No. 00-730

IN THE

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

NORMAN Y. MINETA,
SECRETARY OF TRANSPORTATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AMERICAN CIVIL LIBERTIES UNION, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND PEOPLE FOR THE AMERICAN WAY FOUNDATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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MISCELLANEOUS

STATEMENT OF INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee), American Civil Liberties Union (ACLU), Mexican American Legal Defense and Educational Fund (MALDEF), National Association for the Advancement of Colored People (NAACP), and People For the American Way Foundation (People For) respectfully submit this brief as *amici curiae* in support of Respondents' Disadvantaged Business Enterprise (DBE) program and its enabling statute, the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 113-115.[1]

The Lawyers' Committee, a nonpartisan and nonprofit organization, historically has been committed to issues of social justice and equal opportunity. The ACLU, a nonpartisan and nonprofit organization, is dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. It has long supported the constitutionality of affirmative action in appropriate circumstances. MALDEF, a national civil rights organization established in 1968, works to secure, through litigation, advocacy and education, the civil rights of Latinos living in the United States. The NAACP, established in 1909, is the nation's oldest civil rights organization and has state and local affiliates throughout the nation. Its fundamental mission is the advancement and improvement of the political, educational, social and economic status of minority groups and the elimination of racial prejudice. People For is a nonpartisan, education-oriented citizens'

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[1] Pursuant to Rule 37.6, the *amici* state that no counsel for any party in this case authored any portion of this brief, and no person other than the *amici* and their counsel have made any monetary contribution to its preparation or submission. Concurrent with this brief, letters of consent to its filing have been lodged with the Clerk of the Court under Rule 37.3.

organization established to promote and protect civil and constitutional rights.

STATEMENT OF FACTS

In response to persistent racial and gender discrimination in the construction industry, Congress enacted the DBE program to encourage the participation of minority- and women-owned businesses in federal contracting. *See, e.g.*, 144 Cong. Rec. S1402 (daily ed. Mar. 5, 1998) (statement of Sen. Baucus). The DBE program, currently authorized by Section 1101(b) of TEA-21,[2] directs that at least 10 percent of funds appropriated for federal transportation projects should be spent with "small business concerns owned and controlled by socially and economically disadvantaged individuals." Pub. L. No. 105-178, § 1101(b). An individual is "[s]ocially disadvantaged" under the statute 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 considered "[e]conomically disadvantaged" if he or she is "socially disadvantaged" and his or her "ability to compete in the free enterprise system has been impaired due to diminished capital and credit

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[2] The DBE program was established in 1980 by regulation under the authority of certain federal nondiscrimination statutes. *See* Participation by Disadvantaged Business Enterprises in DOT Programs, 64 Fed. Reg. 5096 (Feb. 2, 1999) (Final Rule). In 1983, Congress enacted -- and President Ronald Reagan signed -- the first statutory DBE program, which applied primarily to minority-owned businesses. *See* Surface Transportation Assistance Act (STAA), Pub. L. No. 97-424, 96 Stat. 2097. In 1987, through the Surface Transportation and Uniform Relocation Assistance Act (STURAA), Pub. L. No. 100-17, 101 Stat. 132, Congress expanded the program to include women-owned businesses. In 1991, Congress passed legislation, endorsed and signed by President George Bush, that reauthorized the DBE program. *See* Intermodal Surface Transportation Efficiency Act (ISTEA), Pub. L. No. 102-240, 105 Stat. 1914. On June 9, 1998, Congress enacted TEA -21.

opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. § 637(a)(6)(A). The statute affords certain minority and female contractors a presumption of disadvantage in the highway construction industry.[3] Pub. L. No. 105-178, § 1101(b). The presumption is rebuttable and subject to challenge by any person. 49 C.F.R. § 26.87.

The United States Department of Transportation (DOT), which administers the DBE program, has promulgated regulations to prevent the designation as DBEs of firms that are not in fact disadvantaged. Toward that end, all individuals claiming to be disadvantaged -- including "presumptively disadvantaged owner[s]" -- must certify that they are in fact socially and economically disadvantaged within the meaning of the statute and its regulations. *Id.* § 26.67(a)(1) (requiring submission of signed, notarized certification), and provide proof of personal net worth, *id.* § 26.67(a)(2). If the individual's personal net worth exceeds a regulatory limit of $750,000, or if the individual is not in fact socially and economically disadvantaged, the presumption of disadvantage is rebutted. *Id.* § 26.67(b).

Once certified, DBEs are eligible for participation in the DBE program. Under the program, state and local recipients of DOT financial assistance are required to determine the expected level of DBE participation in their area "absent the effects of discrimination," *Id.* § 26.45(b), and set their own goals for DBE participation based on local market conditions

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[3] In addition to those presumed to be disadvantaged, *any* business owner -- regardless of race or gender -- may demonstrate social or economic disadvantage and, consequently, qualify for DBE status. 49 C.F.R. § 26.67. In fact, businesses owned by white males, including Petitioner Adarand Constructors, Inc., have qualified for the DBE designation. *See* 144 Cong. Rec. S1427 (daily ed. Mar. 5, 1998) (statement of Sen. Domenici) (quoting Letter to Sen. Domenici from Secretary Slater and Attorney General Reno).

and contractor availability.[4] A recipient then submits to DOT its proposal to achieve its overall participation goal. *Id.* § 26.21. This proposal often consists largely of race-neutral measures, but may also include race-conscious measures[5] as a last resort. *Id.* § 26.51(d). If a recipient determines that it can meet its goal without considering race, it must do so. *Id.* § 26.51(f)(1).

The DBE program, while designed to encourage the use of minority- and women-owned businesses, specifically prohibits recipients' use of quotas. *Id.* § 26.43(a); *see also* 144 Cong. Rec. S1427 (daily ed. Mar. 5, 1998) (statement of Sen. Domenici) (quoting Letter to Sen. Domenici from Secretary Slater and Attorney General Reno). Indeed, Senator Baucus, one of the floor managers of TEA-21 and ranking member of the committee of jurisdiction, confirmed that no quotas may be used[6] and that the contract goals are

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[4] These goals are not based on the 10 percent national goal articulated in the statute; indeed, the regulations counsel against reliance on the national goal. 49 C.F.R. § 26.45; *see also* 64 Fed. Reg. at 5109 (noting that recipients of DOT financial assistance must have regional participation goals); H.R. Rep. No. 105-467, Part 1, at 504 (stating that 10 percent goal "is a national target for DOT; state and local recipients of DOT funding set their own goals for DOT participation in construction projects based on the availability of disadvantaged businesses in their market").

[5] For example, in 2000, nine of the state recipients of federal highway assistance employed no race-conscious measures at all, and no state recipient of such assistance employed only race-conscious measures. *See* U.S. Dep't of Transportation, *FHWA State DBE Goals FY 2001* (July 25, 2001) *at* http://osdbuweb.dot.gov/business/dbe/fhwagoal.html.

[6] Similarly, Senator Robb observed during floor debate on the measure, "this program is not a 'quota program,' as some have suggested. There is a great difference between an aspirational goal and a rigid numerical requirement. Quotas utilize rigid numerical requirements as a means of implementing a program. The DBE program uses aspirational goals." 144 Cong. Rec. S1425 (daily ed. Apr. 1, 1998).

not binding: "If a contractor makes good faith efforts to find qualified women or minority-owned subcontractors, but fails to meet the goal, there is no penalty." 144 Cong. Rec. S1403 (daily ed. Mar. 5, 1998).[7] Consequently, no contractor should ever lose a bid merely because it failed to satisfy minority participation goals. 64 Fed. Reg. at 5098.

In 1995, this Court addressed an earlier version of the DBE program in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The Court did not reach the constitutionality of the program but held that strict scrutiny applies to all race-based classifications -- whether imposed by federal, state, or local government, *id.* at 227 -- and remanded the case for a determination whether the program satisfied that standard of review, *id.* at 237. The Court emphasized that strict scrutiny should not be "strict in theory, but fatal in fact." *Id.*

In response to the Court's decision in *Adarand*, Congress and DOT modified the DBE program. While the relevant statutory language has remained essentially the same, the federal government has significantly changed the way it implements the DBE program. *See Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000). Indeed, Congress re-enacted the DBE program in TEA-21 with the express understanding that the relevant agencies would promulgate regulations designed to satisfy the Court's equal protection standards.[8] Those implementing regulations,

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[7] *See also* 49 C.F.R. § 26.47; H.R. Rep. No. 105-467, Part 1, at 504 ("There is never an absolute requirement that a particular goal be met."); 144 Cong. Rec. S1427 (daily ed. Mar. 5, 1998) (statement of Sen. Domenici) ("Nothing in the statute or regulations imposes sanctions on any state recipient that has attempted in good faith, but failed, to meet its self-imposed goals.") (quoting Letter to Sen. Domenici from Secretary Slater and Attorney General Reno).

[8] *See, e.g.*, 144 Cong. Rec. S1401, S1402, S1408, S1423, S1425, S1428, S1430, S1433 (daily ed. Mar. 5, 1998) (statements of Sens.

described above, were published on February 2, 1999. *See* 64 Fed. Reg. 5096.

Before DOT issued its revised regulations, the district court on remand found that the government had established a compelling interest to justify the DBE program but that the then-existing program was insufficiently tailored to satisfy strict scrutiny review. *Adarand Constructors, Inc. v. Peña*, 965 F. Supp. 1556, 1581-83 (D. Colo. 1997). The United States Court of Appeals for the Tenth Circuit agreed that the federal government has compelling interests in "not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements." 228 F.3d at 1165; *see also id.* at 1176. The Tenth Circuit went on to consider the revised regulations for the DBE program, which had been promulgated after the district court decision. *Id.* at 1158-59. The court concluded that, while certain provisions of the old DBE program were not narrowly tailored, the revised regulations had cured the earlier deficiencies. *Id.* at 1187. The court therefore held that the current DBE program is narrowly tailored to further compelling interests. *Id.*

SUMMARY OF ARGUMENT

Congress has compelling interests in remedying racial discrimination and its effects, and in avoiding the use of federal funds to perpetuate such discrimination and its effects. Toward that end, Congress collected and considered extensive testimony, reports, statistical evidence, and social science data documenting persistent racial discrimination in public contracting and the construction industry. Having

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Warner, Baucus, Kerry, Domenici, Kennedy, and Boxer); 144 Cong. Rec. H2001, H2003, H2004, H2008-11 (daily ed. Apr. 1, 1998) (statements of Reps. Tauscher, Poshard, Bonoir, Meek, Towns, and Millender-McDonald).

assembled substantial record evidence of such discrimination, Congress established and reauthorized the DBE program and, in so doing, acted well within its constitutional authority under the Civil War Amendments.

Furthermore, DOT promulgated revised regulations to tailor the operation of the DBE program narrowly to the interests Congress sought to address. Closely considering this Court's decision in *Adarand*, DOT crafted the new program with the express intent of complying with the equal protection standards articulated therein. Indeed, the new DBE program far exceeds the Court's requirements: the program mandates use of race-neutral measures to satisfy minority participation goals; is designed to last no longer than is necessary to address the discrimination and lingering effects of such discrimination that Congress identified; incorporates an individualized inquiry into disadvantage for every firm designated as a DBE; and only minimally impacts third parties.

ARGUMENT

I. THE DBE PROGRAM FURTHERS THE COMPELLING INTERESTS IN REMEDYING THE EFFECTS OF RACIAL DISCRIMINATION IN THE CONSTRUCTION INDUSTRY AND PREVENTING THE GOVERNMENT'S SUPPORT FOR, OR PERPETUATION OF, SUCH DISCRIMINATION.

This Court stated in *Adarand* that "[t]he 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." 515 U.S. at 237. Consistent with the authority it has to determine the scope of remedial legislation, Congress enacted the DBE program both to remedy the effects of persistent racial discrimination in the

construction industry and to prevent its perpetuation through the distribution of federal funds.[9]

A. Under established precedent, Congress has compelling interests in preventing government support for, and addressing the effects of, racial discrimination.

It is well-established that Congress has compelling interests in remedying the effects of private discrimination in the construction industry, and in preventing the perpetuation of these effects by the distribution of federal funds. *See id.* at 222, 237; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-92, 503 (1989).[10] In *Croson*, for example, the Court applied strict scrutiny to a municipal contracting plan that required prime contractors to subcontract at least 30 percent of each contract to minority business enterprises. 488 U.S. at 493-94. While the Court decided that the city had not made a sufficient showing of discrimination, a majority of the Court made clear that, had such a showing been made, the government "would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market." *Id.* at 503.[11] Similarly, Justice O'Connor stated that "[i]t is beyond

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[9] We do not analyze separately the gender-specific aspects of TEA-21, because the questions before the Court do not implicate the less rigorous standard of intermediate scrutiny that is applicable to gender classifications. *See United States v. Virginia*, 518 U.S. 515, 532-33 (1996).

[10] *See also Croson*, 488 U.S. at 518 (Kennedy, J., concurring) (noting that "the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself"); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 610-11 (1990) (O'Connor, J., dissenting).

[11] Justice O'Connor was joined by Chief Justice Rehnquist and Justice White. Additionally, the dissenting Justices agreed that a governmental

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." *Id.* at 492.[12]

This Court has long held that it violates principles of equal protection for the government to support, encourage or give effect to discrimination practiced by private parties. *See Gilmore v. City of Montgomery*, 417 U.S. 556, 572-74 (1974); *see also Norwood v. Harrison*, 413 U.S. 455, 465 (1973); *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722, 725 (1961); *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948). In *Norwood v. Harrison* (on which the Court expressly relied in *Croson*), the Court concluded that the Constitution requires a governmental entity "to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination." 413 U.S. at 467; *see also id.* at 465 ("Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'") (citation omitted); Title VI of the Civil Rights

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entity has a compelling interest in "preventing the city's own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination." *Croson*, 488 U.S. at 537; *see also Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1519, 1529 (10th Cir. 1994); *Coral Constr. Co. v. King County*, 941 F.2d 910, 916 (9th Cir. 1991).

[12] Indeed, every court that has considered the constitutionality of race-conscious federal contracting programs since this Court's decision in *Adarand* has ruled that they are supported by a compelling governmental interest. *See, e.g., In re Sherbrooke Sodding Co.*, 17 F. Supp. 2d 1026, 1034-35 (D. Minn. 1998); *Adarand*, 965 F. Supp. at 1570-77; *Rothe Dev. Corp. v. U.S. Dep't of Def.*, 49 F. Supp. 2d 937, 951 (W.D. Tex. 1999); *Cortez III Serv. Corp. v. NASA*, 950 F. Supp. 357, 361 (D.D.C. 1996).

Act of 1964, Pub. L. No. 88-352, 78 Stat. 252, 42 U.S.C. § 2000d *et seq*. (prohibiting discrimination in "any program or activity receiving Federal Financial Assistance").

Similarly, the government has a compelling interest in acting to prevent or avoid unconstitutional or unlawful conduct. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290-91 (1986) (O'Connor, J., concurring) (citing *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 165-66 (1977), and *McDaniel v. Barresi*, 402 U.S. 39 (1971)); *see also Bush v. Vera*, 517 U.S. 952, 977 (1996); *id.* at 990, 992, 994 (O'Connor, J., concurring); *id.* at 1033-35, 1014 n.9 (Stevens, J., dissenting). Vigilance is required to avoid the unconstitutional or unlawful use of government funds: "the Court has never attempted to formulate 'an infallible test for determining whether the State . . . has become significantly involved in private discriminations' so as to constitute state action. 'Only by sifting facts and weighing circumstances' (on a case-by-case basis) can the 'non-obvious involvement of the State in private conduct be attributed its true significance.'" *Gilmore*, 417 U.S. at 572-74 (quoting *Reitman*, 387 U.S. at 378, and *Burton*, 365 U.S. at 722). Congress also has authority under the Thirteenth Amendment to eliminate private racial discrimination and its effects in contracts and business relations.[13]

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[13] *See, e.g., EEOC v. Mississippi College*, 626 F.2d 477, 488-89 (5th Cir. 1980). Congress is authorized by Section 2 of the Thirteenth Amendment to effectuate its guarantees in the same manner as Section 5 mandates securing the guarantees of the Fourteenth Amendment. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-40 (1968); *see also Croson*, 488 U.S. at 490. Congress appropriately has acted to remedy and prevent private discrimination in contracts through the Reconstruction Civil Rights Acts, 42 U.S.C. §§ 1981 and 1982. *See, e.g., Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). That same interest is served when Congress exercises its authority to define the conditions on which federal funds will be introduced into the construction

In establishing the DBE program, Congress has acted to further the compelling interests that this Court has long recognized. Congress determined that the federal government, through its massive infusion of federal funds into the national highway construction industry,[14] had become a participant in a system of racial exclusion. *See* Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042, 26,062 (May 23, 1996). Thus, Congress justifiably took affirmative steps to avoid its further involvement in perpetuating a discriminatory system. As the Tenth Circuit stated, "[t]he 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 the effects of racial prejudice." *Adarand*, 228 F.3d at 1176. Nor does the Constitution require "Congress to acquiesce in the workings of an ostensibly free market that would direct the profits to be gleaned from disbursements of public funds to non-minorities alone." *Id.* at 1175. Were this not true, the federal government would be in the untenable position of endorsing racial discrimination in the construction industry by providing economic support ensuring its continuation.

B. The DBE program is an appropriate exercise of the power of Congress, including its power under the enforcement provisions of the Civil War Amendments.

Congress had ample authority to enact the DBE program under the Spending Clause, the Commerce Clause, Section 5

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industry. *See Fullilove v. Klutznick*, 448 U.S. 448, 510 (1980) (Powell, J., concurring).

[14] Under TEA-21, for example, Congress authorized over $100 billion for use on federal highway projects. Pub. L. No. 105-178, § 1101(a).

of the Fourteenth Amendment, and Section 2 of the Thirteenth Amendment.[15] *See Fullilove*, 448 U.S. at 473-78. Each of these provisions confers broad powers on Congress. *Id.*

The Civil War Amendments, in particular, vest in Congress broad power to address matters of racial discrimination. In *Croson*, this Court reiterated the description of these "unique remedial powers" from Chief Justice Burger's opinion for the Court in *Fullilove*:

> 'Here we deal . . . not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that *in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress*, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.' Because of these unique powers, the Chief Justice concluded that 'Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to *declare certain conduct unlawful*, it may, as here, authorize and induce state action to avoid such conduct.

488 U.S. at 488 (internal citations omitted) (emphasis in original). The Court further recognized:

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[15] The DBE program at issue regulates the manner in which States expend federal highway construction funds. Pub. L. No. 105-178, § 1101(b). Thus, the legislation reflects the authority of Congress under Section 5 of the Fourteenth Amendment, rather than the Fifth Amendment. *See Metro Broadcasting*, 497 U.S. at 605-06 (O'Connor, J., dissenting). Insofar as the DBE program seeks to remedy or prevent private discrimination without regard to state action, it is also an expression of the authority of Congress under Section 2 of the Thirteenth Amendment.

> Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. See *Katzenbach v. Morgan*, 384 U.S. at 651 ('Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment').[16]

Id. at 490 (emphasis in original). The Court has recently reaffirmed this unique power in *City of Boerne v. Flores*: "It is for Congress in the first instance to 'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." 521 U.S. 507, 539 (1997) (citation omitted).

Petitioner's suggestion that the federal government can never legitimately employ race-conscious measures (Pet. Br. at 18-23) is simply antithetical to the Fourteenth Amendment. *See Adarand*, 515 U.S. at 237 (noting the appropriateness of government responding to racial discrimination). This argument suggests that, in the case where acts of discrimination or their continuing effects could not be remedied by any race-neutral means, *there should be no remedy*. The Constitution does not require so unjust a result.

In exercising its unique remedial authority, Congress may legitimately implement programs to eliminate and

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[16] The Court recognized that this same "enlargement[] of the power of Congress" was effected by the Thirteenth and Fifteenth Amendments, the other "Civil War Amendments." *Croson*, 488 U.S. at 490.

prevent the government's involvement in racial discrimination that has excluded racial minorities from economic opportunities. As the Court stated in *Kimel v. Florida Bd. of Regents*, "Congress' power 'to enforce' the [Fourteenth] Amendment includes the authority both to remedy and *to deter* violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." 528 U.S. 62, 81 (2000) (emphasis added).[17]

Of course, there are limits on Congress' ability to enact prophylactic legislation. For example, Congress must tailor its legislative action to "remedying or preventing" conduct that "transgress[es] the Fourteenth Amendment's substantive provisions." *Boerne*, 521 U.S. at 519; *see also Kimel*, 528 U.S. at 85-91. Because state discrimination and involvement in private discrimination are directly prohibited by the Fourteenth Amendment, and since Congress has the power to prohibit private discrimination under the Thirteenth Amendment -- which it appropriately has done with respect to the right to contract, *see Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-43 (1968) -- virtually all of the conduct regulated by the DBE program would likely be unconstitutional or unlawful.[18] The fact that the legislation also regulates some constitutional conduct does not render it

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[17] *See also id*. at 88 ("Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation.").

[18] This fact distinguishes the DBE program from what the Court identified as the central defect of the laws in *Garrett*, *Morrison*, and *Kimel* -- namely, that most of the conduct prohibited by the laws at issue in those cases was not unconstitutional under the Fourteenth Amendment. *See Board of Trustees of University of Alabama v. Garrett*, 121 S. Ct. 955, 964 (2001); *Kimel*, 528 U.S. at 90-91; *U.S. v. Morrison*, 529 U.S. 598, 620-27 (2000).

beyond the scope of Congress' authority;[19] it is sufficient that the record establish only a "strong basis in evidence," "approaching a prima facie case of a constitutional or statutory violation." *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277).

Legislation like the DBE program is especially warranted where, as here, other measures have proven unsuccessful. By the time Congress enacted the initial version of the DBE program in 1978, "it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry." *Fullilove*, 448 U.S. at 511 (Powell, J., concurring); *see also id.* at 466 (describing congressional report that expressed "disappointment" with the "limited effectiveness" of earlier legislation). As both the district court and Tenth Circuit recognized, 965 F. Supp. at 1582-83; 228 F.3d at 1178, Congress had attempted to redress the problems facing minority businesses through race-neutral assistance to all small businesses, beginning with the Small Business Act of 1953, but determined that those remedies, without more, did not eradicate the effects of past discrimination.[20] Pub. L. No. 163, § 202, 67 Stat. 232; *see also* 61 Fed. Reg. at 26,053 & n.28.

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[19] Legislation enacted pursuant to Section 5 may sweep broader than merely prohibiting unconstitutional conduct. *See Kimel*, 528 U.S. at 81; *Boerne*, 521 U.S. at 518. For example, this Court has found certain legislation an appropriate exercise of Congress' Section 5 enforcement power, even though it contained discriminatory impact provisions not mandated by the Constitution. *See, e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641, 648-51 (1966).

[20] While Petitioner now focuses on race-neutral alternatives (Pet. Br. at 45-47), Petitioner never challenged the district court's finding that Congress had unsuccessfully attempted to cure the effects of discrimination in the contracting market through race-neutral means. *Adarand*, 228 F.3d at 1178.

Congress' judgment regarding the inadequacy of alternative means has been re-evaluated and affirmed between the initial enactment and the most recent reauthorization of the DBE program.[21] As Senator Chafee, one of the floor managers of TEA-21 and the chairman of the committee of jurisdiction, stated during debate on the conference report, the DBE program "has proven both necessary to and effective in our efforts to remedy discrimination in transportation procurement markets. By reauthorizing the DBE program again this year, Congress has signaled its belief that . . . we need this program if we are to remove the continuing barriers confronted by minority- and women-owned businesses." 144 Cong. Rec. S5403-04, S5414 (daily ed. May 22, 1998). Through its system of reauthorization, Congress resolved that it should take affirmative steps to ensure compliance with existing legislation, as well as to avoid its complicity in a system of racial exclusion.[22] *See Adarand*, 228 F.3d at 1166-68 (noting that Congress' extensive debate regarding renewal of DBE program before passing TEA-21 confirmed that Congress had recently found a continuing remedial need for the DBE program). That judgment, which is within Congress' authority as a coordinate branch of government, should be respected.

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[21] The DBE program, which expires in 2004, remains subject to re-evaluation by Congress prior to any further extension or re-enactment. 64 Fed. Reg. 5103. Nevertheless, Congress need not "make specific factual findings with respect to each legislative action." *Fullilove*, 448 U.S. at 503 (Powell, J., concurring). Petitioner's suggestion in its petition for *certiorari* that the relevant legislative record is limited to the evidence that was before Congress at the time of the enactment of the initial program for disadvantaged businesses in 1978 (Pet. Cert. Br. at 16, 21, 22) reflects its misunderstanding of the legislative process.

[22] Notably, in both chambers of Congress, bipartisan majorities rejected amendments that would have effectively discontinued the DBE program. 64 Fed. Reg. 5096.

C. Congress assembled strong evidence of a pattern of discrimination against minority contractors that supports the need for remedial action.

For Congress' action to be justified by a proper remedial purpose, there must be a determination that the government had a "strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U.S. at 277. Congress need only adduce evidence of "widespread and unconstitutional . . . discrimination," *Kimel*, 528 U.S. at 91, and "evidence that [discrimination in contracting] had become a problem of national import," *id.* at 90 (quoting *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999)). Here, Congress assembled significant and persuasive evidence that racial discrimination and its effects still exist in the national construction industry, and responded appropriately with corrective legislation. *See Adarand*, 515 U.S. at 237.

While the state of the legislative record is not dispositive, *see Florida Prepaid*, 527 U.S. at 646, the legislative history of the DBE program amply reveals "the evil of private prejudice" of which Justice O'Connor warned in *Croson*, 488 U.S. at 492. Over more than two decades, Congress has collected and considered extensive testimony, reports, statistical evidence, and social science data regarding the persistence of racial discrimination in public contracting.[23] The evidence established that, in addition to

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[23] *See, e.g.*, Appendix -- The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Study, 61 Fed. Reg. at 26,051 n.12, 26,054 n.32, 26,057 nn.84 & 86, 26,059 nn.101 & 108, 26,060 nn.115 & 117 (listing dozens of congressional hearings, from 1980 to 1996, regarding racial discrimination faced by minority-owned contracting businesses); *Unconstitutional Set-Asides: ISTEA's Race-Based Set-Asides After Adarand*, Hearings Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary, 105th Cong., 1st Sess., 25-80, 106-08 (1997) (testimony of Nancy McFadden, DOT General Counsel) (discussing evidence of racial

outright discrimination by prime contractors and suppliers, racial discrimination in other aspects of the industry, including access to financial credit and other "economic inequities," 61 Fed. Reg. at 26,052, 26,054-61, "hamper the ability of minority-owned businesses to compete with other firms on an equal footing in our nation's contracting markets," *id.* at 26,050. In addition, state and local disparity studies "contain extensive statistical analyses . . . [that] revealed gross disparities between the availability of minority-owned businesses and the utilization of such businesses in state and local government procurement." *Id.* at 26,061. Based on the record, Congress determined that the disadvantages caused by racial discrimination continue to diminish federal contracting opportunities for minority-owned businesses. *Id.* at 26,062. Moreover, Congress recognized that federal procurement practices effectively subsidize the discrimination of private and public actors, *id.* at 26,062-63, which is unsurprising given the government's dominance in the highway construction industry.

The record Congress assembled leading to the adoption of the current DBE program constitutes the "strong basis in evidence" of compelling interests that satisfy strict scrutiny. Congress has assembled a much more substantial record demonstrating a need for the current DBE program than the record found adequate in *Fullilove.* The *Fullilove* program was adopted as a floor amendment to an appropriations measure, 448 U.S. at 458, "'*without any congressional hearings or investigation whatsoever*,'" *Croson*, 488 U.S. at 547 n.10 (emphasis added) (citation omitted). Despite the sparse legislative record and petitioner's insistence that Congress had not created a sufficient record to justify a race-conscious program, 448 U.S. at 520 n.4, the Court in *Fullilove* determined that "[a]lthough the Act recites no

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discrimination affecting government construction contracts); *id.* at 6-8 (testimony of Rep. Scott) (same).

preambulary 'findings' on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." *Id.* at 478. The *Fullilove* program satisfied the equivalent of strict scrutiny review;[24] so too should the much more substantial record for the DBE program.[25]

Petitioner's arguments that the congressional record is inadequate to support corrective legislation are simply wrong. First, Petitioner complains that many of the discriminatory barriers that Congress seeks to remedy are race-neutral on their face. That fact may be true, but discrimination is seldom explicit, *see Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-68 (1977), and there is little question that these barriers are *not* race-neutral in application.[26] For example, "[i]t has

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[24] Chief Justice Burger stated that the program was valid under either strict scrutiny or intermediate scrutiny. 448 U.S. at 491-92; *see also id*. at 495-96 (Powell, J., concurring) (noting that the plurality opinion had applied strict scrutiny); *Metro Broadcasting*, 497 U.S. at 608 (O'Connor, J., dissenting) (same). While the Court in *Adarand* questioned the standard of review invoked in *Fullilove*, 515 U.S. at 235, nothing in *Adarand* undermines the conclusion reached in Chief Justice Burger's primary opinion that Congress had "abundant evidence" from which it could conclude that minority businesses had been excluded from public contracting opportunities on account of racial discrimination, 448 U.S. at 477-78, nor the point here that the legislative evidence supporting the DBE program far exceeds the legislative record at issue in *Fullilove*.

[25] Petitioner, too, has acknowledged that the DBE program satisfies the requirements of a legislative record in *Fullilove*. *See Adarand Constructors, Inc. v. Peña*, 16 F.3d 1537, 1544 (10th Cir. 1994).

[26] Petitioner does not suggest that discrimination has not *in fact* hindered the participation of racial minorities as prime or sub-contractors in the construction industry. Even congressional opponents of the DBE program conceded this point. Representative Roukema, for example, who sponsored an unsuccessful amendment designed to defeat the program, stated that opponents of the DBE program were "not suggesting

been recognized in Congress that private sector business networks frequently are off-limits to minorities." 61 Fed. Reg. at 26,059 & nn.101, 108 (citing evidence of exclusion). Moreover, in *Fullilove*, this Court upheld a program justified partly by evidence of "difficulties confronting minority businesses," including "deficiencies in working capital, inability to meet bonding requirements, disabilities caused by inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses," 448 U.S. at 467, all of which were facially race-neutral.

Second, Petitioner incorrectly claims that Congress relied on statistics derived from an improper statistical pool because there was no evidence that minority contractors were available to do the work in question. (Pet. Br. at 29-30.) On the contrary, the studies on which Congress relied compared the "*availability* of minority-owned businesses and the *utilization* of such businesses in state and local government procurement." 61 Fed. Reg. at 26,061 (emphasis added). Moreover, when recipients develop their own DBE participation goals, the regulations require evidence of "the relative *availability* of DBEs in [the local] market." 49 C.F.R. § 26.45(b) (emphasis added). That requirement comports with this Court's rulings. In *Croson*, for example, this Court stated that an inference of discriminatory exclusion may arise "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or [its] prime contractors." 488 U.S. at 509. It is precisely that

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that there is no discrimination." 144 Cong. Rec. H2001; *see also id.* ("I know, of course, that discrimination exists . . . . There is no denying it.").

type of evidence on which Congress based the need to enact TEA-21.

D. Under *Croson*, the body of evidence necessary to justify congressional action is necessarily different from that required of state and local governments.

While this Court has ruled that strict scrutiny applies to any governmental race classification, *see Adarand*, 515 U.S. at 227, it emphasized that the range and scale of congressional acts are necessarily different from those of states and localities. Indeed, it has explicitly stated that Congress has a broader scope than its state and local counterparts with which to identify and address compelling national interests.[27] *See Croson*, 488 U.S. at 490.

Petitioner is wrong to suggest that, in order to satisfy strict scrutiny, the DBE program must meet the requirements to which the Court held the City of Richmond in *Croson*. That claim is repudiated by *Croson* itself. In distinguishing the Richmond City Council from the United States Congress, the Court in *Croson* emphasized that Congress "has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment," a mandate which also includes the "power to define situations which *Congress* determines

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[27] For example, in *Fullilove*, this Court explicitly stated that "in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress." 448 U.S. at 483 (Burger, C.J.). While *Adarand* overruled *Fullilove* insofar as it held that race-based programs by the federal government are subject to less than strict scrutiny, this Court has not questioned the distinctive authority of Congress. Rather, the Court rejected the claim made in Justice Stevens' dissent in *Adarand* that "we have ignored the difference between federal and state legislatures," noting that the Court was not addressing the scope of Congress' power to deal with the problem of racial discrimination or the extent to which courts should defer to such congressional authority. 515 U.S. at 230.

threaten principles of equality and to adopt prophylactic rules to deal with those situations." *Id.* (emphasis in original). Based on that mandate, the Court determined that "Congress may identify and redress the effects of society-wide discrimination," but that states and local governments did not have the same discretion. *Id.*

Congress is afforded considerable latitude in the manner in which it identifies and redresses racial discrimination through its power to enforce the Civil War Amendments. *See Adarand*, 228 F.3d at 1163; *Metro Broadcasting*, 497 U.S. at 605 (O'Connor, J., dissenting) ("Congress has considerable latitude, presenting special concerns for judicial review, when it exercises its 'unique remedial powers . . . under § 5 of the Fourteenth Amendment'"); *Croson*, 488 U.S. at 504; *see also Garrett*, 121 S. Ct. at 964-65; *Kimel*, 528 U.S. at 89. Indeed, the *Croson* Court recognized this principle when it said that "[t]he degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body." 488 U.S. at 489 (quoting *Fullilove*, 448 U.S. at 515-16 n.14). That is, the evidentiary showing necessary for Congress to demonstrate a compelling interest must be evaluated in the context of its legislative jurisdiction and unique enforcement powers. Because Congress' legislative authority differs from that of states and localities, so does the nature of the evidence required for it to demonstrate a compelling interest. *See id.* at 491.

Congress is not an amalgam of city councils, and is not required to develop an evidentiary predicate with the kind of local precision required of individual municipalities. *See Oregon v. Mitchell*, 400 U.S. 112, 133, 233 (1970) (upholding constitutionality of ban on literacy tests in national elections despite absence of state-by-state findings of discrimination); *see also id.* at 284 ("Congress was not required to make state-by-state findings" concerning the

discriminatory impact of literacy tests) (Stewart, J., with Burger, C.J., and Blackmun, J.). Although the scope of unlawful discrimination is undoubtedly relevant to the existence of a compelling interest to employ race-conscious remedies, *see U.S. v. Morrison*, 529 U.S. 598, 626-27 (2000), this Court has never held that Congress' capability to adduce such evidence is limited to locating unconstitutional discrimination in some particular number of states or localities. *See Boerne*, 521 U.S. at 533 (recognizing that although geographic limitations may ensure that Section 5 legislation is proportionate to the scope of the harm, "[t]his is not to say, of course, that § 5 legislation requires . . . geographic restrictions"). And it similarly has never held that Congress must adduce city-by-city, region-by-region, or state-by-state evidence of unconstitutional discrimination before it may legitimately impose national remedies. *See Adarand*, 228 F.3d at 1165 n.10.

Indeed, to require findings of discrimination in some pre-specified number of states would not only infringe on the deference afforded Congress to determine the content of remedial legislation, *see Boerne*, 521 U.S. at 536; *Kimel*, 528 U.S. at 81, it would also inappropriately constrain the evidentiary processes through which Congress enacts such legislation.[28] A requirement of state-by-state findings before Congress could enact remedial legislation would effectively eliminate its enhanced role as a national legislature brought about by the Civil War Amendments, and virtually guarantee that Congress could never pass such legislation. *See Rothe*,

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[28] On this latter point, this Court has deferred to Congress' competence to select the specific fact-finding avenues through which it detects unconstitutional discrimination. *See Boerne*, 521 U.S. at 531-32 ("As a general matter, it is for Congress to determine the method by which it will reach a decision."); *Fullilove*, 448 U.S. at 499-502 (Powell, J., concurring) (noting that Congress is especially qualified to make findings of fact).

49 F. Supp. 2d at 949. Such a result would contradict this Court's admonition in *Adarand* that strict judicial scrutiny not be "strict in theory, but fatal in fact." 515 U.S. at 237.

Petitioner mistakenly cites certain recent cases -- including *Boerne*, *Garrett*, and *Morrison* -- for the proposition that a compelling interest to remedy race discrimination is only justifiable in those states in which Congress has specifically found discrimination. (Pet. Br. at 33.) None of these cases provides support for Petitioner's position. *Boerne*, for example, does not provide that state-specific findings are required before national remedies may be imposed. Indeed, it specifically states that geographic restrictions are not required under Section 5. *See Boerne*, 521 U.S. at 533. The Court contrasted the evidence supporting laws motivated by religious bias with the evidence of racial discrimination supporting the provisions of the Voting Rights Act (VRA). *Id.* at 532-33. It concluded that, as the Court defined the right to religious freedom under the First Amendment, Congress adduced insufficient evidence of governmental infringement on that right to justify the Religious Freedom Restoration Act. *See id.*

Similarly, in *Garrett*, the Court ruled that Congress did not adduce sufficient findings that a nationwide pattern of *government* discrimination supported the Americans with Disabilities Act (ADA) as a valid exercise of Section 5. 121 S. Ct. at 965. Although the *Garrett* Court contrasted the evidence before Congress in enacting the VRA as instructive of the comparative insufficiency of the ADA findings, *id.* at 967, it did not hold that Congress must make state-specific findings before imposing national remedies. *Id.*

In *Morrison*, the Court contrasted the provision of the Violence Against Women Act (VAWA) at issue in that case with certain VRA provisions. 529 U.S. at 626-27. In finding a portion of VAWA unconstitutional, the Court noted in *dicta* that VAWA's remedies applied nationally, while the VRA's remedies applied only in those states where Congress

found discrimination. *See id.* In acknowledging these differences, however, the Court did not overrule its prior holding that Congress only need identify a "nationwide pattern of discrimination" before enacting remedial legislation, *see Kimel*, 528 U.S. at 89, a point demonstrated by the Court's subsequent decision in *Garrett*, 121 S. Ct. at 965.

The record before Congress is sufficient to establish such a nationwide pattern of discrimination in the construction industry. Although there is no requirement of geographic-specific findings of discrimination *to justify* remedial legislation, the DBE program employs the consideration of local market conditions in the operation of the program. Under the regulations, recipients set their own minority participation goals based on the availability of minority contractors in the local market. 49 C.F.R. § 26.45. To the extent that race-conscious measures are undertaken at all, they may be based on a variety of factors in the local market, including past utilization. *Id.* This requirement operates to tailor DBE participation goals to local needs and to limit the race-conscious measures of the program to those geographic regions where local market conditions indicate a need. For these reasons, Petitioner's reliance on *Boerne*, *Garrett*, and *Morrison* is misplaced.

II. THE DBE PROGRAM IS NARROWLY TAILORED TO SATISFY CONGRESS' COMPELLING INTERESTS.

In remanding this case, this Court in *Adarand* identified two specific questions for the lower court to address in the narrow tailoring inquiry: (i) whether Congress considered race-neutral means to achieve its interests, 515 U.S. at 237-38; and (ii) whether the DBE program was appropriately limited to "not last longer than the discriminatory effects it is

designed to eliminate,"[29] *id*. (quoting *Fullilove*, 448 U.S. at 513). With respect to these factors, the revised DBE program falls well within constitutional bounds. *See Adarand*, 228 F.3d at 1176-87. Moreover, other factors, such as the program's individualized inquiry into disadvantage and its limited burdens on third parties, demonstrate that the program is narrowly tailored.

Race-neutral Alternatives. The DBE program requires that participants employ race-conscious remedies only as a last resort. Specifically, applicable regulations mandate that participants "must meet the maximum feasible portion of [their] overall goal by using race-neutral means of facilitating DBE participation." 49 C.F.R. § 26.51(a). These race-neutral alternatives may include outreach efforts, the provision of technical assistance to small businesses, and the formation of lending and bonding programs to assist small businesses in obtaining financing. *See* 49 C.F.R. § 26.51; *see also Adarand*, 228 F.3d at 1178-79. By law, therefore, a recipient must use race-neutral alternatives to achieve as much of its minority participation goal as possible *before* adopting any race-conscious measures. 49 C.F.R. § 26.51(d). If a recipient expects to be able to meet its entire overall goal through race-neutral means, it must implement its program without any use of race-conscious measures. *Id.* § 26.51(f)(1). The DBE program, therefore, satisfies this part of the strict scrutiny test. *See Croson*, 488 U.S. at 507.

Durational Requirements. The DBE program is also appropriately limited to ensure that race-conscious measures last no longer than necessary to address the discriminatory effects Congress identified. First, the DBE program, along

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[29] The Court identified these issues in connection with program-specific questions related to older versions of the relevant statutes and regulations, *Adarand*, 515 U.S. at 237-38, some of which are no longer in effect, *see Adarand*, 228 F.3d at 1159.

with TEA-21, expires in 2004, unless Congress reauthorizes the program pursuant to a determination that its remedies remain necessary. 64 Fed. Reg. at 5103. Second, the regulations require a recipient to reevaluate its DBE participation goal annually. Based on this annual review, the recipient proposes its minority participation goal for the following year and must reduce or eliminate the use of race-conscious means to the extent they become unnecessary. 49 C.F.R. § 26.51(f). Third, the duration of participation for any particular individual or firm is limited by the personal net worth threshold and business size requirements. When an individual's personal wealth exceeds $750,000, *see id.* § 26.67, or the DBE's gross receipts are inconsistent with those of a small business, *see id.* § 26.65, DBE program eligibility ends.

The durational limitations are bolstered by other aspects of the DBE program that ensure it is both flexible and limited in scope. The DBE program is strictly voluntary in that prime contractors are not denied opportunities to participate in federal procurement programs, and no contracts are withdrawn if a contractor fails to satisfy the participation goals. *See id.* § 26.51; 64 Fed. Reg. at 5098. Moreover, the statute explicitly provides that the Secretary of Transportation may waive the participation goal for any reason, Pub. L. No. 105-178, § 1101(b), and, under the DOT regulations, state and local recipients of DOT financial assistance may apply for waivers that will release them from almost any DOT regulation if they believe that they can achieve equal opportunity for DBEs through alternative approaches. 49 C.F.R. § 26.15. Correspondingly, recipients can be exempted from any provision of the regulations if special circumstances make compliance impractical. *See id.* § 26.15(a).

Individualized Inquiry. This Court has never held that a race-conscious remedy is constitutional only if it provides for an inquiry into the propriety of each beneficiary's receipt of

remedial aid. *See Adarand*, 515 U.S. at 237-38; *Croson*, 488 U.S. at 507-08. Nevertheless, the current DBE program provides for an individualized inquiry into each and every person who seeks the DBE designation to ensure that the program is proportional to the harm it seeks to remedy and prevent. *See Boerne*, 521 U.S. at 533. As Petitioner acknowledges (Pet. Br. at 10 n.6), the program provides that every participating business -- including "each presumptively disadvantaged" firm -- must be *certified* as a disadvantaged business enterprise. 49 C.F.R. § 26.67(a)(1). The certification process includes submission of a written, notarized certification of actual disadvantage and proof of personal worth, which is signed under penalty of perjury. *Id.* § 26.67(a). Contrary to Petitioner's suggestion (Pet. Br. at 11), the presumption of disadvantage does not alone render a business enterprise automatically eligible for the program. First, although several racial and ethnic groups are considered presumptively disadvantaged, if a particular group is not represented among a local market's available contractors, it will not be included in the analysis of available firms the recipient uses to set its participation goals. 49 C.F.R. § 26.45(b). Second, the government has crafted the implementing regulations to ensure that only disadvantaged persons participate. *See* Participation by Disadvantaged Business Enterprises in Dep't of Transporation Financial Assistance Programs, 66 Fed. Reg. 23,208, 23,210 (May 8, 2001) (to be codified at 49 C.F.R. pt. 26) (noting the importance of requiring proof of personal worth because "[r]ecipients must have a tool to ensure that non-disadvantaged persons do not participate in the program"). If the individual's worth exceeds the regulatory limit or if the individual is not in fact socially or economically disadvantaged, the presumption is rebutted. 49 C.F.R. § 26.67(b). By including a rebuttable presumption in the statutory scheme, Congress recognized the possibility that the opportunities of particular minority individuals may not now be affected by discrimination and its accompanying

disadvantages, and also that members of other groups may have suffered comparable social and economic disadvantage. *See Fullilove*, 448 U.S. at 489.

Minimal Impact on Third Parties. The DBE program exacts a relatively small cost on firms that do not receive a presumption of disadvantage. As long as a prime contractor makes good faith efforts to satisfy the participation goal, it will never lose a contract for failure to comply. 64 Fed. Reg. at 5098. In addition, to avoid any undue burden on non-DBE firms, the revised regulations require recipients to guard against an overconcentration of DBEs in a certain type of work; if a recipient determines that "DBE firms are so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work," it must devise strategies to address the overconcentration. 49 C.F.R. § 26.33 (describing strategies recipient might invoke to ensure "that non-DBEs are not unfairly prevented from competing for subcontracts"). Moreover, a firm *not* owned by a woman or member of a racial minority group can itself qualify as socially disadvantaged by a mere preponderance of the evidence.[30] *Id.* § 26.61(d). To the extent that any subcontractors are disadvantaged by their exclusion from the presumption of disadvantage, it is only incidental. Such a burden is permissible where the aim, as here, is to eradicate racial discrimination and its effects. *See, e.g.*, *Wygant*, 476 U.S. at 280-81.

In contrast, the detriment to minority businesses in the absence of the DBE program would be substantial. By all accounts, the participation of minority businesses in government procurement programs would "fall dramatically

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[30] Under the old DOT regulations, non-minority applicants who sought DBE certification had to prove social disadvantage by clear and convincing evidence. *See Adarand*, 228 F.3d at 1191.

in the absence of at least some kind of remedial measures." 61 Fed. Reg. at 26,053; *see also id.* at 26,062 & nn.130-34 (citing studies); *Adarand*, 228 F.3d at 1174; 144 Cong. Rec. S1404 (daily ed. Mar. 5, 1998) (statement of Sen. Baucus) (citing experience of Michigan, where DBE participation in state highway program fell to zero in nine-month period after state terminated DBE program).[31] Considering the relative burden on affected parties and judged against the backdrop of this Court's equal protection jurisprudence, the DBE program is narrowly tailored to accommodate the government's legitimate remedial and preventive interests.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

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[31] *See also* 144 Cong. Rec. S1409-10 (statement of Sen. Kerry) (citing similar decreases in Louisiana, Florida, and California); *id*. at S1420-21 (statement of Sen. Moseley-Braun) (citing similar examples in Arizona, Arkansas, Rhode Island, and Delaware); *id*. at S1429-30, S1482 (statement of Sen. Kennedy) (citing similar examples in Nebraska, Missouri, Florida, and Pennsylvania).

Respectfully submitted,

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