. Pet. App. 47 n.14. Instead, petitioner offered only "decidedly vague urgings" of bias, id. at 46 n.14, an "unfocused attack" on disparity studies generally, id., at 47 n.14, and an assertion that the "various congressional reports and findings" were "conclusory," id. at 51. Such contentions are an insufficient basis on which to strike down an Act of Congress, much less one founded on 30 years of hearings, investigations, conclusions, and findings. "Given the deference due the duly enacted and carefully considered decision of a co-equal and representative branch of our government," this Court

does "not lightly second guess such legislative judgments, particularly where the judgments are based in part on empirical observations." Westside Community Bd. v. Mergens, 496 U.S. 226, 251 (1990) (plurality opinion of O'Connor, J.).

In any event, petitioner's methodological objections are without merit. For example, petitioner asserts (Br. 29) that Congress was required to compare the availability of contractors who "not only have the necessary expertise" but "who also have met * * * bonding requirements and capitalization." Bonding and access to capital, however, are key two areas where minority businesses suffer discrimination. See pp. __-__, supra. Adjusting the data as petitioner suggests would thus treat minority businesses as unqualified precisely because they suffer discrimination. In attempting to determine whether discrimination exists, it is not error to omit a variable that itself is tainted by discrimination. See Coates v. Johnson & Johnson, 756 F.2d 524, 544 (7th Cir. 1985); Valentino v. United States Postal Serv., 674 F.2d 56, 71, n.26 & 73 n.30 (D.C. Cir. 1982).

Petitioner's contention (Br. 29) that the disparity studies before Congress may not have compared the appropriate pools of "ready, willing and able" minority and non-minority contractors in the relevant markets is unfounded. Study after study made the proper comparisons. See, e.g., Urban Institute Report, supra, at __ (Gov't Lodging __); Louisiana Study __ (Gov't Lodging ___). Petitioner is also incorrect to assert (Br. 30-31) that the studies did not use regression analysis sufficient to eliminate other causes of disparities. E.g., Grown & Bates, supra, at __ (Gov't

Lodging __); Louisiana Study __ (Gov't Lodging).

Discrimination in any event need not be "prove[d] * * * with scientific certainty," or using "appropriate regression analysis" that "include[s] all measurable variables thought to have an effect." Bazemore v. Friday, 478 U.S. 385, 399-400 (1986) (Brennan, J., concurring). See also Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981) (prima facie case "eliminates the most common nondiscriminatory reasons"). Consequently, a party impeaching a study's validity must do more than hypothesize about factors the study did not consider; instead, the party must introduce "evidence to support the contention that the missing factor can explain the disparities." EEOC v. General Tel. Co., 885 F.2d 575, 581 (9th Cir.), cert. denied, 498 U.S. 950 (1989) (quoting Palmer, 815 F.2d at 101); Concrete Works, 36 F.3d at 1524-1525. See also Dothard, 433 U.S. 321, 331 (1977) (party "not required to exhaust every possible source of evidence" because opposing party "is free to adduce countervailing evidence of [its] own."); Contractors Ass'n v. Philadelphia, 6 F.3d 990, 1007 (3d Cir. 1993); Sobel v. Yeshiva Univ., 839 F.2d 18, 34 (2d Cir. 1988), cert. denied, 490 U.S. 1105 (1989); Catlett v. Missouri Highway & Transp. Comm'n, 828 F.2d 1260 (8th Cir. 1987), cert. denied, 485

U.S. 1021 (1988). Petitioner failed to do that here.[16]

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[16] Further, while petitioner and its amici criticize the details of the Urban Institute Report's methodology, that does not rebut the inference of discrimination. To the extent that report fails to account for certain variables, petitioner and its amici must provide evidence that the missing factor -- not discrimination -- accounts for the observed disparities. See General Tel. Co., 885 F.2d at 581 (plaintiff must provide evidence that the missing factor can explain the disparity to rebut inference of discrimination).

More broadly, it is unclear what all of petitioner's statistical criticism really proves. Strict scrutiny requires the government to point to a compelling interest with "a strong basis in evidence" and observable roots in the actual marketplace. It does not requires statistical perfection, a standard that social science itself is incapable of achieving. None of petitioner's statistical objections casts genuine doubt about Congress's overall finding of continuing discrimination and its effects in the construction industry. Moreover, the DOT regulations require local jurisdictions to conduct additional disparity studies before implementing any race-conscious mechanisms in that jurisdiction. 49 C.F.R. 26.45(b); pp. __-__, supra. See also 61 Fed Reg. 26,045 (study requirement for direct federal procurement); 28 C.F.R. 19.201(b) (same); pp. __-__, supra.[17] Petitioner cannot demonstrate that such studies can never provide the statistical proof that, according to petitioner, is constitutionally required. For that reason alone, petitioner's facial challenge to the adequacy of proof must fail. Salerno, 481 U.S. at 745 (law not invalid on its

[17] Petitioner's assertion (Br. 34) that the Department of Commerce's benchmark study "disclaims any attempt to find the requisite discrimination" is incorrect; the entire purpose of the study is to find disparities in utilization that are not explained by factors other than race. The footnote petitioner cites (63 Fed. Reg. 35,718 n.10) merely notes that the study does not adjust its estimate of the number, size and age of ready, willing and able DBEs to determine how many, how large, and how old the DBE pool would be absent discrimination. See Croson, 488 U.S. at 499 ("It is sheer speculation how many minority firms there would" be absent "societal discrimination."). In declining to adjust for discrimination's effect on those factors, the study thus may understate the effects of discrimination. Absent discrimination, one would expect the number, size, and age of DBEs to be larger than the current number.

face unless "no set of circumstances exists" under which law might operate constitutionally).

This Court has stated that gross disparities standing "alone * * * may constitute prima facie proof of a pattern or practice of discrimination." Adarand, 515 U.S. at 537; Croson, 488 U.S. at 533. Here, Congress did not merely rely on proof of disparities. Instead, it investigated the matter year after year. It adduced evidence of discrimination in highway subcontracting and in access to critical resources -- capital, bonding, supplies -- needed to compete. It heard the first-hand testimony of individual victims. In response to that showing, Congress authorized a remedial program, and the DOT promulgated regulations that make race-conscious remedies possible only upon additional findings suggesting discrimination. Congress clearly identified a compelling interest with a "strong basis in the evidence."

3. Congress May Condition Its Spending To Address A Nationwide Problem Affecting Nationwide Appropriations

Finally, petitioner claims that Congress lacks constitutional authority to enact legislation like TEA-21 unless it finds discrimination in a majority of States. To the extent petitioner asserts that Congress cannot enact even narrowly-tailored legislation -- legislation that imposes a remedy only in those markets where there is discrimination to remedy -- unless it finds discrimination in more than 25 States, the contention is without merit. As a national sovereign, the federal government has a compelling interest in avoiding the improper (discrimination-based and discrimination-reinforcing) distribution of federal funds

nationwide. Thus, while a state or local government has only "the authority to eradicate the effects of private discrimination within its own legislative jurisdiction," Congress has the power -- indeed, the responsibility -- to ensure that federal spending does not reinforce discrimination in any location where federal dollars are spent. See Croson, 488 U.S. at 490-492 (plurality); Oregon v. Mitchell, 400 U.S. 112, 284 (1970) (Stewart, J., concurring).

Petitioner's reliance on United States v. Morrison, 529 U.S. 598 (2001), is thus misplaced. Morrison concerned whether Congress's creation of a federal remedy for gender-based violence under the Violence Against Women's Act was within Congress's power under the Commerce Clause and Section 5 of the Fourteenth Amendment. This Court concluded that Congress could not create such a remedy under the Commerce Clause, because the remedy was for "noneconomic" violent crimes that have "always been the province of the States." Id. at 618-619. And the Court concluded that Congress could not rest the legislation on Section 5 of the Fourteenth Amendment because the Act was not directed at State actors, and because "Congress's findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States." Id. at 626.

Unlike the legislation at issue in Morrison, TEA-21 falls squarely within the national government's specifically enumerated powers, regardless of geographic scope. TEA-21 both authorizes the spending of federal moneys for mass transit and highway construction projects, and attaches conditions to that spending to

achieve national goals. Congress has unquestioned authority under the Spending Clause, U.S. Const., Art. I, § 8, to "further broad policy objects by conditioning the receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." South Dakota v. Dole, 483 U.S. 203, 206 (1987). Petitioner cites no authority for the novel proposition that Congress cannot further its interest in remedying discrimination by imposing conditions on its spending unless it finds that the evil of discrimination exists in a majority of States.

Petitioner may be correct that legislation mandating the use of race-conscious remedies nationwide, even in regions where discrimination and its effects do not persist, would raise constitutional concerns. But such concerns are best addressed through a narrow-tailoring analysis, not the compelling interest inquiry. See Pet. App. 27 n.10. In any event, such complaints have no place in the context of TEA-21 as implemented by the DOT. Together, the statutory and regulatory provisions require that race-conscious remedies be adopted only in jurisdictions where discrimination and its effects remain a problem. See pp. __-__, infra.

For related reasons, the Department of Commerce's benchmark study (cited Pet. Br. 14, 18, 33-34) does not support petitioner's contention that there is a lack of "congruence" -- "a match between the geographic area in which * * * discrimination is found, and the area in which the race-based solution applies," Pet. Br. 33 -- in the DBE program. To be sure, that study found no disparities in

direct federal procurement of prime contractors for highway construction on federal lands in many jurisdictions. In the context of direct federal procurement, however, the Federal Acquisition Regulations preclude the use of race-based criteria unless the Department of Commerce's benchmark study finds disparities in the relevant market. 61 Fed. Reg. 26,046-26,047; 28 C.F.R. 19.201(b). Similarly, in the context of DOT's aid program, DOT regulations prohibit the use of race-conscious remedies unless localized studies find disparities suggesting discrimination. See 49 C.F.R. 26.45, 26.51; pp. __-__, supra. Thus, far from disproving geographic "congruence" as petitioner contends, the Department of Commerce's benchmark study and the similar local studies required by DOT are designed to ensure it.[18]

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[18] Respondent also reads too much into the Department of Commerce's benchmark study. That study examined only direct federal procurement -- not procurement by states and localities using federal funds from the aid program -- and it looked only for disparities in the government's hiring of prime contractors. When it comes to discrimination against subcontractors on federally aided projects in localized markets, the individual state studies

and the Urban Institute study are a better source. See pp. __-__, supra. In addition, the Department of Commerce's study found overwhelming evidence that the effects of discrimination persist: It concluded that greater use of small disadvantaged businesses would be expected absent the effects of discrimination in the majority of the approximately 70 industries and markets that compose all areas of federal procurement. 63 Fed. Reg. 35,714-35,715.

In any event, there is no requirement that Congress address only those problems that are not only national in scope but of uniform incidence throughout the fifty States. Congress clearly has the power to address national problems like discrimination even if certain jurisdictions remain relatively free of such problems. Outside the spending context, for example, the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. § 1973, establishes nationwide rules to ensure that racial discrimination does not impair the right to vote. Because the incidence of such discrimination is not uniform, moreover, Congress has established special rules for those jurisdictions that (based on statutorily identified practices or patterns) are of particular concern. See Lopez v. Monterey County, 525 U.S. 266, 269-270 (1999). Nothing prevents Congress from exercising its spending powers to the same effect. When Congress employs race-conscious remedies, the requirement of narrow tailoring does demand that congressional legislation not impose racial remedies where discrimination and its effects are not a problem, regardless of the source of constitutional power Congress has invoked. But nothing the DOT's DBE program mandates race-conscious remedies in any jurisdiction. Indeed, Congress and the DOT struck a balance that allows Congress to address the national problem of discrimination, while prohibiting the use of race-conscious remedies on federally aided projects in jurisdictions where the problem is not manifest.

B. THE DOT'S DBE PROGRAM IS NARROWLY TAILORED

Even when the use of race-conscious measures serves a compelling interest, such measures must be narrowly tailored to

that end. Petitioner has failed to show that the DBE program is incapable of being administered in a way that meets that narrow-tailoring requirement. The DOT's regulations proscribe any sort of preference for DBEs unless race-neutral means of combating discrimination and its effects are insufficient; the program thus authorizes the use of race-conscious means only as a last resort. 49 C.F.R. 26.51(a). The regulations further tailor the program by attempting to reserve remedies to those individuals who in fact have suffered social and economic disadvantage; by limiting the geographic scope of remedies to those circumstances where there is evidence of their necessity; and by limiting duration. The program thus limits the use of race-based preferences based on DBE status to cases of stubborn and persistent discrimination incapable of eradication through race-neutral measures.

1. The DBE Program Permits Race-Conscious Measures Only Based On Evidence Of Discrimination And Its Effects Where Race-Neutral Corrections Are Insufficient

"In determining whether race-conscious remedies are appropriate," this Court begins with "the efficacy of alternative remedies." United States v. Paradise, 480 U.S. 149, 171 (1987). Because of the dangers inherent in race-conscious government action, the Court examines whether there has been "consideration of the use of race-neutral means," Croson, 488 U.S. at 507, and the extent to which opportunities can be made available "without classifying individuals on the basis of race," id. at 511 (plurality opinion). See Adarand, 515 U.S. at 237-238; Croson, 488 U.S. at 519 (Kennedy, J., concurring) (racial classifications permissible only "as a last resort"). Seizing on those

requirements, petitioner declares that Congress failed to consider "even the obvious race neutral options" before enacting TEA-21. Pet. Br. 45. That is not correct: Congress repeatedly attempted to use race-neutral means to eliminate the effects of discrimination, but found such means inadequate. See Pet. App. 57 ("Adarand does not challenge [the district court's] finding, that Congress over a period of decades attempted to correct by race-neutral means * * * and only after it continued to find discriminatory effects did it first implement a race-conscious remedy."). For example, although petitioner asserts that Congress should have attempted to overcome discrimination in the provision of bonding by offering bonding assistance, Pet. Br. 43, Congress did just that in 1970 by establishing the Surety Bond Guarantee program, 15 U.S.C. 694(a), 694(b). Nonetheless, five years later, the General Accounting Office reported that the effect of such programs in "helping disadvantaged firms to become self-sufficient and competitive has been minimal." Library of Congress, Congressional Research Service, Minority Enterprise and Public Policy 53 (1977). The Secretary's DBE program, moreover, continues to require the exhaustion of race-neutral remedies, such as assistance in meeting bonding requirements, before race-conscious remedies may be invoked as a last resort.

Equally important, before any remedial measure, race-conscious or neutral, may be employed, the Secretary's regulations require federal-aid recipients to determine whether the effects of discrimination persist in the relevant market by ascertaining "the level of DBE participation [the recipient] would expect absent the

effects of discrimination." 49 C.F.R. 26.45(b). This determination relies on the DBE certification process and requires much more than a simple finding of racial under-representation. The aid recipient must look to the number of DBEs who are qualified in the relevant market, not the number of entities owned by members of particular races, and compare that to the total number of qualified businesses. The DBE certification process, moreover, is designed to identify the victims of discrimination, and not to classify individuals solely on the basis of race. Although minority-owned entities enjoy a statutory presumption that they qualify as DBEs, their owners must certify that they have suffered discrimination. See pp. __-__, supra. Moreover, the DOT's regulations allow that presumption to be rebutted. Likewise, aid recipients must include, in their count of DBEs, businesses that are owned by non-minorities who have qualified for DBE status based on individual circumstances (i.e., proof that they have been victims of discrimination). As a result, the DBE certification process itself reflects an effort to identify the effects of discrimination and to limit the remedial benefits to victims of discrimination. Furthermore, once recipients calculate the levels of DBE participation, they must adjust those figures to discount the effect of non-discriminatory factors that might limit DBE participation, so that their estimates reflect the level of DBE participation that would be expected in the absence of discrimination.

Only where the study described above establishes a disparity suggesting the persistence of discrimination or its effects are

race-conscious corrections even an option. 49 C.F.R. 26.45(b); pp. __-__, supra. See also 61 Fed. Reg. 26,049 (in direct federal procurement, race may "be relied upon only when annual analysis indicates that minority contracting falls below levels that would be anticipated absent discrimination" (emphasis added)). Moreover, even if the study suggests that discrimination persists, race-conscious measures cannot be employed unless race-neutral means are inadequate. "You must meet the maximum feasible portion of your overall goal," the Secretary's regulations provide, "by using race-neutral means of facilitating DBE participation." 49 C.F.R. 26.51(a). See also 64 Fed. Reg. at 5112 ("recipients must give priority to race-neutral means"). The Justice Department guidelines, which govern direct federal procurement, similarly declare that federal "agencies at all times" must "use race-neutral alternatives to the maximum extent possible." 61 Fed. Reg. at 26,049. Only "where those efforts are insufficient to overcome the effects of past and present discrimination," the guidelines specify, "can race-conscious efforts be invoked." Ibid.

Consequently, petitioner's assertion that "[t]here is no evidence of" efforts to use race-neutral means like providing "financing for small firms," "relaxation of bonding requirements," or providing training "for disadvantaged entrepreneurs of all races," Pet. Br. 46, is incorrect. Such efforts are explicitly required by the Secretary's regulations. Indeed, the regulations specifically require consideration of each of the race-neutral mechanisms that petitioner identifies, and require that those race-neutral benefits be made available to all small businesses, not

just DBEs. Recipients must consider "assistance in overcoming limitations such as inability to obtain bonding or financing" by "simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing," 49 C.F.R. 26.51(b)(2) (emphasis added); they must try offering small businesses "technical assistance," 49 C.F.R. 26.51(b)(3), and logistical and business support, 49 C.F.R. 26.51(b)(9).

The Secretary's regulations also identify numerous race-neutral means that petitioner does not mention. E.g., 49 C.F.R. 26.51(b)(1) (arranging solicitations, bid presentation times, quantities and job sizes, specifications, and schedules to make it easier for small and new businesses to participate); 49 C.F.R. 26.51(b)(4) (ensuring dissemination of opportunities and guidelines to the relevant communities). See also pp. __-__ (describing similar requirements for direct federal procurement). In sum, the DOT's regulations require recipients to avail themselves of the "array of race-neutral devices to increase the accessibility of contracting opportunities to small entrepreneurs of all races," Croson, 488 U.S. at 509, before permitting the use of race-conscious mechanisms as a last resort. In light of the regulations' preference for race-neutral remedies and reservation of race-conscious remedies as a last resort, petitioner cannot show that the regulations are incapable of constitutional application.

2. The DBE Program Meets Narrow Tailoring Through Flexibility, Proportionality, And Durational Limits

"In determining whether an affirmative-action remedy is

narrowly drawn to achieve its goal," this Court also considers duration, the relationship between any hiring goals and the relevant pool of qualified entities, and the program's flexibility. United States v. Paradise, 480 U.S. 149, 187-188 (1987) (Powell, J., concurring). With respect to duration, this Court has explained that race-conscious remedies should "not last longer than the discriminatory effects [they are] designed to eliminate." Adarand I, 515 U.S. at 238. The Secretary's regulations and the terms of Congress's authorization for the DBE program ensure that such limits are observed. As noted, race-conscious remedies are permissible only as a last resort. Whenever such means are employed, moreover, recipients must eliminate or curtail them whenever it appears that race-neutral means will provide an adequate solution. 49 C.F.R. 26.51(f). The regulations thus require aid recipients constantly to reassess their programs to ensure that race-conscious remedies remain necessary. Thus, the structure "is inherently self limiting in the use of race-conscious measures." 63 Fed. Reg. 26,049. As "barriers to minority contracting are removed and the use of race-neutral means of ensuring opportunity succeeds," the program should "automatically reduce, and eventually eliminate, the use of race in decisionmaking." 63 Fed. Reg. 26,048. The provisions of TEA-21 authorizing the DBE program, moreover, expire in 2004, providing a built-in sunset unless Congress finds sufficient grounds for renewing the program. In the interim, moreover, the program is the subject of ongoing study and review. 112 Stat. 107 (calling for mandatory study).

The DBE program also provides narrow tailoring by requiring use of the "relevant statistical pool," Croson, 488 U.S. at 501, in establishing DBE participation yardsticks, and by mandating flexible implementation, Paradise, 480 U.S. at 187 (Powell, J., concurring). See also Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548, 1576 (11th Cir. 1994) (goals must be "reasonably related to the pool of qualified minorities"). The DOT DBE regulations require each recipient to set annual goals reflecting local market conditions; to set those goals based on the actual number of certified DBEs ready, willing, and able to compete in the recipient's market; and to ensure that the goal reflects the level of participation that would be expected absent discrimination. 49 C.F.R. 26.45. Contrast Croson, 488 U.S. at 502 (rigid 30 percent quota unrelated to "how many MBE's in the relevant market are qualified"). In setting goals, moreover, recipients must consider only those groups shown to be under-represented compared to local availability. 49 C.F.R. 26.45(b). Petitioner is thus incorrect to assert that the DBE program, like the quota at issue in Croson, suffers from "random inclusion of racial groups that, as a practical matter, may never have suffered discrimination in the construction industry in" the relevant geographic market. Pet. Br. 43-44 (quoting 488 U.S. at 506). As the program is implemented, any group that is not represented in the relevant market, or for which there is no disparity suggesting discrimination, must be excluded from DBE remedial goals.

Flexibility is also a hallmark of the DBE program. No penalty is imposed for failure to meet annual goals. 49 C.F.R. 26.47.

When a recipient establishes goals for DBE participation for a particular contract, contractors subject to that goal need only pursue it in good faith; they are not required to achieve it. 49 C.F.R. 26.53(a) ("When you have established a DBE contract goal, you must award the contract only to a bidder/offeror who makes good faith efforts to meet it."). If "a bidder/offeror does document adequate good faith efforts," the State or locality "must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal." 49 C.F.R. 26.53(a)(2). The regulations strictly prohibit inflexible mechanisms like quotas. 49 C.F.R. 26.43. The flexibility of the program is further enhanced through waiver provisions, under which a recipient may be released from any regulatory requirement if it believes that equal opportunity for DBEs can be achieved through other approaches. 49 C.F.R. 26.15. See Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 64 Fed. Reg. 5,096, 5,102-5,103 (Feb. 2, 1999). A recipient can also receive an exemption from compliance if exceptional circumstances warrant it. 49 C.F.R. 26.15.

3. Congress's Use of Racial and Ethnic Presumptions Is Not Fatally Over-Inclusive

Petitioner's primary claim, in the end, is not that the entire program is overbroad. It is that the racial and ethnic presumption employed by TEA-21 in identifying socially and economically disadvantaged individuals is fatally over-inclusive because not every member of the identified races and ethnic groups in fact is socially and economically disadvantaged. Pet. Br. 41-43. That argument does isolate the one race-conscious aspect of the program

that operates uniformly and nationwide, without regard to local circumstances. But the argument ignores the fact that the presumption -- as well as DBE certifications generally -- are without any effect on third parties unless race-conscious remedies (like DBE contract goals) are employed. Because DOT regulations limit the use of race-conscious or DBE-specific remedies to those markets where they are necessary to combat discrimination and its effects, the impact of the statute's race-based presumption on parties like petitioner is similarly limited.

It is true, of course, that the race-based presumption operates when state and local recipients of federal aid (and the Department of Commerce) conduct studies to determine the level of DBE participation that would be expected absent discrimination. But the government has a responsibility to identify and remedy racial discrimination. See, e.g., U.S. Const. Amend. XIV, § 5; U.S. Const. Amend. XV § 2. The government could not discharge that duty if it could not use race-conscious mechanisms for identifying whether racial discrimination exists. Even the gathering of race-conscious data involves a degree of race-conscious government action that would be unnecessary in a perfectly color-blind world. But the federal government has found it necessary to use race-conscious mechanisms to identify disparities that may indicate persistent discrimination. Congress clearly envisioned that race-based presumptions would aid in the identification of discrimination and its effects in the construction industry. The use of those criteria, without more, does not violate the Constitution, and DOT regulations ensure that race-conscious

remedies that might affect third parties are not employed unless and until discrimination and its effects have been identified and race-neutral means found inadequate.

Petitioner's argument also overlooks that the Secretary's implementing regulations are designed to limit participation to entities owned and controlled by individuals who have suffered social and economic disadvantage themselves, i.e., actual victims of discrimination. Under those regulations, the owners of firms seeking DBE designation must submit a notarized statement that they are socially and economically disadvantaged. 49 C.F.R. 26.67(a). Thus, owners in effect must certify that they have been "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," which is the standard for social disadvantage, 15 U.S.C. 637(a)(5), and that their "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged," which is the standard for economic disadvantage, 15 U.S.C. 637(a)(6)(A). An applicant for DBE certification, moreover, must submit documentation of its owner's personal wealth; if the owner's net worth exceeds $750,000, any presumption of disadvantage is considered irrefutably rebutted. See 49 C.F.R. 26.67(a)(2). Finally, even a facially valid certification is rebuttable, 49 C.F.R. 26.26(b), and third parties may challenge eligibility by showing that the owner is not actually socially or economically disadvantaged, 49 C.F.R. 26.87. See also S. Rep. No. 4, 100th Cong., 1st Sess. 28 (presumption is

rebuttable).

Those provisions belie petitioner's claim that the program necessarily extends benefits, based on race alone, to individuals who have not suffered discrimination. As the district court explained in Interstate Traffic Control v. Beverage, 101 F. Supp. 2d 445, 453 (S.D. W. Va. 2000), the rebuttable presumption of disadvantage would permit an individual who has not actually suffered discrimination and impaired business opportunities to be certified as a DBE only if (1) that individual falsely declares that he has suffered disadvantage and (2) the inaccurate declaration goes unchallenged. Petitioner nowhere alleges that such errors are necessarily commonplace, and the possibility of such false declarations does not make the program facially invalid. Moreover, because any claim of disadvantage may be rebutted, the primary effect of the presumption is to allocate burdens of proof. Petitioner nowhere shows that shifting the burden of proof to the party opposing certification is inappropriate where the applicant for certification is a member of a group that, as a historical matter, has been established to have suffered and to suffer discrimination.

Petitioner also charges that the notarized statement requirement is "essentially meaningless," Pet. Br. 10 n.6, and that it is invalid because it eliminates the presumption of disadvantage, id. at 41-42. Those contentions are in considerable tension with each other, and both are without merit. As to the former, the DOT's regulations warn that the DOT "may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or

other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program." 49 C.F.R. 26.107(e). Applicants apparently take that warning seriously: In the DOT's experience, the notarized statement requirement and net-worth limits have, since being implemented, affected both the number and identity of applicants. In addition, because petitioner brings a facial challenge, any speculation about undetected fraud or errors in implementation are irrelevant; the program must be upheld unless it is incapable of constitutional implementation.

Petitioner's claim that the notarized statement requirement is inconsistent with the statutory presumption of disadvantage has greater plausibility, but ultimately fares no better. First and foremost, the court of appeals never addressed the validity of the regulation, and petitioner would be the wrong party to challenge it. See U.S. Br. in Opp. 28. If DOT's regulations impermissibly deny contracting opportunities to wealthy minorities who have not suffered discrimination, then those wrongfully denied DBE status would be proper plaintiffs. Petitioner suffers no injury -- indeed, could only benefit -- from this alleged defect. Second, the presumption continues to operate as a presumption notwithstanding the notarized statement requirement. An applicant for DBE certification who is not a member of the specified groups must demonstrate social and economic disadvantage by a preponderance of the evidence. 49 C.F.R. 26.67. An applicant for DBE certification who is a member of the specified groups, in contrast, need not present evidence sufficient to satisfy the

certifying entity; he instead may rely on the presumption. That is the essence of a presumption.

The notarized statement, moreover, is not proof of social and economic disadvantage. It is instead a procedural requirement designed to prevent abuse and ensure that all applicants proceed in good faith. Nothing in the statutory presumption precludes the Secretary from imposing reasonable procedural requirements to deter bad-faith certification requests that, if challenged, would be rejected. And the statute certainly does not require the Secretary to implement the statute in a way that permits applicants to file certification requests in bad faith. Nor does the filing of a notarized document prevent a challenge to a company's status as a DBE.

To be sure, the DOT's regulations implement the statutory presumption in a manner that is designed to minimize the constitutional and policy concerns that would arise from a robust presumption that members of certain minority groups have suffered economic and social disadvantage. But for that reason, not only the traditional deference owed to the Secretary, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984), but also the canon favoring the construction that renders the statute constitutional, Jones v. United States, 119 S. Ct. 1215, 1222 (1999), both support the Secretary's interpretation.

Petitioner's perceived need to attack the Secretary's implementation of the statutory presumption underscores that petitioner cannot meet its burden of demonstrating that the statutory DBE program is incapable of constitutional application.

By limiting DBE status to those who certify that they are victims of discrimination, the Secretary's regulations tailor the broad statutory provisions to the requirements of the Constitution. The regulations are designed to employ race-conscious remedies for the limited purpose of remedying discrimination and its effects. If they fail in that objective, an injured party can bring an as-applied challenge. But petitioner should not be allowed to bring a facial challenge to the DBE program claiming that it is not narrowly tailored and then attack the very regulatory provisions that provide the narrow tailoring that petitioner claims is lacking.

Perhaps the most troubling aspect of any remedial scheme is that "innocent third parties may" sometimes "be called upon to bear some of the burden of the remedy." Wygant, 476 U.S. at 281 (plurality opinion). But the regulations at issue here are designed to minimize that burden so that it is not "'unacceptabl[y] substantial," United States v. Paradise, 480 U.S. 149, 182 (1987) (plurality opinion). The current program is aimed at redressing the effects of discrimination. 64 Fed. Reg. 5096 ("program is intended to remedy past and current discrimination against disadvantaged enterprises, ensure a 'level playing field' and foster equal opportunity in DOT-assisted contracts"). Its design ensures that aid recipients employ race-conscious remedies only as a last resort. Each recipient of TEA-21 funds sets and attains goals based on demonstrable evidence of the relative availability of ready, willing and able DBEs in the areas from which it obtains contractors, but only to the extent that the DBE program is needed

to counter the effects of discrimination in the recipient's market. 49 C.F.R. 26.45. And remedies are limited to those who can attest in good faith that they are actual victims of discrimination and have suffered impaired opportunities as a result. The program thus is designed to avoid bestowing undue benefits on DBEs, and to create as level a playing field as constitutionally possible. If the application of this program imposes particular hardships on third parties in specific jurisdictions, those problems can be addressed in as-applied challenges. But that possibility does not render the program unconstitutional on its face.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

Theodore B. Olson
Solicitor General

AUGUST 2001

Paul C.

No. 00-730

IN THE SUPREME COURT OF THE UNITED STATES

ADARAND CONSTRUCTORS, INC., PETITIONER

v.

NORMAN Y. MINETA, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.

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

race-conscious

reg. interpreted

compelling interest

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the court of appeals misapplied the strict scrutiny standard in determining whether Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-98) is reported at 228 F.3d 1147. The memorandum opinion of the district court (Pet. App. 128-201) is reported at 965 F. Supp. 1556.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2000. The petition for a writ of certiorari was filed on November 3, 2000. The Court granted certiorari on March 26, 2001, and on April 13, 2001, limited the grant to two reformulated questions presented. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, and the Fifth and Fourteenth Amendments to the Constitution, U.S. Const. Amends. V & XIV, are reproduced at App., infra, __-__. Relevant

provisions of the Transportation Equity Act for the Twenty First Century, Pub. L. No. 105-178, 112 Stat. 113-115, are reproduced App., infra, __-__, and provisions of the Small Business Act, 15 U.S.C. 631 et seq., are reproduced App., infra, __-__. Relevant portions of the Department of Transportation regulations, 49 C.F.R. Pt. 26, are reproduced App., infra, __-__; the Department of Justice's proposed guidelines for the use of race-conscious remedies in federal spending programs, 61 Fed. Reg. 26042 (1996), are reproduced App., infra, __-__; and provisions of the Federal Acquisition Regulations are reproduced App., infra, __-__.

STATEMENT

Congress has found that many Americans, because "of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control," lack equal "opportunity for full participation in our free enterprise system," and thus are "socially and economically disadvantaged" on account of race or ethnicity. 15 U.S.C. 631(f)(1). See also Pub. L. No. 95-507, § 201, 92 Stat. 1760 (1978). Congress therefore has attempted to ensure that past discrimination and present bias do not "cause federal funds to be distributed in a manner" which reflects and "reinforce[s] prior patterns of discrimination." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989). E.g., Fullilove v. Klutznick, 448 U.S. 448, 465 (1980) (plurality opinion) (upholding spending legislation addressing the "effects of past inequalities stemming from racial prejudice" that continue to "adversely affect our present economic system" (quoting H.R. Rep.

468, 98th Cong., 1st Sess., 1-2 (1975))); id. at 466 n.48 ("past overt social and economic discrimination is presently operating, in effect, to perpetuate past inequities").

This case arises out of Congress's longstanding efforts to distribute federal highway and transit construction funds, and the opportunities created by those funds, in a manner that does not reflect or reinforce prior and existing patterns of discrimination in that industry. One of the products of those efforts is the Department of Transportation's (the DOT's) Disadvantaged Business Enterprise (DBE) program, which provides opportunities for socially and economically disadvantaged businesses to participate in federally aided highway and transit programs. The current program differs dramatically from the program that was before this Court in Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (Adarand I). Indeed, the Department overhauled the program in response to that decision. See 64 Fed. Reg. 5096, 5101-5103, 5129 (1999); 49 C.F.R. Pt. 26.

1. Congress repeatedly has placed conditions in the laws authorizing appropriations for highway and transit construction to ensure that appropriated funds do not support unlawful discrimination. See, e.g., Surface Transportation Assistance Act of 1982 (STAA), Pub. L. No. 97-424, § 105(f), 96 Stat. 2100; Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, § 106(c)(2)(B), 101 Stat. 146; Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919-1921. The currently effective appropriation, Section 1101(b) of the Transportation

Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, Tit. I, § 1101(b)(1), 112 Stat. 113, provides that, "[e]xcept to the extent the Secretary determines otherwise, not less than 10 percent of the amounts made available" under the Act "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals."[1]

TEA-21 incorporates the definitions of "social" and "economic" disadvantage provided by the Small Business Act (SBA), 15 U.S.C. 631 et. seq. See TEA-21 § 1101(b)(1)(B), 112 Stat. 113. The SBA defines an individual as "socially disadvantaged" if he or she has been "subjected to racial or ethnic prejudice or cultural bias because of" his or her "identity as a member of a group without regard to * * * individual qualities." 15 U.S.C. 637(a)(5). The Act defines an individual as "[e]conomically disadvantaged" if his or her "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. 637(a)(6). Those basic definitions are race-neutral. The hallmark of disadvantage is not the individual's

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[1] Similar provisions can be found in TEA-21's predecessors. See, e.g., STAA, 96 Stat. 2100. The 10 percent aspirational goal in the STAA was modeled on the minority business enterprise program of the Public Works Employment Act of 1977, 42 U.S.C. 6705(f)(2), which this Court upheld in Fullilove, supra.

race. Rather, it is having suffered discrimination on account of race, ethnicity or cultural bias (without regard to what that race, ethnicity or culture might be), and having impaired capital and credit opportunities compared to those who have not suffered such discrimination.

TEA-21 also incorporates a race-based presumption from the SBA. Adarand I, 515 U.S. at 204. In particular, TEA-21 directs that contractors "shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act." 15 U.S.C. 637(d)(3)(C). TEA-21 also creates a presumption that women are disadvantaged in the highway and transit construction industry. TEA-21, § 1101(b)(1)(B), 112 Stat. 113. However, DOT's implementing regulations provide that the presumption of social and economic disadvantage is rebuttable, and that individuals who do not benefit from the presumption can be certified as socially and economically disadvantaged if they meet the statutory criteria for disadvantage based on individual experience. See 49 C.F.R. 26.67(a), 26.67(d). See also 13 C.F.R. 124.103(c), 124.601-124.609, 124.1008(e)(2).

2. The DOT provides funding for highway and transit projects primarily through two mechanisms. First, the DOT allocates more than 99 percent of its highway and transit construction funds ($19 billion in 1999) as aid to States and localities. See Pub. L. No. 105-178, Tit. I, § 1101(a), 112 Stat. 111-113. Second, the Federal

Highway Administration (FHWA), an agency of the DOT, administers the balance of the funds ($ 0.17 billion in 1999) by contracting for highway construction on federal lands.

a. TEA-21, like its predecessors, provides that the Secretary "shall establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies" as a DBE. TEA-21, § 1101(b)(4), 112 Stat. 114. See Adarand I, 515 U.S. at 208 (same authority under TEA-21's predecessor). Pursuant to that authority, the Secretary has promulgated regulations designed to limit DBE certification to firms owned and controlled by individuals who are, in fact, socially and economically disadvantaged. The DOT requires that all applicants for DBE certification, including those who are statutorily presumed to be disadvantaged, submit a signed and notarized statement affirming that they are socially and economically disadvantaged. 49 C.F.R. 26.67(a)(1). Applicants seeking DBE certification thus must certify that they have been "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," 15 U.S.C. 637(a)(5), and that their "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged," 15 U.S.C. 637(a)(6)(A). The regulations warn that the DOT "may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent

statement in connection with participation of a DBE in any DOT-assisted program." 49 C.F.R. 26.107(e). Applicants for DBE certification, moreover, must disclose their owners' personal net worth, with appropriate documentation. 49 C.F.R. 26.67(a)(2)(i). If the owner's net worth exceeds $750,000, the presumption of economic disadvantage is deemed conclusively rebutted and the individual is ineigible for the DBE program. 49 C.F.R. 26.67(b)(1). The Secretary's regulations also provide that anyone may challenge DBE certifications. 49 C.F.R. 26.87. If a state or local grant recipient has a reasonable basis to believe that the owner of a DBE in fact is not socially and economically disadvantaged, it may commence an investigation. 49 C.F.R. 26.67(b)(2).

To ensure that the effects of discrimination are investigated and remedies are developed in light of local market conditions, the Secretary's regulations require States and localities receiving federal aid to establish numerical measurements to identify the effects of discrimination. In particular, recipients must estimate "the level of DBE participation [the recipient] would expect absent the effects of discrimination." 49 C.F.R. 26.45(b). Recipients are expressly prohibited from establishing a reflexive goal based on past goals, the 10-percent national figure mentioned in TEA-21, or the racial composition of the local populace. Ibid. Instead, recipients must first consider "demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses willing, ready and able to participate on DOT-assisted contracts." 49 C.F.R. 26.45(b), (c). Then recipients must

"examine all of the evidence available within the jurisdiction" to determine what adjustments, if any, should be made to ensure that the benchmark realistically reflects the level of DBE participation that would be expected absent the effects of discrimination. 49 C.F.R. 26.45(d).

With respect to remedies, the Secretary's regulations provide that recipients, even after identifying discriminatory effects, must seek to eliminate them through race- and gender-neutral means to the maximum feasible extent. 49 C.F.R. 26.51(a). Recipients thus must attempt to arrange solicitations in ways that facilitate participation by small businesses, including DBEs; provide race-neutral assistance in overcoming limitations such as the inability to obtain bonding or financing; offer technical assistance and services to small businesses; and engage in outreach efforts. 49 C.F.R. 26.51(b). Race- and gender-conscious measures, such as DBE goals for individual contracts, may be used only if race- and gender-neutral means are insufficient to eliminate the effects of discrimination. 49 C.F.R. 26.51(d). Quotas are specifically prohibited. 49 C.F.R. 26.43. Finally, if recipients use DBE-conscious measures during a particular year, they must discontinue those measures if at any point it appears that they can achieve adequate DBE participation through race-neutral means. 49 C.F.R. 26.51(f)(1).

Recipients of DOT financial assistance may apply to the DOT for waivers that will release them from almost any DOT regulation if they can achieve or have achieved equal opportunity through other approaches, or if special circumstances make compliance

impractical. 49 C.F.R. 26.15. Moreover, no penalty is imposed on contractors or recipients for failing to meet annual goals. 49 C.F.R. 26.47. When a recipient establishes goals for DBE participation for a particular contract (a mechanism that can used only where race- and gender- neutral means have proven inadequate), contractors subject to that goal need only pursue it in good faith; they are not required to achieve it. 49 C.F.R. 26.53(a) ("When you have established a DBE contract goal, you must award the contract only to a bidder/offeror who makes good faith efforts to meet it."). If "a bidder/offeror does document adequate good faith efforts," a State or locality "must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal." 49 C.F.R. 26.53(a)(2).

b. When the DOT directly contracts for highway construction on federal lands through the FHWA, it employs the same certification requirements that govern the DOT's aid program. The DOT does not itself certify DBEs, but relies on the certification decisions of state and local fund recipients. See Pet. Br. 10. Nonetheless, direct federal procurement is not governed by precisely the same rules as the state and local aid program. Rather, direct federal contracting is governed by Sections 8(d)(4)-(6) of the SBA, 15 U.S.C. 637(d)(4)-(6), and the regulations implementing those provisions. Those provisions, which are not properly before the Court, see pp. __-__, infra, apply to all direct federal procurement; they are not specific to the DOT.

The SBA broadly seeks to promote contracting opportunities for small businesses, including small disadvantaged businesses or

"SDBs" (a subset of DBEs),[2] HUBZone small businesses, veteran-owned businesses, service-disabled veteran-owned businesses, and women-owned businesses. Section 8(d)(1) of the SBA establishes a policy of ensuring that such businesses have opportunities to participate in the performance of federal contracts. 15 U.S.C. 637(d)(1). Consistent with that policy, Section 8(d)(4) of the SBA requires businesses seeking federal contracts to adopt, and make a good faith effort to comply with, a subcontracting plan. 15 U.S.C. 637(d)(4); 48 C.F.R. 19.702. Under Section 8(d)(6), the subcontracting plan must describe the efforts the business will undertake to ensure "that small business concerns" including SDBs, women-owned businesses, HUBZone businesses, and veteran-owned businesses, "will have an equitable opportunity to compete for subcontracts." 15 U.S.C. 637(d)(6)(C). The subcontracting plan must establish "percentage goals" for the use of such businesses. 15 U.S.C. 637(d)(6)(A); 48 C.F.R. 19.704. No penalty may be imposed on any prime contractor that fails to meet the goals established by a subcontracting plan, so long as the prime contractor has made "good faith efforts." 48 C.F.R. 19.705-7. Finally, the SBA authorizes federal agencies to use financial or

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[2] The standards for SDB certification are comparable to those used for DBE certification. The Small Business Administration's regulations recognize a rebuttable presumption of disadvantage (13 C.F.R. 124.103(b)(1), 124.1008(e)(1)); require a statement of social disadvantage (13 C.F.R. 124.103, 124.1008(e)), impose a cap of $250,000 or $750,000 for determining economic disadvantage (13 C.F.R. 124.104(c)(2), 124.1008(e)(1)), and allow any person to challenge a certification of disadvantage (13 C.F.R. 124.103(b)(3), 124.1008(e)(1)(ii), 124.1017). Women-owned businesses are not presumed to be SDBs under the SBA, but they are presumed to be DBEs under TEA-21 and the Secretary's regulations.

other incentives as the agency "may deem appropriate in order to encourage" subcontracting with such small businesses. See 15 U.S.C. 637(d)(4)(E).

The SBA does not require that agencies adopt any particular methodology, whether race-neutral or race-conscious, to ensure that SDBs/DBEs have an equitable opportunity to participate in federal contracts. Following this Court's decision in Adarand I, the Justice Department issued proposed guidelines to govern the use of race-conscious remedies under the SBA, such as contract goals and financial incentives, to ensure compliance with constitutional requirements. See 61 Fed. Reg. 26,042 (1996); 48 C.F.R. 19.201.

Those guidelines in many respects resemble the DOT's DBE program. The Department of Commerce now performs market-specific benchmark studies to estimate "the level of" DBE "contracting that one would reasonably expect to find in a market absent discrimination or its effects." 61 Fed. Reg. 26,045. Compare pp. __-__, supra (DOT requirement for federal aid recipients). The Department of Commerce begins by calculating the number of SDBs/DBEs that are available and qualified to perform government contracts in the relevant region and industry, and then compares that figure to the number of non-SDB/DBE contractors, accounting for additional factors such as age and size. See id. at 26,045-26,046. The Department then may make adjustments based on relevant data and regression analysis that "hold[s] constant a variety of variables that might affect business formation so that the effect of race can be isolated." Ibid. Where the comparison between the

benchmarks and actual SDB/DBE utilization do not indicate a disparity suggesting discrimination or its continuing effects, federal agencies are prohibited from using race-conscious mechanisms to promote SDB/DBE participation. See id. at 26,046-26,047; 28 C.F.R. 19.201(b).

If the benchmark study reveals disparities suggesting that discrimination or its effects still influence the allocation of federal opportunities and funds, the guidelines "require[] that agencies at all times use race-neutral alternatives," such as technical assistance and outreach, "to the maximum extent possible." See 61 Fed. Reg. 26,049. For example, agencies must develop race-neutral mentoring programs, eliminate surety costs from bids where bonding presents a barrier to entry, ensure that SDBs/DBEs are not excluded from mailing lists, and eliminate practices that disproportionately disadvantage SDBs/DBEs. Ibid. By regulation, contracting officers must ensure that small businesses are made aware of opportunities, 48 C.F.R. 19.202-2, and must consider dividing contracts into reasonably small lots, adjusting delivery schedules, or altering contract structures to facilitate small business participation, 48 C.F.R. 19.202-1. Only "where those efforts are insufficient to overcome the effects of past and present discrimination can race-conscious efforts be invoked." 61 Fed. Reg. 26,049. Even then, agencies may not "set contracts aside for bidding exclusively by" SDBs/DBEs. Id. at 26,048. The system thus represents "a good faith effort to remedy the effect of discrimination," but without guaranteeing any particular level of SDB/DBE contracting. Ibid.

The Department of Commerce has completed one benchmark study. See 64 Fed. Reg. 52,806 (1999); 63 Fed. Reg. 35,714 (1998). As a result of that study, the use of race-conscious criteria in direct federal procurement of highway and transit construction is proscribed in all but a handful of States. See 64 Fed. Reg. at 52,807 (for SIC major industry group 16, racial criteria proscribed except in the East and West South Central regions). Consequently, as petitioner concedes, the DOT is prohibited from using financial incentives to encourage the use of DBE subcontractors in direct procurement contracts in States "such as Colorado, Adarand's area of operations." Pet. Br. 14.

3. This case arose out of the FHWA's former use of Subcontractor Compensation Clauses (SCCs), a now-rescinded device that the DOT developed to help it achieve the DBE participation goals established pursuant to the statutes that preceded TEA-21 (the STAA, STURAA, and ISTEA). SCCs provided bonus payments as a financial incentive to prime contractors for subcontracting with DBEs on federal highway construction projects. See Adarand I, 515 U.S. at 209. The district court declared the SCC program, as previously administered, unconstitutional, Pet. App. 200; the court of appeals affirmed that conclusion, id. at 59-60; and the DOT has not sought review of that ruling. As a result, the now-rescinded SCC program is no longer at issue. This lawsuit, however, has outlived the program that originally provoked it.

a. In 1989, the Colorado Federal Lands Highway Division of the DOT awarded a prime contract to construct a federal forest highway in West Dolores, Colorado to Mountain Gravel & Construction

Company. Pet. App. 132. The contract contained an SCC, Pet. App. 132, and Mountain Gravel selected a certified DBE (Gonzales Construction) to be a subcontractor on a portion of the job, Pet. App. 132-133. On August 10, 1990, petitioner brought this action for declaratory and injunctive relief, claiming that Mountain Gravel had rejected its lower bid for the West Dolores subcontract because of the SCC. Adarand I, 515 U.S. at 205. The complaint alleged that the SCC violated 42 U.S.C. 1983, 42 U.S.C. 2000d et seq. (Title VI), and the Fifth and Fourteenth Amendments.

The district court initially upheld the SCC under intermediate scrutiny, Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240, 244-245 (D. Colo. 1992), and the Tenth Circuit affirmed, Adarand Constructors, Inc. v. Peña, 16 F.3d 1537, 1539 (10th Cir. 1994). This Court, however, vacated the court of appeals' judgment, holding that strict scrutiny is the proper standard for determining whether race-based classifications violate the equal protection component of the Due Process Clause of the Fifth Amendment. Adarand I, 515 U.S. at 227. The Court remanded the case for a determination of "whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny." Id. at 238.

Following remand, petitioner filed a First Amended Complaint, seeking, inter alia, a declaration that "§ 105(f) of the STAA, § 106(c) of the STURAA, § 1003(b) of ISTEA, § 8(d) of the SBA (15 U.S.C. § 637(d)) and 15 U.S.C. § 644(g), the regulations promulgated thereunder, and the contract provisions promulgated pursuant to those statutes and regulations are unconstitutional as

applied to highway construction in the State of Colorado." Pet. App. 141. In June of 1997, before the Secretary's revised regulations (described pp. __-__, supra) took effect, the district court granted petitioner's motion for summary judgment. Pet. App. 128-201. The court found that the DBE program met the compelling interest requirement of the strict scrutiny test. The court was "unpersuaded by [petitioner's] argument that the vast body of evidence before Congress as it considered the challenged enactments, and the numerous studies compiled more recently," are insufficient. Id. at 177. Congress, the court concluded, had "a strong basis in evidence from which it could conclude there were significant discriminatory barriers facing minority businesses." Id. at 178. The challenged statutes, the court further found, "constitute a considered response by Congress to the effects of discrimination on the ability of minorities to participate in the mainstream of federal contracting." Id. at 178-179. The court, however, concluded that the SCC program was not narrowly tailored. Id. at 181-200. The court declared unconstitutional Section 106 of STURAA and Section 1003(b) of ISTEA, which authorize both direct federal procurement for construction on federal lands and federal aid under the DOT's DBE program. Id. at 200-201. The DOT moved for the court to clarify the scope of the order, arguing that the federal aid program was not at issue, but the court denied the DOT's motion. R. 109 (June 23, 1997).

b. In 1998, while the case was pending on appeal before the Tenth Circuit, Congress reconsidered the DBE program and determined that remedial measures remained necessary to address the effects of

discrimination and, accordingly, authorized those measures in TEA-21. During the debates, both houses of Congress considered and soundly rejected two amendments that would have eliminated the DBE program. 144 Cong. Rec. S1496 (Mar. 6, 1998), H2011 (Apr. 1, 1998). Congress considered evidence of overt discrimination in the awarding of subcontracts; pay disparities unexplained by other factors; discrimination in the provision of business loans and bonding; and the adverse consequences of an "old-boy" network and bid-shopping practices that continued the exclusion of certain groups. 144 Cong. Rec. S1409, S1413, S1422, S1429-S1430. See 64 Fed. Reg. at 5100-5102 (summarizing). Congress also considered studies of DBE participation in several States showing that, where the States had terminated their DBE programs, DBE participation in the state-funded portion of the highway program fell to nearly zero. See 144 Cong. Rec. S1404, S1409-1410, S1420 (Mar. 5, 1998); id. at S1482 (Mar. 6, 1998).

Congress also considered the DOT's implementation of the DBE program. The DOT, Congress understood, was revising its regulatory program to address outstanding judicial, legislative, and practical concerns, and to focus the program more narrowly on small firms owned by individuals who are truly socially and economically disadvantaged. 144 Cong. Rec. S1409, S1423-1425, S1430-1431 (Mar. 5, 1998); id. at S1485-1486 (Mar. 6, 1998); id. at S5413-5414 (May 22, 1998). In particular, the House Report noted that the DOT would continue its review of "the DBE program in light of recent court rulings" and noted that the DOT had "proposed new regulations to ensure that the program withstands constitutional muster." H.

Rep. No. 550, 105th Cong., 2d Sess. 409-410 (1998). In February of 1999, the DOT issued the anticipated regulations, described above, pp. __-__, supra.

c. Shortly thereafter, in March of 1999, the court of appeals held the case moot because Colorado had certified petitioner as a DBE. Adarand Constructors, Inc. v. Slater, 169 F.3d 1292 (10th Cir. 1999). This Court reversed. Adarand v. Slater, 528 U.S. 216 (2000) (per curiam) (Adarand II). Around that time, the DOT eliminated the SCC, the financial incentive program the Court had considered in Adarand I and that had been the subject of petitioner's original complaint. See Pet. App. 97 ("Adarand does not dispute" that "the SCC, which spawned this litigation in 1989, is no longer in use.").

4. After supplemental briefing in light of those developments, the court of appeals unanimously affirmed in part and reversed in part. Pet. App. 1-81.

a. The court of appeals first identified the statutory and regulatory provisions properly at issue in this case. The court of appeals concluded that petitioner had standing to challenge the SCC program, which had formed part of the contract petitioner had been denied, and to raise a facial challenge to "the race-based rebuttable presumption used in some certifications under the Subcontracting Compensation Clause" and incorporated from the SBA into TEA-21. Pet App. 13. The court of appeals, however, concluded that petitioner lacks standing to challenge the presumption of disadvantage for women-owned enterprises. Id. at 13-14. The court further held that petitioner lacks standing to

challenge any provision of the SBA other than the definitions that are incorporated into TEA-21. Thus, the court concluded that petitioner cannot challenge the SBA's "generalized policy of maximizing contracting opportunities for small disadvantaged businesses set forth in 15 U.S.C. §§ 637 and 644(g)," or "paragraphs (4)-(6) of 15 U.S.C. 637(d)," i.e. Sections 8(d)(4)-(6) of the Small Business Act. Pet. App. 14. See also id. at 86 n.35 ("There is no indication from any of the parties in their briefs or elsewhere that the particular requirements of paragraphs (4)-(6) of § 8(d) are at issue in instant lawsuit or that [petitioner] has or will continue to bid for contracts or subcontracts covered by those paragraphs.").

b. Turning to the constitutionality of the statutes and regulations properly at issue, the court of appeals agreed with the district court that the government had established a compelling interest in "eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies," Pet. App. 54, and in "remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups," id. at 25. The court of appeals found "a strong basis in [the] evidence" before Congress for concluding "that racial discrimination and its continuing effects have distorted the market for public contracts." Pet. App. 24-49. The evidence, the court explained, showed that prime contractors refused "to employ minority subcontractors due to 'old boy' networks," id. at 34-35. See also id. at 40-41 (noting that the evidence "strongly supports the thesis that informal,

racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms"). The evidence was "particularly striking in the area of race-based denial of access to capital." Id. at 34. See also id. at 34-38 (reviewing the evidence). Minority subcontractors were also confronted with "overt racial discrimination" in areas such as the provision of performance and payment bonds needed to compete for government contracts. Id. at 42-43. Further, the court explained, there was evidence of discrimination in pricing by suppliers, under which "nonminority subcontractors receive special prices and discounts from suppliers not available to minority subcontractors," a practice that makes minority subcontractors less competitive. Id. at 44.

The court also relied on local disparity studies conducted by numerous state and local governments. Pet. App. 44-48. Although conceding the limits of those sources, the court concluded that the consistent disparity between the use of DBE subcontractors and their availability "raises an inference that the various discriminatory factors" previously identified by Congress had "created that disparity." Pet. App. 46. The significance of the studies, the court explained, was increased by specific evidence showing that discrimination not only had decreased the use of existing minority enterprises, but also had prevented the formation of new ones. Id. at 48. Finally, the court noted that, when state-sponsored DBE programs were discontinued, DBE participation dropped dramatically or disappeared altogether. Id. at 49. "Although that evidence standing alone is not dispositive," the

court explained, "it supports the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination." Ibid.

The court declined to entertain petitioner's "vague urgings" that the studies were unreliable, id. at 46-47 n.14, or petitioner's "highly general criticism" of methodology, id. at 51. Petitioner, the court explained, had failed to identify specific flaws in the studies or introduce studies or evidence of its own in district court, despite an opportunity to do so. Ibid. In sum, the court concluded, the evidence "demonstrates both that the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises * * * are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market." Id. at 52. "The Constitution does not obligate Congress to stand idly by and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of racial prejudice." Ibid.

c. The court of appeals also concluded that the DBE program is, as currently administered, "narrowly tailored." The court first found that certain provisions of the prior DBE certification process failed the narrow-tailoring test. Pet. App. 72-74. Specifically, it held that the automatic use of financial incentives to encourage use of DBEs, as originally contemplated by the SCC, could not pass constitutional muster. Pet. App. 79-80.

But the court concluded that the new DOT regulations cured the constitutional deficiencies. Ibid. The court of appeals explained that petitioner had not challenged the district court's finding that Congress had unsuccessfully tried to cure the effects of discrimination through race-neutral means. Pet. App. 57-58. Moreover, the court pointed out, the DOT's regulations require recipients to exhaust race-neutral means before resorting to race-conscious methods, 49 C.F.R. 26.51(a), and specify available race-neutral measures, 49 C.F.R. 26.51(b). By permitting the use of race-conscious remedies only as a last resort, the Secretary's regulations help ensure narrow tailoring. Pet. App. 59-60.

The court of appeals also stressed the program's durational limits. The presumption of social and economic disadvantage for certain specified minority groups would cease to apply to any certified DBE three years after the initial certification, and the DOT DBE program itself expires at the end of three years, together with TEA-21. Pet. App. 62-63. And Congress's extensive debate regarding whether to renew the DBE program before passing TEA-21, the court held, underscored Congress's view that there was a continuing remedial need for the DBE program. Ibid.

The court of appeals held that the DBE program complied with the four narrow tailoring considerations discussed in United States v. Paradise, 480 U.S. 149, 171 (1987). First, the court found that 49 C.F.R. 26.15's express waiver provision, which allow recipients to seek exemption from DBE requirements "despite the already non-mandatory nature of DBE programs," afforded appropriate flexibility. Pet. App. 63-64. Second, each state and local

recipient of federal funds is required, under the Secretary's regulations, to establish its own goals based on local circumstances. Id. at 66. Third, the court of appeals concluded that the DBE program does not impose an undue burden on third parties. Id. at 69-71. For example, the new regulations "require recipients to ensure that DBEs are not 'so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate.'" Id. at 70 (citing 49 C.F.R. 26.33(a)). Finally, the court of appeals rejected petitioner's argument that Congress must inquire into discrimination against each particular minority group in each State's construction industry, so as to ensure that the DBE program is not over- or under-inclusive. Id. at 71-79.

SUMMARY OF ARGUMENT

[To Follow]

ARGUMENT

TEA-21 AND THE SECRETARY'S DBE REGULATIONS ARE NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENT INTEREST

Eliminating racial discrimination ~~and its effects~~ remains one of the Nation's great challenges. "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 Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995) (plurality opinion of O'Connor, J.) (Adarand I). Where the government responds using race-based criteria of its own, those criteria are subject to strict scrutiny. Consequently, racial classifications -- even if employed to combat discrimination and its effects -- are constitutional only if they serve a compelling

government purpose and are narrowly tailored to achieve that end. Adarand I, 515 U.S. at 227; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 483 (1989). Although that standard is demanding, this Court has gone out of its way "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" Adarand I, 515 U.S. at 237. "When race-based action is necessary to further a compelling interest," the Court has stated, "such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out" in its cases. Ibid.[3]

I. Because Petitioner Mounts A Facial Challenge To The DBE Program And Therefore Bears The Burden Of Showing That The Program Is Incapable Of Constitutional Application

In this case, petitioner seeks a declaration that the DBE program under TEA-21 is unconstitutional "on its face," Pet. 9, to the extent it borrows a racial presumption from Section 8(d)(3) of the Small Business Act to identify socially and economically disadvantaged individuals. Because petitioner challenges the statute and regulations on their face, petitioner cannot prevail merely by asserting that they might be applied in an unconstitutional manner. Instead, petitioner may prevail only if

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[3] Petitioner's argument that racial classifications are per se unconstitutional, Pet. Br. 18-23, is thus at war with this Court's precedents.

it "[i]s apparent that" the statute and regulations "could never be applied in a valid manner." Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 797-98 (1984) (emphasis added). A facial challenge thus is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid. The fact that [the law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." United States v. Salerno, 481 U.S. 739, 745 (1987).

Petitioner has not met that burden. In the context of national appropriations legislation, there can be few more compelling interests than those Congress pursued in TEA-21: Ensuring that public monies and the opportunities they create are not allocated based on, and do not reinforce, patterns of racial discrimination. "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." Croson, 488 U.S. at 492 (plurality opinion) (O'Connor, J.). Congress thus may take affirmative steps to avoid "becom[ing] a 'passive participant in a system of racial exclusion practiced by elements of the local construction industry." Ibid. (plurality opinion). And Congress may legitimately invoke its constitutional powers to ensure that "past discrimination" and present prejudice do not "cause federal funds to be distributed in a manner" which reflects and "reinforce[s] prior patterns of discrimination." Croson, 488 U.S.

at 504. Even petitioner concedes that the use of racial preferences as "a last resort to 'remedy private discrimination'" is a "possible justification" for race-conscious government policies. Pet. Br. 22 (quoting Croson, 488 U.S. at 509). Congress, after investigating discrimination and its relationship to federal expenditures for 30 years, had an ample basis for invoking those powers here.

Petitioner also has failed to show that the DBE program is incapable of being administered in a way that is narrowly tailored to promote the government's compelling interest. The DOT's regulations proscribe any sort of preference for DBEs unless race-neutral means of combating discrimination and its effects are insufficient; the program thus authorizes the use of race-conscious means only as a last resort. 49 C.F.R. 26.51(a). The regulations further tailor the program by attempting to reserve remedies to those individuals who in fact have suffered social and economic disadvantage; by limiting the geographic scope of remedies to those circumstances where there is evidence of their necessity; and by limiting duration. The program thus limits the use of race-based preferences based on DBE status to cases of stubborn and persistent discrimination incapable of eradication through race-neutral measures.

Not only does petitioner face the difficult burden of mounting a facial challenge to the DOT's DBE program, but petitioner also lacks standing to challenge the provisions of the SBA and federal acquisition regulations it now purports to challenge. As petitioner concedes (Br. 15), this case has been plagued by

confusion regarding the precise statutory and regulatory provisions petitioner is challenging. Petitioner has always sought to challenge the constitutionality of the statutory definitions of "socially and economically disadvantaged," which are incorporated into TEA-21 from Sections 8(d)(3) of the Small Business Act, as well as the certification standards and procedures employed to identify DBEs. Those standards and procedures apply both to DOT's aid program, which provides federal funds to state and local governments, and to the DOT's direct spending of federal money for highway construction on federal land. See pp. __-__, supra; Pet. Br. 7, 9, 16.

Purporting to clarify the scope of its challenge, petitioner now declares that it is not challenging any aspect of the DOT's state and local aid program. "[T]his case," petitioner declares, "involves only" the DOT's direct federal contracts. Pet. Br. 15-16, 27. Petitioner thus does not ask this Court to review or invalidate the DOT DBE program reviewed by the court of appeals; rather, it focuses on the government-wide "goal setting" and "goal achievement mechanisms" implemented under Subsections 8(d)(4) through 8(d)(6) of SBA, 15 U.S.C. 637(d)(4)-(6), and the Federal Acquisition Regulations (FAR), 48 C.F.R. Pt. 19. See Pet. Br. 13-14; see also pp. __-__, supra. Indeed, petitioner now claims that it is injured, not by anything TEA-21 requires, but by the subcontracting plan requirement found in Section 8(d)(4)(B), 15 U.S.C. 637(d)(4), under which prime contractors must submit plans setting goals for DBE participation. Pet. 13.

Petitioner, however, did not challenge Sections 8(d)(4)

through 8(d)(6) of the SBA in the courts below, and those courts did not address them. Indeed, the court of appeals found "no indication from any of the parties in their briefs or elsewhere that the particular requirements of paragraphs (4)-(6) of § 8(d) are at issue in the instant lawsuit." Pet. App. 86 n.35. Nor were those provisions ever part of this case. The "scope of this case," petitioner admits, "includes all of the statutory definitional underpinnings, goal setting, and goal achievement mechanisms that gave rise to the terms of the * * * contract" petitioner was denied in 1989. Pet. Br. 15 (emphasis added). But Subections 8(d)(4) through (6) of the SBA did not "g[i]ve rise to" any part of that contract. Instead, the now-discontinued Subcontractor Compensation Clause (SCC) that allegedly harmed petitioner was established by the Secretary directly under the STAA; it was not a product of the SBA. See Pet. App. 63 n.24 ("None of the parties in this case contend that SBA § 8(d)(4), 15 U.S.C. 637(d)(4), pertains to the SCC."). Nor did any other provision of the SBA petitioner now purports to challenge appear in that 1989 contract.[4]

Petitioner's failure to challenge the validity of Subsections 8(b)(4) through (6) below by itself bars their consideration in this Court. E.g., National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 470 (1999); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). The court of appeals, moreover, specifically held

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[4] In fact, petitioner's contract specifically stated that it did not include the subcontractor plan requirement under Section 8(b)(4). See App., infra, __a (stating that subcontractor plan requirement does not apply). Petitioner's extensive discussion of subcontractor plans, Pet. Br. 13, and its claim that they are "coercive," Pet. Br. 14, are thus beyond the scope of this case.

that petitioner lacks "standing to challenge paragraphs (4)-(6) of 15 U.S.C. 637(d)," Pet. App. 14; id. at 86 n.35. See also Pet. Br. 6 n.2 ("The panel denied Adarand standing to challenge 15 U.S.C. §§ 637(a), 644(g), and 637(d)(4-6)"). Given petitioner's failure to challenge that holding at any point before this Court, its attempt to raise Sections 8(d)(4)-(6) of the SBA for the first time in its brief on the merits is unavailing. See Hagen v. Utah, 510 U.S. 399, 409 (1994).

Petitioner's belated attempt to "smuggl[e] additional questions" into this lawsuit, Kaisha v. U.S. Philips Corp., 510 U.S. 27, 32 n.6 (1993), is particularly problematic in view of the lack of any realistic possibility of continuing injury from paragraphs 8(d)(4) through (6). Those paragraphs are implicated only by the DOT's direct contracting, not the DOT's state and local aid program. But the Department of Commerce, based on its benchmark studies, has precluded the use of racial criteria (and therefore the application of paragraphs 8(d)(4)-(6)) in direct contracting in every area in which petitioner does business, as petitioner concedes. Pet. Br. 14; pp. __-__, supra. Petitioner thus cannot show any threatened injury from those provisions, much less one that might excuse its dual failures to raise those provisions below and to challenge the court of appeals' unequivocal holding that petitioner lacks standing to raise them.[5]

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[5] Petitioner's submission also casts serious doubt on the extent to which there remains a real and substantial controversy of any sort. With respect to petitioner's past injury in direct federal procurement, the court of appeals held that the SCC was unconstitutional as applied; the government did not seek review of that decision; the DOT has discontinued use of the SCC nationwide; and the issue thus is not before this Court. See pp. __-__, supra.

II. CONGRESS HAS A COMPELLING INTEREST IN ELIMINATING DISCRIMINATION AND ITS EFFECTS ON GOVERNMENT SPENDING AND PROCUREMENT

Petitioner does not dispute that Congress has a compelling interest in controlling the distribution of public funds and the

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With respect to petitioner's claim for forward-looking relief, any continuing injury in direct federal procurement is foreclosed by the DOT's termination of the SCC program and the Department of Commerce's benchmark study, which precludes the DOT from using race-conscious remedies in any area in which petitioner does business. See pp. __-__, supra; Pet. Br. 14. Yet petitioner now asserts that this "case deals exclusively with direct federal procurement," and "has nothing to do with financial assistance." Pet. Br. 27. Accordingly, there is no basis for prospective relief with respect to the aspects of the program petitioner purports to challenge.

opportunities they create to ensure that they are not distributed based on, and do not reinforce patterns created by, past and present discrimination. See Pet. Br. 22 ("The only possible justification for deliberate governmental" use of racial criteria is "to 'remedy private discrimination'"); id. at 26 ("compelling interest is always 'remedying past or present discrimination'"). Instead, petitioner primarily argues that Congress did not have a "strong basis in evidence" for finding a national problem of discrimination in highway and transit construction. That argument was properly rejected by both the district court and the court of appeals.

A. Congress Had Ample Evidence Of Discrimination When It Enacted TEA-21

Treating the compelling interest inquiry as a question of fact, petitioner argues (Pet. 23-28) that the court of appeals erred in relying on legislative and administrative materials that identify the effects of discrimination in highway and transit construction. Such sources, petitioner asserts, are neither "sworn testimony from personal knowledge" nor otherwise admissible. Pet. Br. 23-26. That argument -- which was not properly raised below -- betrays a misunderstanding of the compelling interest inquiry, which is, after all, a legal inquiry. Federal courts do not measure the substantiality of Congress's interests by requiring Congress to prove its interest in a de novo trial. Instead, federal courts properly "examine first the evidence before Congress," and then review any "further evidence" necessary to resolve the matter. Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 196 (1997). Cf. Board of Trustees of the University of

Alabama v. Garrett, 531 U.S. 356 (2001) (examining whether "Congress identified a history and a pattern"). The court of appeals and district court followed that methodology and correctly concluded, as a matter of law, that Congress had a compelling interest in enacting TEA-21's contracting provisions and their predecessors. Moreover, even if one were to accept petitioner's effort to recharacterize that legal conclusion into a factual finding, petitioner's request that this Court reconsider the findings of the district court and court of appeals would run afoul of the two court rule. See United States v. Doe, 465 U.S. 605, 614

(1984).[6]

The enormous body of evidence before Congress, accumulated over 30 years, establishes the compelling nature of Congress's

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[6] Petitioner's contention (Pet. Br. 27) that the court of appeals did not review the legislative record and instead "rel[ied] exclusively on the content of Appendix A," -- Proposed Reforms to Affirmative Action In Federal Procurement: A Preliminary Survey, 61 Fed. Reg. 26,041, 26,050 (May 23, 1996) -- is flatly incorrect. The court of appeals, after conducting its own searching review of the legislative record, concluded "that there is an even more substantial body of legislative history supporting the compelling interest in the present case than that cited by" the government's submission. Pet. App. __a. For example, the court cited materials not mentioned in Appendix A. E.g., Pet. App. 36-37 (citing statements of Toni Hawkins, M. Harrison Boyd, and Anthony Robinson.

20-30 years ago

interest. Throughout the 1970s, the permanent select committee of the House of Representatives conducted extensive hearings on the effects of past and present discrimination on the distribution of contracting opportunities. See App. __a-__a, infra (listing relevant select committee hearings). Based on its investigation, the Committee concluded that past discrimination disproportionately hindered the participation of minority-owned businesses in federal procurement projects. See Summary of Activities, A Report of the House Committee on Small Business, 94th Cong., 2d Sess. 182 (1977). Congress responded by enacting the Public Works Employment Act of 1977, 42 U.S.C. 6705(f)(2), which this Court upheld in Fullilove v. Klutznick, 448 U.S. 448 (1980). "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." Id. at 477-478 (plurality); accord id. at 458-467, 473; id. at 503, 505-506 (Powell, J., concurring); id. at 520 (Marshall, J., concurring in judgment). See also H.R. Rep. No. 468, 94th Cong., 1st Sess. 1-2, 11-12, 28-30, 32 (1975); U.S. Comm'n on Civil Rights, Minorities and Women as Government Contractors 20-22, 112, 126-127 (May 1975).

Congress's investigations throughout the 1980s and 1990s, see App., infra, __a-__a, documented that minority-owned firms continue to suffer discrimination and its effects -- in obtaining bonding, in securing adequate financing, and in receiving prompt payment by prime contractors for completed work. See, e.g., Small and Minority Business in the Decade of the 80's (Part 1): Hearings

Before the House Comm. on Small Business, 97th Cong., 1st Sess. 106, 241 (1981) (1980s Hearings); Hearings on Minority Business and its Contributions to the U.S. Economy of the Senate Comm. on Small Business, 97th Cong., 2d Sess. 44-45, 50, 88, 95 (1982). The hearings showed that public and private contracting officers alike retained a negative perception of the skills and competence of minorities. See 1980s Hearings, supra, at 106, 114, 118, 241. They provided statistical analyses demonstrating gross disparities in contracting. For example, in 1986, minority-owned businesses accounted for only 2.7% of the total prime contract revenue, receiving $5 billion out of almost $185 billion. H.R. Rep. No. 460, 100th Cong., 1st Sess. 18 (1987). The House Report observed that such a disparity could "not [be] the result of random chance," and concluded that "past discrimination has hurt the socially and economically disadvantaged individuals in their entrepreneurial endeavors." H.R. Rep. No. 460, 100th Cong., 1st Sess. 18 (1987).

The Small Business Administration's annual reports to Congress, throughout the 1990s, showed gross disparities between the numbers of available minority businesses and their participation in federal procurement. See, e.g., The State of Small Business: A Report of the President to Congress 362 (1994) (minority owned businesses represent 9 percent of total business community but receive 4.1 percent of federal procurement dollars); The State of Small Business: A Report of the President to Congress 323 (1995) (4.7 percent of procurement dollars). See also Minority Construction Contracting: Hearing Before the Subcomm. on SBA, the General Economy, and Minority Enterprise Development of the Comm. on Small

Business, 101 Cong., 1st Sess. (1989).

After having collected evidence for a decade, Congress in 1982 amended the Surface Transportation Assistance Act of 1982 (STAA), Pub. L. No. 97-424, § 105(f), 96 Stat. 2100, to add a 10% national aspirational goal for DBE participation on federally funded mass transit and highway construction projects. For two years, through at least eight hearings, Congress then investigated and evaluated the effect of those provisions before renewing them for four years in the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, § 106(c)(2)(B), 101 Stat. 146. See App., infra, at __-__ (listing hearings). The Senate Report accompanying STURAA explained Congress's decision:

> The Committee has considered extensive testimony and evidence on the bill's DBE (disadvantaged business enterprise) provision, and has concluded that this provision is necessary to remedy the discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway and mass transit construction industry.

S. Rep. No. 4, 100th Cong., 1st Sess. 11 (1987). Following that renewal, Congress continued reviewing the program, holding hearings and gathering evidence. See App., infra, __a-__a (listing hearings). Each time, the evidence showed that discrimination, past and present, continued to prevent socially and economically disadvantaged business owners from participating in and competing for work on federal and federally aided highway construction contracts on a level playing field. Pp. __-__, infra. As a result, Congress reauthorized the DBE program in 1991 when it enacted the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919-1921,

and again in 1998, when it enacted the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, Tit. I, §§ 1101(b), 112 Stat. 113.

Congress heard specific evidence of the problems confronted by DBEs. With respect to access to necessary capital, minority applicants generally -- and minority applicants in the construction industry in particular -- were denied bank loans at a higher rate than non-minorities with identical collateral and credentials. Pet. App. 35-39. A study supported by the U.S. Bureau of the Census and National Science Foundation analyzed 286 owners entering the construction industry and found that "blacks, controlling for borrower risk, are less likely to have their business loan applications, approved than other business borrowers," and generally receive smaller loans when approved. Caren Grown & Timothy Bates, Commercial Bank Lending Practices and the Development of Black Owned Construction Companies, 14 J. Urban Affairs 25, 26, 39 (1992) (Grown & Bates) (discussed by Rep. Norton, 144 Cong. Rec. H3958 (1998)) (Gov't Lodging __-__).[7] An Urban Institute study of 58 state and local disparity studies in government contracting found that "African Americans with the same level of financial capital as whites receive about a third of the loan dollars when seeking business loans." Maria E. Enchautegui et al., Urban Institute, Do Minority-Owned Businesses Get a Fair Share of Government Contracts? 36 (Dec. 1997) (citations omitted) (discussed by Rep. Norton, 144 Cong. Rec. H3959 (1998)) (Urban

[7] For the convenience of the Court, we have lodged copies of the studies upon which Congress and the court of appeals relied.

Institute Report) (Gov't Lodging __). Congress, moreover, heard first-hand accounts of subtle and not-so-subtle discrimination in the provision of needed capital.[8]

go after the bank

[8] For example, one bank denied a minority-owned business a loan to purchase new vans to bid on a public contract worth $3 million, but offered a loan for the same purpose to a non-minority-owned firm, even though that firm had an affiliate that was in bankruptcy. See Availability of Credit to Minority-Owned Small Businesses: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking, Finance, and Urban Affairs, 103d Cong., 2d Sess. 20 (1994) (Toni Hawkins).

Discrimination and entrenched patterns resulting from years of exclusion also prevent minority business owners from obtaining surety bonds, which generally are required by state and federal procurement rules. The "inability to obtain bonding is one of the top three reasons that new minority small businesses have difficulty procuring U.S. Government contracts." Problems Facing Minority and Women-Owned Small Businesses, Including SBA Section 8(a) Firms, in Procuring U.S. Government Contracts: An Interim Report, H.R. Rep. No. 103-870, 103d Cong., 2d Sess. 15 (1994) (cited by Rep. Norton, 144 Cong. Rec. H3958); see also Surety Bonds and Minority Contractors: Hearing Before the House Subcomm. on Commerce, Consumer Protection and Competitiveness of the Comm. on Energy and Commerce, 100th Cong., 2d Sess. 8-9 (1988). A survey by the National Association of Minority Contractors indicated that, as DBEs and their needs grow, surety companies "put caps and growth limitations on the larger DBEs which were not placed on white contractors." Id. at 9. Again, Congress heard from individuals who had encountered difficulties created by discrimination and its lasting effects on the availability of bonding. The president of the National Black League, for example, testified that a "negative perception of black business is at the very core of * * * areas where" his "constituents have witnessed problems." H.R. Rep. No.

103-870, supra, at 9.[9]

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[9] See H.R. Rep. No. 103-870, supra, at 16-17 (1994) (black contractor forced to seek bonding from out of state after local non-minority competitors told local sureties not to underwrite him). See also State of Louisiana Disparity Study, Vol. II 91 (June 1991) (Gov't Lodging __) (cited by Sen. Kennedy, 144 Cong. Rec. S1482) (significant number of minority-owned businesses interviewed for the disparity study stated that they had difficulty obtaining bonding, including bid performance and payment bonds).

penalties

The evidence showed that some prime contractors engaged in discriminatory bid-shopping, allowing a preferred subcontractor to match any low bid submitted by a minority-owned contractor. See, e.g., How State and Local Governments Will Meet the Croson Standard: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 54 (1989); see also State of Colorado and the Colorado Department of Transportation Disparity Study, Final Report, 5-56, 5-59 (Jan. 1, 1998) (Gov't Lodging __) (Colorado Study) (cited by Sen. Chafee, 144 Cong. Rec. S1493, S5413); State of Louisiana Disparity Study, Vol. II, 69, 73 (June 1991) (Gov't Lodging __) (Louisiana Study) (cited by Sen. Kennedy, 144 Cong. Rec. S1482). Some contractors resist contracting with minority businesses altogether.[10] And some suppliers charge higher prices to minority customers, raising their costs and rendering them less competitive. See, e.g., Colorado Study at 5-78 (Gov't Lodging __-__); Louisiana Study 89 (Gov't

[10] See, e.g., Associated General Contractors v. Coalition for Economic Equity, 950 F.2d 1401,1416 (9th Cir. 1991) (citing reports that minority firms were "denied contracts despite being the low bidder," and "refused work even after they were awarded the contracts as low bidder"); Cone Corp. v. Hillsborough County, 908 F.2d 908, 916 (11th Cir. 1990). See also The Meaning and Significance for Minority Business of the Supreme Court Decision in the City of Richmond v. J.A. Croson: Hearing Before the Legislation and National Security Subcomm. of the House Comm. on Government Operations, 101st Cong. 193-194 (1990) (citing a Department of Commerce study, Ray Marshall & Andrew Brimmer, Public Policy & Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia, Part II, 138-139 (June 29, 1990) (Brimmer-Marshall Report) (Gov't Lodging __-__), which showed that 40% of black-owned construction businesses work primarily for minority customers, the highest rate for any minority group).

Lodging __); Brimmer-Marshall Report 72 (Gov't Lodging __) (minority firm in Georgia found problem so pronounced that it sent white employees to purchase supplies).

Congress also heard evidence that black, Hispanic, Asian, and Native-American-owned businesses were underused compared to their availability. E.g., Urban Institute Report, supra, at 11, 13, 19-20, 63 (Gov't Lodging __, __, __-__, __). For example, the Urban Institute Report found that minority-owned businesses received an average of only 57 percent of the state and local contracting expenditures that they would have been expected to obtain based on the proportion of "ready, willing, and able" firms that were minority-owned." Id. at v-vi, 1, 19-22, 61 (Gov't Lodging __-__, __, __-__, __). Throughout the debates on TEA-21, members of Congress noted study after study, incident after incident, showing gross disparities in utilization.[11]

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[11] Hispanic firms received .26% and women-owned firms received .18% of the state-funded highway construction contracts in Colorado, while over 99% of the state contracts went to white-owned firms, 144 Cong. Rec. S5414; in the United States as a whole, minorities own 9% of construction companies but receive only 4% of construction receipts, id. at S1403; women-owned construction companies earn only half of what is earned by male-owned firms, according to the Urban Institute Report, id. at S1409; white-owned construction firms receive 50 times as many loan dollars as African-American-owned firms that have identical equity, id. at S1422; African-Americans were three times more likely and Hispanics 1.5 times more likely to be rejected for business loans than whites, according to a Denver study, id. at S1493; minority-owned firms get only 61 cents and women-owned firms get 58 cents for every dollar of work compared to the amounts paid to white male-owned businesses on transportation-related contracts, id. at S1490. Finally, Senator Lautenberg also spoke of the continuing effects of past discrimination:

> Transportation construction has historically relied on the old boy network which, until the last decade, was

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> almost exclusively a white, old boy network * * * * This is an industry that relies heavily on business friendships and relationships established decades, sometimes generations, ago -- years before minority-owned firms were even allowed to compete.

Id. at S1490.

Finally, the evidence showed that, although programs like the DOT DBE program were often effective, premature termination of similar programs in the states had almost always caused inordinate disparities to return. DBE participation in the state-funded portion of a Michigan highway program fell to zero nine months after that State's DBE program ended, while the federally funded portion (which continued to operate under the federal DBE program) had a 12.7% participation rate. 144 Cong. Rec. S1404. In Tampa, after the city discontinued its DBE plan in 1989, the number of contracts awarded to Latinos was suddenly cut in half, while the number of contracts awarded to blacks fell by 99%; similarly dramatic drops in DBE participation resulted in Richmond Virginia, Hillsborough County, Florida, and Philadelphia when their DBE programs ended. See U.S. Comm'n on Minority Business Development, Final Report 99 (discussed by Rep. Norton, 144 Cong. Rec. H3858). See also 144 Cong. Rec. S1409-1410, S1420-1421, S1429-1430.

Indeed, the recent GAO Report upon which petitioner places great reliance, Disadvantaged Business Enterprises (June 2001) (GAO Report), collected data for two States that had discontinued their DBE programs and found, in each case, that DBE contracting "dramatically declined" once the program ended. See GAO Report 40-41 (Gov't Lodging __).[12] As TEA-21's floor manager (Sen. Baucus) explained to his colleagues, such "dramatic decreases in DBE participation in those areas in which DBE programs have been

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[12] Because petitioner reproduces only part of the GAO Report in its appendix and omits charts and methodology, we have included a complete copy in the lodging (at __-__).

curtailed or suspended" show not merely "underutilization of women- and minority-owned business in the industry," 144 Cong. Rec. S5414 (1998) (Sen. Baucus), but that race-neutral alternatives sometimes cannot level the playing field.[13]

In view of that record, both houses of Congress in 1998 soundly rejected two amendments to TEA-21 that would have eliminated the DBE program. See 144 Cong. Rec. S1496 (1998), H2011 (1998). Even opponents to the DBE program agreed that there was sufficient evidence that discrimination impaired the ability of DBEs to compete for government contracts. As Representative Roukema, the sponsor of an unsuccessful amendment to repeal the DBE program, explained, the program's opponents "were not suggesting that there is no discrimination." 144 Cong. Rec. H2001.

B. Petitioner's Objections To The Evidence Before Congress Are Unsubstantiated and Insubstantial

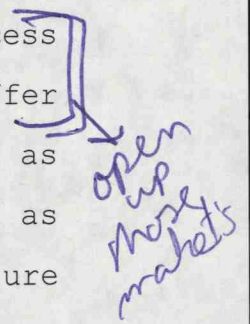
[13] The views of a bill's floor managers are accorded particular weight in determining legislative intent. See generally United States v. Emmons, 410 U.S. 396, 405 n.14 (1973); United Steelworkers of America v. Weber, 443 U.S. 193, 233-255 (1979) (Rehnquist, J. dissenting); Monell v. Dep't of Social Servs., 436 U.S. 658, 686-87 (1978).

Responding to the vast body of evidence before Congress, petitioner principally argues that the court of appeals did not review the evidence under the proper standard. The court of appeals, petitioner argues, failed to ensure that the statistical evidence before Congress "was drawn from the proper sample pool," Pet. Br. 29-30; did not examine methodologies, id. at 30; and did not ensure that the studies conclusively eliminated all nondiscriminatory explanations for disparities, id. at 30-31.

Petitioner misunderstands the judicial role in evaluating the existence of a compelling interest. Courts of appeals do not sit as peer review boards to conduct sua sponte review of congressional findings and methodologies for scientific accuracy, unaided by the parties before them. In this case, petitioner failed to identify the specific evidence it believes unreliable, explain the reasons for that concern, or explain how the voluminous evidence remaining could conceivably be insufficient. Cf. Katzenbach v. Morgan, 384 U.S. 641, 653 (1966) (court does not revisit "the congressional resolution," but determines whether it can "perceive a basis upon which the Congress might resolve the conflict as it did"). Nor did petitioner, despite the opportunity to do so, introduce its own evidence to show that racial discrimination in the highway construction industry has ceased to exist. Pet. App. 47 n.14. Instead, petitioner offered only "decidedly vague urgings" of bias, id. at 46 n.14, an "unfocused attack" on disparity studies generally, id., at 47 n.14, and an assertion that the "various congressional reports and findings" were "conclusory," id. at 51. Such contentions are an insufficient basis on which to strike down

an Act of Congress, much less one founded on 30 years of hearings, investigations, conclusions, and findings. "Given the deference due the duly enacted and carefully considered decision of a co-equal and representative branch of our government," this Court does "not lightly second guess such legislative judgments, particularly where the judgments are based in part on empirical observations." Westside Community Bd. v. Mergens, 496 U.S. 226, 251 (1990) (plurality opinion of O'Connor, J.).

In any event, petitioner's methodological objections are without merit. For example, petitioner asserts (Br. 29) that Congress was required to compare the availability of contractors who "not only have the necessary expertise" but "who also have met * * * bonding requirements and capitalization." Bonding and access to capital, however, are two areas where minority businesses suffer discrimination, see pp. __-__, supra; adjusting the data as petitioner suggests would thus treat minority businesses as unqualified precisely because they suffer discrimination. Failure to adjust data for a particular variable is not grounds for exclusion where there is evidence that the variable itself is tainted by discrimination. See Coates v. Johnson & Johnson, 756 F.2d 524, 544 (7th Cir. 1985); Valentino v. United States Postal Serv., 674 F.2d 56, 71, n.26 & 73 n.30 (D.C. Cir. 1982).



Petitioner's contention (Br. 29) that the disparity studies before Congress may not have compared the appropriate pools of "ready, willing and able" minority and non-minority contractors in the relevant markets fares no better. Study after study made the proper comparisons. See, e.g., Urban Institute Report, supra, at

__ (Gov't Lodging __); Louisiana Study __ (Gov't Lodging ___). Petitioner is also incorrect to assert (Br. 30-31) that the studies did not use regression analysis sufficient to eliminate other causes of disparities. E.g., Grown & Bates, supra, at __ (Gov't Lodging __); Louisiana Study __ (Gov't Lodging).

This Court has in any event rejected the view that discrimination must be "prove[d] * * * with scientific certainty," or that "appropriate regression analysis" must "include all measurable variables thought to have an effect[.]" 478 U.S. 385, 399-400 (1986). See also Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981) (prima facie case "eliminates the most common nondiscriminatory reasons"). Consequently, a party impeaching a study's validity must do more than hypothesize about factors the study did not consider; instead, the party must introduce "evidence to support the contention that the missing factor can explain the disparities." EEOC v. General Tel. Co., 885 F.2d 575, 581 (9th Cir.), cert. denied, 498 U.S. 950 (1989) (quoting Palmer, 815 F.2d at 101); Concrete Works, 36 F.3d at 1524-1525. See also Dothard, 433 U.S. 321, 331 (1977) (party "not required to exhaust every possible source of evidence" because opposing party "is free to adduce countervailing evidence of [its] own."); Contractors Ass'n v. Philadelphia, 6 F.3d 990, 1007 (3d Cir. 1993); Sobel v. Yeshiva Univ., 839 F.2d 18, 34 (2d Cir. 1988), cert. denied, 490 U.S. 1105 (1989); Catlett v. Missouri Highway & Transp. Comm'n, 828 F.2d 1260 (8th Cir. 1987), cert. denied, 485 U.S. 1021 (1988). Petitioner failed to do that here.[14]

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[14] Further, while petitioner and its amici attempt to nitpick

the methodology of the Urban Institute Report, that does not rebut the inference of discrimination. To the extent that report fails to account for certain variables, petitioner and its amici must provide evidence that the missing factor -- not discrimination -- accounts for the observed disparities. See General Tel. Co., 885 F.2d at 581 (plaintiff must provide evidence that the missing factor can explain the disparity to rebut inference of discrimination).

More broadly, it is unclear what all of petitioner's statistical criticism really proves. Strict scrutiny requires the government to point to a compelling interest with "a strong basis in evidence" and observable roots in the actual marketplace. It does not requires statistical perfection, a standard that social science itself is incapable of achieving. None of petitioner's statistical objections casts genuine doubt about Congress's overall finding of continuing discrimination and its effects in the construction industry. Nor do they prove that the disparities between actual DBE utilization and the "level of DBE participation [that would be] expect[ed] absent the effects of discrimination" that are a pre-requisite to the use of any race-conscious relief under the Secretary's DBE program, 49 C.F.R. 26.45(b); pp. __-__, supra & pp. __-__, infra, or in direct federal procurement, 61 Fed Reg. 26,045; 28 C.F.R. 19.201(b); pp. __-__, supra,[15] can never provide the statistical proof that, according to petitioner, is constitutionally required. For that reason alone, petitioner's facial challenge to the adequacy of proof must fail. Salerno, 481 U.S. at 745 (law not invalid on its face unless "no set of

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[15] Petitioner's assertion (Br. 34) that the Department of Commerce's benchmark study "disclaims any attempt to find the requisite discrimination" is incorrect; the entire purpose of the study is to find disparities in utilization that are not explained by factors other than race. The footnote petitioner cites (63 Fed. Reg. 35,718 n.10) merely notes that the study does not adjust its estimate of the number, size and age of ready, willing and able DBEs to determine how many, how large, and how old the DBE pool would be absent discrimination. See Croson, 488 U.S. at 499 ("It is sheer speculation how many minority firms there would" be absent "societal discrimination."). By declining to make such an adjustment, the study necessarily underestimates the level of DBE participation that would be expected absent discrimination.

circumstances exists" under which law might operate constitutionally).

This Court has stated that gross disparities standing "alone * * * may constitute prima facie proof of a pattern or practice of discrimination." Adarand, 515 U.S. at 537; Croson, 488 U.S. at 533. Here, Congress did not merely rely on proof of disparities. Instead, it investigated the matter year after year. It adduced evidence of discrimination in highway subcontracting and in access to critical inputs -- capital, bonding, supplies -- needed to compete. It heard the first-hand testimony of individual victims. In response, Congress authorized a remedial program, and the DOT promulgated regulations that make race-conscious remedies possible only upon additional findings suggesting discrimination. Congress clearly identified a compelling interest with a "strong basis in the evidence."

C. Congress May Condition Its Spending To Address A Nationwide Problem Affecting Nationwide Appropriations

1. Finally, petitioner claims that Congress lacks constitutional authority to enact legislation like TEA-21 unless it finds discrimination in a majority of States. To the extent petitioner asserts that Congress cannot enact even narrowly-tailored legislation -- legislation that imposes a remedy only in those markets where there is discrimination to remedy -- unless it finds discrimination in more than 25 States, the contention is without merit. "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not

serve to finance the evil of private prejudice." Croson Co., 488 U.S. at 492 (plurality opinion). Because Congress is a national sovereign that spends federal funds on a nationwide basis, Congress's compelling interest in avoiding improper (discrimination-based and discrimination-reinforcing) distribution of federal funds extends nationwide as well. Thus, while a state or local government has only "the authority to eradicate the effects of private discrimination within its own legislative jurisdiction," Congress has the power to "identify and redress the effects of society-wide discrimination," particularly where it affects federal spending. Croson, 488 U.S. at 490-492 (plurality); Oregon v. Mitchell, 400 U.S. 112, 284 (1970) (Stewart, J., concurring).

Petitioner's reliance on United States v. Morrison, 529 U.S. 598 (2001), is misplaced. Morrison concerned whether Congress's creation of a federal remedy for gender-based violence under the Violence Against Women's Act was within Congress's power under the Commerce Clause and Section 5 of the Fourteenth Amendment. This Court concluded that Congress could not create such a remedy under the Commerce Clause, because the remedy was for "noneconomic" violent crimes that have "always been the province of the States." Id. at 618-619. And the Court concluded that Congress could not rest the legislation on Section 5 of the Fourteenth Amendment because the Act was not directed at State actors, and because "Congress's findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States." Id. at 626.

Unlike the legislation at issue in Morrison, TEA-21 falls squarely within the national government's specifically enumerated powers, regardless of geographic scope. TEA-21 is appropriations legislation, U.S. Const. Art. I, § 9, Cl. 7, that both authorizes the spending of federal moneys for mass transit and highway construction projects, and attaches conditions to that spending to achieve national goals. Congress has unquestioned authority under the Spending Clause, U.S. Const., Art. I, § 8, to "further broad policy objects by conditioning the receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." South Dakota v. Dole, 483 U.S. 203, 206 (1987). Petitioner cites no authority for the proposition that Congress cannot further its interest in remedying discrimination by imposing conditions on its spending unless it finds that the evil of discrimination exists in a majority of States.

2. Petitioner may be correct that legislation mandating the use of race-conscious remedies nationwide, even in regions where discrimination and its effects do not persist, would raise constitutional concerns. But such concerns are best addressed through a narrow-tailoring analysis, not the compelling interest inquiry. See Pet. App. 27 n.10. In any event, such complaints have no place in the context of TEA-21 as implemented by the DOT. Together, the statutory and regulatory provisions guarantee that race-conscious remedies will be adopted only in jurisdictions where discrimination and its effects remain a problem. See pp. __-__, infra.

For related reasons, the Department of Commerce's benchmark

study (cited Pet. Br. 14, 18, 33-34) do not support petitioner's position. As an initial matter, that study looked only at direct federal procurement -- not procurement by states and localities using federal funds from the aid program -- and it looked only for disparities in the government's hiring of prime contractors. Thus, when it comes to the effects of discrimination on subcontractors for federally aided projects in localized markets, the individual state studies and the Urban Institute study are a better source. See pp. __-__, supra. In addition, the Department of Commerce's study found overwhelming evidence that the effects of discrimination persist: It concluded that greater use of small disadvantaged businesses would be expected absent the effects of discrimination in the majority of the approximately 70 industries and markets that compose all areas of federal procurement. Id. at 35,714-35,715.

More fundamentally, to the extent petitioner complains about a lack of "congruence" -- "a match between the geographic area in which * * * discrimination is found, and the area in which the race-based solution applies," Pet. Br. 33 -- the Department of Commerce's benchmark study (and the similar local studies required by DOT regulations) do not support that concern. The DOT's regulations prohibit the use of race-conscious remedies under its aid program unless localized studies find disparities suggesting discrimination. See 49 C.F.R. 26.45, 26.51; pp. __-__, supra. Similarly, in the context of direct federal procurement, the Federal Acquisition Regulations preclude the use of race-based criteria unless the Department of Commerce's benchmark study finds

disparities in the relevant product and geographic market. 61 Fed. Reg. 26,046-26,047; 28 C.F.R. 19.201(b). Thus, far from disproving "congruence" as petitioner contends, the Department of Commerce's benchmark study and the similar local studies required by DOT ensure it.

In any event, there is no requirement that Congress address only those problems that are not only national in scope but of uniform incidence throughout the fifty States. Congress clearly has the power to target national problems like discrimination -- particularly discrimination that implicates its own spending -- even if certain jurisdictions remain relatively free of such problems. When race-conscious remedies are employed, the requirement of narrow tailoring demands that congressional legislation not impose racial remedies where discrimination and its effects are not a problem. But nothing the DOT's DBE program mandates race-conscious remedies in any jurisdiction. Indeed, Congress and the DOT struck a balance that allows Congress to target the national problem of discrimination, while prohibiting the use of race-conscious remedies in jurisdictions where the problem is not manifest.

III. THE DOT'S DBE PROGRAM IS NARROWLY TAILORED

Even when the use of race-conscious measures serves a compelling interest, such measures must be narrowly tailored to that end. Here, the Secretary's regulations limit the use of race-conscious remedies to those situations race-neutral measures have proven inadequate. The regulations, moreover, ensure that such measures are carefully circumscribed in scope, extent, and

duration.

A. The DBE Program Permits Race-Conscious Measures Only Based On Evidence Of Discrimination And Its Effects Where Race-Neutral Corrections Are Insufficient

"In determining whether race-conscious remedies are appropriate," this Court begins with "the efficacy of alternative remedies." United States v. Paradise, 480 U.S. 149, 171 (1987). Because of the dangers inherent in race-conscious government action, the Court examines whether there has been "consideration of the use of race-neutral means," Croson, 488 U.S. at 507, and the extent to which opportunities can be made available "without classifying individuals on the basis of race," id. at 511 (plurality opinion). See Adarand, 515 U.S. at 237-238; Croson, 488 U.S. at 519 (Kennedy, J., concurring) (racial classifications permissible only "as a last resort"). Seizing on those requirements, petitioner declares that Congress failed to consider "even the obvious race neutral options" before enacting TEA-21. Pet. Br. 45. Not so: Congress repeatedly attempted to use race-neutral means to eliminate the effects of discrimination, but found such means inadequate. For example, although petitioner asserts that Congress should have attempted to overcome discrimination in the provision of bonding by offering bonding assistance, Pet. Br. 43, Congress did just that in 1970 by establishing the Surety Bond Guarantee program, 15 U.S.C. 694(a), 694(b). Nonetheless, five years later, the General Accounting Office reported that the effect of such programs in "helping disadvantaged firms to become self-sufficient and competitive has been minimal." Library of Congress, Congressional Research Service, Minority Enterprise and Public

Policy 53 (1977).[16]

Moreover, the Secretary's DBE program continues to require the exhaustion of race-neutral remedies, like assistance in meeting bonding requirements, before race-conscious remedies may be invoked as a last resort. Before any remedial measure, race-conscious or

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[16] Similarly, before reauthorizing the DBE program in STURAA, ISTEA, and TEA-21, Congress repeatedly examined whether the need for such a remedy remained, and was aware of the consequences when other jurisdictions eliminated similar programs. See pp. __-__, supra. Moreover, when Congress enacted TEA-21, it was aware of the Secretary's regulations, 144 Cong. Rec. S1409, 1412, 1423, 1433, and in any event was entitled to rely on the Secretary to use his discretion to ensure constitutional implementation. See H. Rep. No. 550, 105th Cong., 2d Sess. 409-410 (1998) (explaining that the DOT had "proposed new regulations to ensure that the program withstands constitutional muster").

neutral, may be employed, the Secretary's regulations require federal-aid recipients to determine whether discrimination persists in the relevant market by ascertaining "the level of DBE participation [the recipient] would expect absent the effects of discrimination." 49 C.F.R. 26.45(b). This process requires much more than a simple finding of racial under-representation. First, the aid recipient must look to the number of DBEs who are qualified in the relevant market, not the number of entities owned by members of particular races, and compare that to the total number of qualified businesses. Aid recipients thus must include, in their count of DBEs, businesses that are owned by non-minorities who have qualified for DBE status based on individual circumstances (i.e., proof that they have been victims of discrimination). And aid recipients must exclude minorities who are not certified as DBEs, whether the absence of certification is a consequence of a firm-specific challenge, a net-worth in excess of regulatory limits, or the owner's inability to represent in good faith that he or she has suffered from ethnic or racial discrimination. See pp. __-__, infra. Accordingly, the unadjusted levels of expected DBE participation themselves reflect efforts to identify victims of discrimination, rather than members of particular racial or ethnic groups. Second, recipients must adjust those figures to discount the effect of non-discriminatory factors that might limit DBE participation, so that their estimates reflect the level of DBE participation that would be expected in the absence of discrimination.

Only where the study shows a disparity suggesting the

persistence of discrimination or its effects are race-conscious corrections an option. 49 C.F.R. 26.45(b); pp. __-__, supra. See also 61 Fed. Reg. 26,049 (in direct federal procurement, race may "be relied upon only when annual analysis indicates that minority contracting falls below levels that would be anticipated absent discrimination"). Further, even if the study suggests that discrimination persists, race-conscious measures cannot be employed unless race-neutral means are inadequate. "You must meet the maximum feasible portion of your overall goal," the Secretary's regulations provide, "by using race-neutral means of facilitating DBE participation." 49 C.F.R. 26.51(a). See also 64 Fed. Reg. at 5112 ("recipients must give priority to race-neutral means"). The Justice Department guidelines, which provide the requirements for direct federal procurement, similarly declare that federal "agencies at all times" must "use race-neutral alternatives to the maximum extent possible." 61 Fed. Reg. at 26,049. Only "where those efforts are insufficient to overcome the effects of past and present discrimination," the guidelines specify, "can race-conscious efforts be invoked." Ibid.

Consequently, petitioner's claim that "[t]here is no evidence of" efforts to use race-neutral means like providing "financing for small firms," "relaxation of bonding requirements," or providing training "for disadvantaged entrepreneurs of all races," Pet. Br. 46, is incorrect. Such efforts are mandatory. The Secretary's regulations, in fact, require consideration of each of the race-neutral mechanisms that petitioner identifies. Recipients must consider "assistance in overcoming limitations such as inability to

obtain bonding or financing" by "simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing," 49 C.F.R. 26.51(b)(2); they must try offering small businesses "technical assistance," 49 C.F.R. 26.51(b)(3), and logistical and business support, 49 C.F.R. 26.51(b)(9). The Secretary's regulations also identify numerous race-neutral means that petitioner does not mention. E.g., 49 C.F.R. 26.51(b)(1) (arranging solicitations, bid presentation times, quantities and job sizes, specifications, and schedules to make it easier for small and new businesses to participate); 49 C.F.R. 26.51(b)(4) (ensuring dissemination of opportunities and guidelines to the relevant communities). See also pp. __-__ (describing similar requirements for direct federal procurement). In sum, the DOT's regulations require recipients to avail themselves of the "array of race-neutral devices to increase the accessibility of contracting opportunities to small entrepreneurs of all races," Croson, 488 U.S. at 509, before permitting the use of race-conscious mechanisms as a last resort.

B. The DBE Program Meets Narrow Tailoring Through Flexibility, Proportionality, And Durational Limits

"In determining whether an affirmative-action remedy is narrowly drawn to achieve its goal," this Court also considers duration, the relationship between any hiring goals and the relevant pool of qualified entities, and the program's flexibility. United States v. Paradise, 480 U.S. 149, 187-188 (1987) (Powell, J., concurring). With respect to duration, this Court has explained that race-conscious remedies should "not last longer than

the discriminatory effects [they are] designed to eliminate." Adarand I, 515 U.S. at 238. The Secretary's regulations and the terms of Congress's authorization for the DBE program ensure that such limits are observed. Grant recipients cannot use race-conscious remedies in the first instance unless they find a disparity evidencing the effects discrimination and that the disparity cannot be eliminated through race-neutral means. See pp. __-__, supra. If race-conscious means are employed, moreover, recipients must eliminate or curtail them whenever it appears that race-neutral means will provide an adequate solution. 49 C.F.R. 26.51(f). The regulations thus require aid recipients constantly to reassess their programs to ensure that race-conscious remedies remain necessary. Thus, the structure "is inherently self limiting in the use of race-conscious measures." 63 Fed. Reg. 26,049. As "barriers to minority contracting are removed and the use of race-neutral means of ensuring opportunity succeeds," the program should "automatically reduce, and eventually eliminate, the use of race in decisionmaking." 63 Fed. Reg. 26,048. The provisions of TEA-21 authorizing the DBE program, moreover, themselves expire in 2004, providing a built-in sunset unless Congress finds sufficient grounds for renewing the program. In the interim, moreover, the program is the subject of ongoing study and review. 112 Stat. 107 (calling for mandatory study).[17]

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[17] Petitioner reproduces part of the resulting GAO Report in an appendix to its brief, and we have lodged the entire report with

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the Court (Gov't Lodging __-__).

The DBE program also provides narrow tailoring by requiring that DBE participation benchmarks be established based on the "relevant statistical pool," Croson, 488 U.S. at 501, and mandating flexible implementation, Paradise, 480 U.S. at 187 (Powell, J., concurring). See also Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548, 1576 (11th Cir. 1994) (goals must be "reasonably related to the pool of qualified minorities"). The DOT DBE regulations require each recipient to set annual goals reflecting local market conditions; to set those goals based on the actual number of DBEs ready, willing, and able to compete in the recipient's market; and to ensure that the goal reflects the level of participation that would be expected absent discrimination. 49 C.F.R. 26.45. Contrast Croson, 488 U.S. at 502 (rigid 30 percent quota unrelated to "how many MBE's in the relevant market are qualified"). In setting goals, moreover, recipients must consider only those groups shown to be under-represented compared to local availability. 49 C.F.R. 26.45(b). Petitioner is thus incorrect to assert that the DBE program, like the quota at issue in Croson, suffers from "random inclusion of racial groups that, as a practical matter, may never have suffered discrimination in the construction industry in" the relevant geographic market. Pet. Br. 43-44 (quoting 488 U.S. at 506). As the program is implemented, any group that is not represented in the relevant market, or for which there is no disparity suggesting discrimination, must be excluded from DBE remedial goals.

Flexibility is also a hallmark of the DBE program. No penalty is imposed for failure to meet annual goals. 49 C.F.R. 26.47.

When a recipient establishes goals for DBE participation for a particular contract -- a mechanism that can used only where race-neutral means are inadequate -- contractors subject to that goal need only pursue it in good faith; they are not required to achieve it. 49 C.F.R. 26.53(a) ("When you have established a DBE contract goal, you must award the contract only to a bidder/offeror who makes good faith efforts to meet it."). If "a bidder/offeror does document adequate good faith efforts," the State or locality "must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal." 49 C.F.R. 26.53(a)(2). The regulations strictly prohibit inflexible mechanisms like quotas. 49 C.F.R. 26.43. The flexibility of the program is further enhanced through waiver provisions, under which a recipient may be released from any regulatory requirement if it believes that equal opportunity for DBEs can be achieved through other approaches. 49 C.F.R. 26.15. See Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 64 Fed. Reg. 5,096, 5,102-5,103 (Feb. 2, 1999). A recipient can also receive an exemption from compliance if exceptional circumstances warrant it. 49 C.F.R. 26.15.

C. Congress's Use of Racial and Ethnic Presumptions Is Not Fatally Over-Inclusive

Petitioner's primary claim, in the end, is not that the entire program is overbroad. It is that the racial and ethnic presumption employed by TEA-21 in identifying socially and economically disadvantaged individuals is fatally over-inclusive because not every member of the identified races and ethnic groups in fact is socially and economically disadvantaged. Pet. Br. 41-43. That

argument does isolate the one race-conscious aspect of the program that operates uniformly and nationwide, without regard to local circumstances. But the argument ignores the fact that the presumption -- as well as DBE certifications generally -- are without any effect on third parties unless race-conscious remedies (like DBE contract goals) are employed. Because DOT regulations limit use of race-conscious or DBE-specific remedies to those markets where they are necessary to combat discrimination and its effects, the impact of the statute's race-based presumption on parties like petitioner is similarly limited.

It is true, of course, that the race-based presumption operates when state and local recipients of federal aid (and the Department of Commerce) conduct studies to determine the level of DBE participation that would be expected absent discrimination. But the government has a responsibility to identify and remedy racial discrimination. See, e.g., U.S. Const. Amend. XIV, § 5; U.S. Const. Amend. XV § 2. The government could not discharge that duty if it could not use race-conscious mechanisms for identifying whether racial discrimination exists. Even the gathering of race-conscious data involves a degree of race-conscious government action that would be unnecessary in a perfectly color-blind world. But the federal government inevitably must use race-conscious mechanisms to identify disparities that may indicate persistent discrimination. Congress clearly envisioned that race-based presumptions would be useful in identifying discrimination in the construction industry. The use of those criteria, without more, does not violate the Constitution, and DOT regulations ensure that

race-conscious remedies that might affect third parties are not employed unless and until discrimination and its effects have been identified and race-neutral means found inadequate.

Petitioner's argument also overlooks that the Secretary's implementing regulations are designed to limit participation to entities owned and controlled by individuals who have suffered social and economic disadvantage themselves, i.e., actual victims of discrimination. Under those regulations, the owners of firms seeking DBE designation must submit a notarized statement that they are socially and economically disadvantaged. 49 C.F.R. 26.67(a). Thus, owners in effect must certify that they have been "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," which is the standard for social disadvantage, 15 U.S.C. 637(a)(5), and that their "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged," which is the standard for economic disadvantage, 15 U.S.C. 637(a)(6)(A). An applicant for DBE certification, moreover, must submit documentation of its owner's personal wealth; if the owner's net worth exceeds $750,000, any presumption of disadvantage is considered irrefutably rebutted. See 49 C.F.R. 26.67(a)(2). Finally, even a facially valid certification is rebuttable, 49 C.F.R. 26.26(b), and third parties may challenge eligibility by showing that the owner is not actually socially or economically disadvantaged, 49 C.F.R. 26.87. See also S. Rep. No. 4, 100th Cong., 1st Sess. 28 (presumption is

rebuttable).

Those provisions belie petitioner's claim that the program necessarily extends benefits, based on race alone, to individuals who have not suffered discrimination. As the district court explained in Interstate Traffic Control v. Beverage, 101 F. Supp. 2d 445, 453 (S.D. W. Va. 2000), the rebuttable presumption of disadvantage would permit an individual who has not actually suffered discrimination and impaired business opportunities to be certified as a DBE only if (1) that individual falsely declares that he has suffered disadvantage and (2) the inaccurate declaration goes unchallenged. Petitioner nowhere alleges that such errors are necessarily commonplace, and the possibility of such false declarations does not make the program facially invalid. Moreover, because any claim of disadvantage may be rebutted, the primary effect of the presumption is to allocate burdens of proof. Petitioner nowhere shows that shifting the burden of proof to the party opposing certification is inappropriate where the applicant for certification is a member of a group that, as a historical matter, is known to have suffered and to suffer discrimination.

Petitioner also simultaneously charges that the notarized statement requirement is "essentially meaningless," Pet. Br. 10 n.6, and that it is invalid because it eliminates the presumption of disadvantage, id. at 41-42. Those contentions are in considerable tension with each other, and both are without merit. As to the former, the DOT's regulations warn that the DOT "may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a

false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program." 49 C.F.R. 26.107(e). Applicants take that warning seriously: In the DOT's experience, the notarized statement requirement and net-worth limits have, since being implemented, affected both the number and identity of applicants. In addition, because petitioner brings a facial challenge, any speculation about undetected fraud or errors in implementation are irrelevant; the program must be upheld unless it is incapable of constitutional implementation.

Petitioner's claim that the notarized statement requirement is inconsistent with the statutory presumption of disadvantage has greater plausibility, but ultimately fares no better. First and foremost, the court of appeals never addressed the validity of the regulation, and petitioner would be the wrong party to challenge it. See U.S. Br. in Opp. 28. If DOT's regulations impermissibly deny contracting opportunities to wealthy minorities who have not suffered discrimination, then those wrongfully denied DBE status would be proper plaintiffs. Petitioner suffers no injury -- indeed, could only benefit -- from this alleged defect. Second, the presumption continues to operate as a presumption notwithstanding the notarized statement requirement. An applicant for DBE certification who is not a member of the specified groups must demonstrate social and economic disadvantage by a preponderance of the evidence. 49 C.F.R. 26.67. An applicant for DBE certification who is a member of the specified groups, in contrast, need not present evidence sufficient to satisfy the certifying entity; he instead may rely on the presumption. That is

the essence of a presumption.

The notarized statement, moreover, is not proof of social and economic disadvantage. It is instead a procedural requirement designed to prevent abuse and ensure that all applicants proceed in good faith. Nothing in the statutory presumption precludes the Secretary from imposing reasonable procedural requirements to deter bad-faith certification requests that, if challenged, would be rejected. And the statute certainly does not require the Secretary to implement the statute in a way that permits applicants to file certification requests in bad faith. Nor does the filing of a notarized document prevent a challenge to a company's status as a DBE.

To be sure, the DOT's regulations implement the statutory presumption in a manner that is designed to minimize the constitutional and policy concerns that arise from a robust presumption that members of certain minority groups have suffered economic and social disadvantage. But for that reason, not only the traditional deference owed to the Secretary, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984), but also the canon of construction favoring the construction that renders the statute constitutional, Jones v. United States, 119 S. Ct. 1215, 1222 (1999), both support the Secretary's interpretation.

Perhaps the most troubling aspect of any remedial scheme is that "innocent third parties may" sometimes "be called upon to bear some of the burden of the remedy." Wygant, 476 U.S. at 281 (plurality opinion). But the regulations at issue here are designed to minimize that burden so that it is not "'unacceptabl[y]

substantial," United States v. Paradise, 480 U.S. 149, 182 (1987) (plurality opinion). The current program is aimed at replicating a market in which there are no effects of discrimination. 64 Fed. Reg. 5096 ("program is intended to remedy past and current discrimination against disadvantaged enterprises, ensure a 'level playing field' and foster equal opportunity in DOT-assisted contracts"). Its design ensures that aid recipients employ race-conscious remedies only as a last resort. Each recipient of TEA-21 funds sets and attains goals based on demonstrable evidence of the relative availability of ready, willing and able DBEs in the areas from which it obtains contractors, but only to the extent that the DBE program is needed to counter the effects of discrimination in the recipient's market. 49 C.F.R. 26.45. And remedies are limited to those who can attest in good faith that they are actual victims of discrimination and have suffered impaired opportunities as a result. The program thus is designed to avoid bestowing undue benefits on DBEs, and to create as level a playing field as constitutionally possible.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2001

APPENDIX
SELECTED HEARINGS AND REPORTS 1972-1995

1. House Rep. No. 92-1615, "Minority Small Business Enterprise," Report of the Subcomm. on Minority Small Business Enterprise to the House Select Comm. on Small Business, 92d Cong., 2d Sess. (1972) (findings and conclusions leading to creation of a permanent select committee).

2. Government Minority Enterprise Programs-Fiscal Year 1974 (Vol. 1): Hearings Before the Subcomm. on Minority Small Business Enterprise and Franchising of the House Permanent Select Comm. on Small Business, 93d Cong., 1st Sess. (1973).

3. Government Minority Enterprise Programs-Fiscal Year 1974 (Vol. II): Hearings Before the Subcomm. on Minority Small Business Enterprise and Franchising of the House Permanent Select Comm. on Small Business, 93d Cong., 2d Sess. (1974).

4. H.R. Rep. No. 94-468, "Minority Enterprise and Allied Problems of Small Business," A Report of the Subcomm. on SBA Oversight and Minority Enterprise of the House Comm. on Small Business, 94th Cong., 1st Sess. (1975).

5. Summary of Activities, A Report of the House Committee on Small Business, 94th Cong., 2d Sess. 182 (1977).

6. Minority Subcontracting: Joint Hearing Before the Senate Select Comm. on Small Business and Subcomm. on Minority Enterprise and General Oversight of the House Comm. on Small Business, 95th Cong., 2d Sess. (1978).

7. To Amend the Small Business Act to Extend the Current SBA 8(a) Pilot Program: Hearings on H.R. 5612 Before the Senate Select Comm. on Small Business, 96th Cong., 2d Sess. (1980).

8. Small Business and the Federal Procurement System: Hearings Before the Subcomm. on General Oversight of the House Comm. on Small Business, 97th Cong., 1st Sess. (1981).

9. Small and Minority Business in the Decade of the 80's (Part 1): Hearings Before the House Comm. on Small Business, 97th Cong., 1st Sess. (1981).

10. Hearings on Minority Business and its Contributions to the U.S. Economy of the Senate Comm. on Small Business, 97th Cong., 2d Sess. (1982).

11. Hearings on Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program Before the Senate Comm. on Small Business, 98th Cong., 1st Sess. (1983).

12. Hearings on the State of Hispanic Small Business in America Before the Subcomm. on Small Business, 99th Cong., 2d Sess. (1985).

13. Hearings on Minority Enterprise and General Small Business Problems Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business, 99th Cong., 2d Sess. (1986).

14. To Present and Examine the Result of a Survey of the Graduates of the Small Business Administration Section 8(a) Minority Business Development Program: Hearings Before the Senate Small Business Comm., 100th Cong., 1st Sess. (1987).

15. A Bill to Reform the Capital Ownership Development Program: Hearings on H.R. 1807 Before the House Subcomm. on Procurement, Innovation, and Minority Enterprise Development of the House Comm. on Small Business, 101st Cong., 1st Sess. (1987).

16. Minority Business Development Act: Hearings Before the Subcomm. on Procurement, Innovation, and Minority Enterprise Development of the House Comm. on Small Business, 101st Cong., 1st Sess. (1987).

17. Small Business Problems: Hearings Before the House Comm. on Small Business, 100th Cong., 1st Sess. (1987).

18. The Small Business Competitiveness Demonstration Program Act of 1988: Hearings on S. 1559 Before the Senate Comm. on Small Business, 100th Cong., 2d Sess. (1988).

19. Twenty Years After the Kerner Commission: The Need for a New Civil Rights Agenda: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 100th Cong., 2d Sess. (1988).

20. Surety Bonds and Minority Contractors: Hearing Before the House Subcomm. on Commerce, Consumer Protection and Competitiveness of the Comm. on Energy and Commerce, 100th Cong., 2d Sess. (1988).

21. Minority Construction Contracting: Hearing Before the Subcomm. on SBA, the General Economy, and Minority Enterprise Development of the Comm. on Small Business, 101 Cong., 1st Sess. (1989).

22. Implementation of Small Business Subcontracting Program: Hearing Before the House Comm. on Small Business, 100th Cong., 2d Sess. (1988).

23. City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. of Small Business, 101st Cong., 2d Sess. (1990).

24. The Meaning and Significance for Minority Business of the Supreme Court Decision in the City of Richmond v. J.A. Croson: Hearing Before the Legislation and National Security Subcomm. of the House Comm. on Government Operations, 101st Cong., 2d Sess. (1990).

25. Federal Minority Business Programs: Hearing Before the House Comm. on Small Business, 102d Cong., 1st Sess. (1991).

26. Fiscal Economic and Social Crises Confronting American Cities: Hearings before the Senate Comm. on Banking, Housing and Urban Affairs, 102d Cong., 2d Sess. (1992).

27. Small Business Development: Hearing Before the House Subcomm. on Procurement, Tourism and Rural Development of the Comm. on Small Business, 102d Cong., 2d Sess. (1992).

28. Problems Facing Minority and Women-Owned Small Businesses in Procuring U.S. Government Contracts: Hearing Before the House Subcomm. on Commerce, Consumer and Monetary Affairs of the Comm. on Gov't Operations, 103d Cong., 1st Sess. (1993).

29. Government Accounting Office Report, Problems Continue with SBA's Minority Business Development Program (Sept. 1993).

30. SBA's Minority Business Development: Hearing Before the House Comm. on Small Business, 103d Cong., 1st Sess. (1993)

31. Department of Defense: Federal Programs to Promote Minority Business Development: Hearing Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the Comm. on Small Business, 103d Cong., 1st Sess. (1993).

32. Discrimination in Surety Bonding, Hearing Before the House Subcomm. on Minority Enterprise, Finance and Urban Development of the Comm. on Small Business, 103d Cong., 1st Sess. (1993).

33. The SBA's 8(a) Minority Business Development Program: Hearing Before the Senate Comm. on Small Business, 104th Cong., 1st Sess. (1995).

APPENDIX __: HEARINGS ON THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982

1. Implementation of the Surface Transportation Assistance Act of 1982: Hearing Before the Senate Comm. on the Environment and Public Works, 98th Cong., 2d Sess. (1984).

2. Review of the 10-Percent Set Aside Program, Section 105(f) of the Surface Transportation Assistance Act of 1982: Hearing Before the House Comm. on Small Business, 98th Cong., 2d Sess. (1984).

3. Surface Transportation Issues: Hearing Before the House Comm. on Public Works and Transportation, 98th Cong., 2d Sess. (1984).

4. Review of 10-Percent Set Aside Program (Section 105(f)) of the Surface Transportation Assistance Act of 1982: Hearing Before the House Comm. on Small Business, 99th Cong., 1st Sess. (1985).

5. Minority Business Participation in Department of Transportation Projects: Hearing Before the House Comm. on Government Operations, 99th Cong., 1st Sess. (1985).

6. The Disadvantaged Enterprise Program of the Federal Aid Highway Act: Hearing Before the Subcomm. on Transportation of the Senate Comm. on Environment and Public Works, 99th Cong., 1st Sess. 10 (1985).

7. Minority Business Participation in Department of Transportation Projects: Hearing Before the House Comm. on Government Operations, 99th Cong., 1st Sess. (1985).

APPENDIX __: HEARINGS AND REPORTS IN CONNECTION WITH ISTEA AND TEA-21

1. Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearing Before the House Comm. on Small Business, 100th Cong., 2d Sess. (1988).

2. Barriers to Full Minority Participation in Federally Funded Highway Construction Projects: Hearing Before the House Comm. on Government Operations, 100th Cong., 2d Sess. (1988).

3. Surety Bonds and Minority Contractors: Hearing Before the House Comm. on Energy and Commerce, 100th Cong., 2d Sess. (1988).

4. Subcontracting with Small and Disadvantaged Businesses: GSA Subcontracting with Small and Disadvantaged Businesses: Hearing Before the House Comm. on Government Operations, 100th Cong., 2d Sess. (1988).

5. Minority Business Set-Aside Programs: Hearing Before the House Judiciary Comm., 101st Cong., 1st Sess. (1990).

6. Problems with Equal Employment Opportunity and Minority and Women Contracting at Federal Agencies: Hearing Before the House Comm. Banking, Finance and Urban Affairs, 102d Cong., 2d Sess. (1992).

7. Discrimination in Surety Bonding: Hearing Before the House Comm. on Small Business, 103d Cong., 1st Sess. (1993).

8. Problems Facing Minority and Women-Owned Small Businesses in Procuring U.S. Government Contracts: Hearing Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations, 103d Cong., 1st Sess. (1993)

9. Discrimination in Surety Bonding: Hearing Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business, 103 Cong., 1st Sess. (1993).

10. Access to Credit in Distressed Communities: Hearing Before the House Comm. on Small Business, 103d Cong., 1st Sess. (1993).

11. Availability of Credit to Minority and Women-Owned Business: Hearing Before the Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking, 103d Cong., 2d Sess. (1994).

12. Unconstitutional Set-Asides: ISTEA's Race-Based Set-Asides After Adarand: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Judiciary Comm., 105th Cong., 1st Sess. (1997) (attaching "Proposed Reforms to Affirmative Action In Federal Procurement: A Preliminary Survey,"

61 Fed. Reg. 26,041 (May 23, 1996)).