IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1665

SHERBROOKE TURF, INC.,

Plaintiff-Appellant

v.

MINNESOTA DEPARTMENT OF TRANSPORTATION, *et al.*,

Defendants-Appellees

UNITED STATES OF AMERICA, *et al.*,

Intervenor/Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE UNITED STATES AS APPELLEE

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SUMMARY OF THE CASE

As a condition for receiving federal financial assistance for highway construction under the Transportation Equity Act for the 21st Century (TEA-21), the Minnesota Department of Transportation (MNDOT) has developed and implemented a disadvantaged business enterprise (DBE) program. Sherbrooke Turf, Inc. (Sherbrooke), which is not a DBE, provides landscaping services along highways in Minnesota and bids on federally-assisted highway construction subcontracts. In April 2000, Sherbrooke sued MNDOT for a declaration that the DBE provisions in TEA-21 and its implementing regulations are unconstitutional

facially and as applied, and to enjoin the State of Minnesota's DBE program. The United States, U.S. Department of Transportation, and Federal Highway Administration (collectively, Federal Defendants) intervened in the district court. Ruling on cross-motions for summary judgment, the district court held that the DBE program was constitutional both facially and as applied to Sherbrooke. The district court also denied Sherbrooke's motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). Sherbrooke appeals from the denial of its Rule 59(e) motion.

STATEMENT OF THE ISSUES

1. Whether Sherbrooke has standing to challenge the constitutionality of the DBE Program.

- *Northeastern Fla. Chapter of Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656 (1993).

2. Whether a recipient of federal aid under TEA-21 must show that its implementation of the federal DBE program is narrowly tailored to serve a compelling interest.

- *Ellis* v. *Skinner*, 961 F.2d 912 (10th Cir. 1992);
- *Harrison & Burrowes Bridge Constructors, Inc.* v. *Cuomo*, 981 F.2d 50 (2d Cir. 1992);
- *Tennessee Asphalt Co.* v. *Farris*, 942 F.2d 969 (6th Cir. 1991);
- *Milwaukee County Pavers Ass'n* v. *Fiedler*, 922 F.2d 419 (7th Cir. 1991).

3. Whether the district court correctly determined that the federal DBE program is facially constitutional.

- *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995);
- *United States* v. *Salerno*, 481 U.S. 739 (1987);
- *United States* v. *Paradise*, 480 U.S. 149 (1987);
- *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147 (10th Cir. 2000).

4. Whether the district court correctly determined that the federal DBE program is constitutional as applied.

- *Milwaukee County Pavers Ass'n* v. *Fiedler*, 922 F.2d 419 (7th Cir. 1991).

STATEMENT OF THE CASE

This case arises out of Congress's longstanding efforts to distribute federal highway construction and transit 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 U.S. Department of Transportation's (DOT's) Disadvantaged Business Enterprise program, which provides opportunities for socially and economically disadvantaged businesses to participate in federally-aided highway and transit programs. Sherbrooke challenges the constitutionality of this program both on its face and as applied to Sherbrooke by MNDOT.

1. *Federal DBE Program*. In response to the Supreme Court's decision in *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995) (*Adarand III*), which held that the constitutionality of the federal DBE program must be evaluated under

strict scrutiny, DOT in February of 1999, issued new regulations revamping its 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)(2)(B), 112 Stat. 113, DOT's DBE program employs the definitions of "social" and "economic" disadvantage contained in the Small Business Act (SBA), 15 U.S.C. 631 *et seq*. See also *Adarand III*, 515 U.S. at 208 (similar incorporation of those definitions required by TEA-21's predecessors). Thus, for purposes of the DBE program, an individual is "[s]ocially 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)(A). The determining factor is not the individual's race, but 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 sustained diminished capital and credit opportunities compared to those who have not been victims of such discrimination. The Secretary's regulations make it clear the DBE program is aimed at 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. 26.61(b) & Pt. 26, App. E.

As Congress required in TEA-21, § 1101(b)(2)(B), 112 Stat. 113, the Secretary's regulations also incorporate a race-based presumption from the SBA. In particular, TEA-21 adopts the SBA's presumption "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" SBA, 15 U.S.C. 637(d)(3)(C). See 49 C.F.R. 26.67(a). As required by statute, see TEA-21, § 1101(b)(2)(B), 112 Stat. 113, the Secretary's regulations articulate a further presumption that women are disadvantaged in the highway and transit construction industry. See 49 C.F.R. 26.67(a)(1). Those presumptions of social and economic disadvantage are rebuttable. See 49 C.F.R. 26.67(a), (b).

Pursuant to his authority to "establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies" as a DBE, see TEA-21, § 1101(b)(4), 112 Stat. 114; *Adarand III*, 515 U.S. at 208, the Secretary has issued regulations designed to channel benefits of DBE certification to firms owned by individuals who are, in fact, socially and economically disadvantaged. DOT thus requires applicants for DBE certification who are statutorily presumed to be disadvantaged to "submit a signed, notarized certification that" they are "in fact, socially and economically disadvantaged." 49 C.F.R. 26.67(a)(1); *id.* at 26.83(c)(7)(ii) (applicants must attest by affidavit or declaration executed under penalty of perjury that the information on their DBE application form is accurate

and truthful). The regulations admonish applicants that 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 must also 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 race, ethnicity, or gender. 49 C.F.R. 26.67(b)(1). Anyone, including competitors, 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 investigate the firm and decertify it if the firm does not meet the requirements for social and economic disadvantage. 49 C.F.R. 26.67(b)(2).

To ensure that remedies for the effects of discrimination are tailored to local conditions, the Secretary's regulations require States and localities receiving federal aid to establish numerical measurements, based on local DBE availability and other evidence, to assess 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 rigid figure based

on past goals, a flat 10% 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 ready, willing and able to participate on * * * DOT-assisted contracts." 49 C.F.R. 26.45(b), (c). Recipients must then "examine all of the evidence available" in the jurisdiction to determine what adjustments should be made to ensure that the resulting standard 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 state and local aid recipients must seek to eliminate the effects of discrimination through race- and gender-neutral means to the maximum extent feasible. 49 C.F.R. 26.51(a). Recipients must consider arranging solicitations in ways that facilitate participation by small businesses, including DBEs; providing race- and gender-neutral assistance in overcoming limitations such as the inability to obtain bonding or financing; offering technical assistance and services to small businesses; and engaging 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 prove insufficient. 49 C.F.R. 26.51(d). Quotas are expressly prohibited, and the Secretary will not authorize the use of set-asides except in the most egregious instances of otherwise irremediable discrimination. 49 C.F.R. 26.43. Recipients must discontinue the use of race- or gender-conscious measures if, at any point, it appears that they can achieve adequate DBE

participation through race- and gender-neutral means. 49 C.F.R. 26.51(f)(1).

Recipients of DOT financial assistance may apply to DOT for waivers from almost any DBE regulations 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 race- and gender-neutral measures have proven inadequate and a recipient establishes a DBE participation goal for particular contracts, contractors must pursue that goal 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. *Minnesota's Implementation Of DOT's DBE Program*. In 1998, the district court enjoined Minnesota's implementation of an earlier version of the federal DBE program. See *In re Sherbrooke Sodding Co.*, 17 F. Supp. 2d 1026, 1032 (D. Minn. 1998) (Rosenbaum, J.). The district court had held that, although the former DBE program was supported by a compelling interest, it was not narrowly tailored. *Id.* at 1032, 1034-1037. Since that decision, DOT has promulgated new DBE regulations, specifically designed to narrowly tailor the federal DBE program, that have been found by a court of appeals to satisfy the narrow tailoring requirement of strict scrutiny. See *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147, 1176-1187 (10th Cir. 2000) (*Adarand VII*), cert. dismissed

as improvidently granted, 534 U.S. 103 (2001).

The Minnesota Department of Transportation (MNDOT) spent two years determining how it would comply with the new regulations. To comply with DOT's regulations, MNDOT commissioned two separate consultants – Mason Tillman Associates (MTA) in 1999 and National Economic Research Associates (NERA) in 2000 – to calculate whether minority- and women-owned business enterprises were underutilized in federally-funded highway construction contracts in Minnesota (see NERA Study at 1-2, 18-20 (MA127-128); Dep. of Ernest Lloyd at 68-69 (MA110-111).[1]

Based on the NERA Study, which took into account the MTA Study, MNDOT concluded that DBEs were underutilized. The NERA Study determined the appropriate geographic market for MNDOT's highway construction industry, then estimated the baseline DBE availability (adjusting for any over- and under-count of DBEs), and classified their availability within Minnesota based on their geographic concentration and specialty industry codes for highway construction (see NERA Study at 3-17 (MA129-143)). According to the NERA Study, DBEs providing construction and professional engineering services in Minnesota were

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[1] "A__-__" indicates the relevant page numbers of Appellant's Appendix. "SA__- __" refers to the relevant page numbers of Federal Defendants' Supplemental Appendix, and "MA__-__" refers to the relevant page numbers of the Minnesota Appendix. "Br. __" indicates the page numbers of Sherbrooke's opening brief, and "Add. __" refers to the relevant page numbers of the Appellant's Addendum. "Tr. __" indicates the relevant pages of the transcript for the March 28, 2001, hearing on the parties' cross-motions for summary judgment. "Doc. __" refers to the docket entry on the district court docket sheet.

11.4% of the market (see *id.* at 15 (MA141)). NERA further refined the underutilization determination to 11.6% through regression analyses that revealed that minorities have lower business formation rates than whites even after accounting for other observable individual characteristics (see *id.* at 20-27 (MA146-153)).

MNDOT thus set 11.6% as the aspirational annual goal for DBE participation in Minnesota. And, as required by 49 C.F.R. 26.51, MNDOT calculated the portion of that goal that could be met through race-neutral means. Based upon a decline in DBE participation in federally-assisted highway construction contracts from 10.25% in 1998 to 2.25% in 1999, when Minnesota's DBE program was enjoined, MNDOT concluded that it could meet 2.6% of its annual goal through race-neutral means and 9% of its goal through race-conscious means (see Affidavit of Michael Garza (Garza Aff.) ¶ 11 & Ex. A (MA2, 9); Statement on the United States Department of Transportation's Approval of Minnesota's Fiscal Year 2000 Disadvantaged Business Enterprise Program (Ashby Statement) at 18 (SA18)). After reviewing the NERA Study and other materials submitted by MNDOT, DOT approved Minnesota's implementation of the DBE program (see Ashby Statement at 14-24 (SA14-24)).

3. *Statement Of Facts And Proceedings Below.* In April 2000, Sherbrooke, a non-DBE firm owned by a white male, sued MNDOT for declaratory and injunctive relief, alleging that the DBE provisions in TEA-21 and its implementing regulations are facially unconstitutional in violation of equal protection, and that the

DBE program, as implemented by MNDOT, was unconstitutionally applied to Sherbrooke. The United States, DOT, and Federal Highway Administration, a DOT agency, (collectively, Federal Defendants) intervened as defendants (Doc. 16).

Subsequently, Federal Defendants and MNDOT (collectively, defendants) moved to dismiss for lack of standing, and each party filed cross-motions for summary judgment. At the March 28, 2001, hearing on the summary judgment motions, the district court requested that Federal Defendants submit in writing "five or ten" examples in the legislative record "that represent hard findings of discrimination in the road construction program" (Tr. 61 (A849)). As requested, on April 10, 2001, Federal Defendants filed with the court five examples of anecdotal evidence of discrimination before Congress and six examples of statistical evidence (Doc. 86; see also A653-655).

Also during the March 28, 2001, hearing, the district court orally denied defendants' motion to dismiss for lack of standing, holding that Sherbrooke had standing based on its allegation of its inability to compete against DBEs on equal footing (see Tr. 75 (A863)). After the hearing, however, the district court sua sponte ordered Sherbrooke to amend its complaint to "specify the facts necessary to support [its] standing" to challenge the DBE program (see A651). In its Third Amended Complaint, Sherbrooke alleged that it lost two subcontracting projects – the Sterns County and Ottertail County Projects – to DBEs (see A666-668). The

court, on May 4, again concluded that Sherbrooke had standing (A675).[2]

On November 15, 2001, the district court granted defendants' motions for summary judgment (see Add. 1). Applying strict scrutiny, the court held that the DBE program was constitutional, facially and as applied. First, the court found persuasive the Tenth Circuit's analysis of the legislative history in *Adarand VII* and that court's conclusion that Congress had a strong basis in evidence in finding a compelling interest to support the DBE provision in TEA-21 (Add. 11-12). The district court rejected Sherbrooke's assertion that the court may not rely on the Tenth Circuit's "painstaking[]" review of the evidence before Congress and must "reconsider every piece of evidence presented to Congress" to "independently determine the validity and worthiness of the compelling interest" (Add. 12-14).

The district court also found that the federal DBE program, as implemented through 49 C.F.R. Pt. 26, is narrowly tailored (Add. 23). In particular, the court determined that 49 C.F.R. 26.51 "reveal[s] a heightened commitment to incorporating race-neutral elements in the DBE program" (Add. 16); that the duration of the program is limited on several levels because TEA-21 will expire at the end of fiscal year 2003, a state DBE program terminates if a State meets its annual goals through race-neutral means for two consecutive years, and DBEs must be certified annually with their financial and contracting records reviewed by the recipient before each certification (Add. 17-18); that recipients are required to

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[2] Sherbrooke later stipulated to striking all allegations concerning the Sterns County Project in its amended complaint (Doc. 107).

ensure that the DBE program does not unfairly burden non-DBE subcontractors (Add. 18-19); and that the regulations "explicitly" prohibit quotas for DBE participation and require recipients to identify ready, willing and able DBEs in the relevant geographic market to avoid random inclusion of individuals as DBEs (Add. 20-23).

Lastly, the district court held that MNDOT need not independently demonstrate that its implementation of the federal program is narrowly tailored to serve a compelling interest in Minnesota (Add. 25-26). It is well-established, according to the court, that when a State participates in a heavily regulated federal program, as in this case, any challenge to the state program requires only a showing that the State is in compliance with the underlying federal program (*ibid.*). Thus the court concluded, because Sherbrooke did not raise a triable issue regarding MNDOT's compliance with the federal DBE regulations, Minnesota's implementation of the federal DBE program is constitutional as applied (Add. 24-26).

4. *Standard Of Review.* The Court reviews a denial of a motion for postjudgment relief pursuant to Federal Rule of Civil Procedure 59(e) for an abuse of discretion. See *Roark* v. *City of Hazen*, 189 F.3d 758, 761(8th Cir. 1999). In this case, the Court's review will necessarily include a review of the district court's rulings on the parties' cross-motions for summary judgment. Summary judgment is "appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Hunt* v. *Cromartie*, 526

U.S. 541, 549 (1999). A genuine issue of fact is material if it "might affect the outcome of the suit under governing law." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Conclusory affidavits, even from expert witnesses, are insufficient to raise a genuine issue of fact. See *Godfrey* v. *Pulitzer Publ'g Co.*, 276 F.3d 405, 412 (8th Cir. 2002); *Jackson* v. *Anchor Packing Co.*, 994 F.2d 1295, 1304 (8th Cir. 1993). The Court reviews de novo the district court's legal conclusion that no genuine issue of material fact existed for trial. See *Carroll* v. *Pfeffer*, 262 F.3d 847, 849 (8th Cir. 2001), cert. denied, 122 S. Ct. 2363 (2002).

SUMMARY OF ARGUMENT

While Sherbrooke has standing to challenge the constitutionality of DOT's current DBE program on its face and as applied, its challenges are unavailing.

Sherbrooke focuses its facial attack on the adequacy of the record of discrimination before Congress when it enacted TEA-21 mainly by accusing government attorneys of misrepresentation and courts of ignorance. The legislative record, however, shows that Congress authorized DOT to adopt a DBE program against a backdrop of extensive evidence 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 alleged 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 if Congress did not have evidence of discrimination in a particular jurisdiction or in every jurisdiction across the Nation. In asserting that all recipients of TEA-21 aid must independently satisfy strict scrutiny on top of the compelling interest showing required of Congress, Sherbrooke seeks to effectively require Congress to have evidence of discrimination in every State before legislating nationwide. Congress's authority to remedy discrimination is not so limited, however, especially where the implementing regulations seek to limit race-conscious remedies to jurisdictions where the effects of discrimination remain a problem and race-neutral remedies have thus far proved insufficient.

At bottom, Sherbrooke's complaints have little place in the context of a facial challenge. Together, the statutory and regulatory provisions of the federal DBE program are designed to limit race-conscious remedies to *only* those in jurisdictions where discrimination or its effects remain a problem and race-neutral relief has been proven insufficient. First, notwithstanding the statutory racial presumption, DOT's regulations limit DBE status to firms owned by individuals who have suffered the effects of discrimination. Discrimination, not race, is the key to DBE status. Second, state and local recipients of federal aid must assess the local market to determine whether there is a need for race-conscious remedies to redress the effects of discrimination in their jurisdiction. Even where such a need is identified, aid recipients may use race-conscious remedies only as a last resort. Third, the regulations have built-in flexibility to allow aid recipients to address the

specific problems confronted in a particular jurisdiction.

With respect to Sherbrooke's as applied challenge, which is addressed more fully in MNDOT's brief, the district court correctly concluded that Sherbrooke's loss of one or two projects to DBE firms out of the approximate 200 bids that it submits annually since the enactment of TEA-21 does not raise a triable issue regarding whether MNDOT's implementation of the federal DBE program, which was expressly approved by DOT, unconstitutionally burdens third parties. On appeal, Sherbrooke relies on stray statements by state employees that they were not personally aware of any specific instances of discrimination to challenge MNDOT's administration of the DBE program. Sherbrooke, however, concedes that the state employees "did not say there isn't" any discrimination. Thus, the district court properly granted summary judgment for defendants on both the facial and as applied challenges.

ARGUMENT

I. SHERBROOKE HAS STANDING TO CHALLENGE THE DBE PROGRAM

Sherbrooke has standing to challenge the DBE program both on its face and as applied. As the Supreme Court held in *Northeastern Florida Chapter of Associated General Contractors of America* v. *City of Jacksonville*, 508 U.S. 656, 666 (1993), standing is established in equal protection cases of this type when a party alleges an "inability to compete on equal footing in the bidding process, not the loss of a contract." Accord *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200,

211 (1995) (*Adarand III*). Sherbrooke has done so (A668-669), as the district court has twice held (A863, A675). The court again reaffirmed (Add. 28) this determination when it denied Sherbrooke's motion to alter the judgment, in which Sherbrooke argued that the court's decision on the cross-motions for summary judgment implicitly found that Sherbrooke did not have standing to pursue the as applied challenge.

Contrary to Sherbrooke's assertion (Br. 18-31), the district court's order did not find that Sherbrooke lacked standing to pursue its as applied challenge. The court's discussion of the fact that Sherbrooke has identified only one or two contracts that it lost under Minnesota's DBE program relates not to whether Sherbrooke has standing but to whether the program unconstitutionally overburdens Sherbrooke (Add. 23-24). The Supreme Court held that "innocent persons may be called upon to bear some of the burden of the remedy" for discrimination, *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 281 (1986) (plurality), so long as that burden is not "unacceptabl[y]" substantial, see *United States* v. *Paradise*, 480 U.S. 149, 182 (1987) (plurality). The district court thus concluded that losing one or two contracts to DBE firms, out of the 200 bids that Sherbrooke submits annually in Minnesota, did not show that the DBE program caused an "unconstitutional burden" on Sherbrooke's ability to compete for landscaping subcontracts and, therefore, Sherbrooke was not entitled to judgment in its as applied challenge (Add. 23-24).

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT RECIPIENTS OF TEA-21 FINANCIAL ASSISTANCE NEED NOT INDEPENDENTLY SATISFY STRICT SCRUTINY

Sherbrooke contends (Br. 31-41) that case law and the federal DBE regulations require MNDOT, as a federal aid recipient under TEA-21, to demonstrate that its implementation of the DBE program meets strict scrutiny. This is an unusual – and improper – collateral attack on the federal DBE program. Although this Court has not addressed this issue, the Second, Sixth, Seventh, and Tenth Circuits have held in challenges to various States' implementations of an earlier version of the DBE program that, if a state agency is merely complying with federal law, its conduct is constitutional if the underlying federal program is itself constitutional. See *Ellis* v. *Skinner*, 961 F.2d 912, 915 (10th Cir. 1992); *Harrison & Burrowes Bridge Constructors, Inc.* v. *Cuomo*, 981 F.2d 50, 57 (2d Cir. 1992); *Tennessee Asphalt Co.* v. *Farris*, 942 F.2d 969, 975 (6th Cir. 1991); *Milwaukee County Pavers Ass'n* v. *Fiedler*, 922 F.2d 419, 423 (7th Cir. 1991). See also *Converse Constr. Co.* v. *Massachusetts Bay Transp. Auth.*, 899 F. Supp. 753, 761 (D. Mass. 1995).

For example, in *Milwaukee County Pavers Ass'n*, 922 F.2d at 423, the Seventh Circuit stated that "[i]f the state does exactly what the [federal] statute expects it to do," and the statute is constitutional, "we do not see how the state can be thought to have violated the Constitution." Moreover, "[i]nsofar as the state is merely doing what the statute and regulations envisage and permit, the attack on the state is an impermissible collateral attack on the statute and regulations." *Id.* at

424. Because Congress may "enlist a branch of state government * * * to further federal ends," see *FERC* v. *Mississippi*, 456 U.S. 742, 762 (1982), "[t]o disallow the states from playing this role would merely hamstring" an otherwise constitutionally sound federal program, *Milwaukee County Pavers Ass'n*, 922 F.2d at 424. Thus, whether MNDOT's implementation of the federal DBE program here is lawful "depends on whether the [State] exceeded its federal grant of authority," see *Harrison & Burrowes*, 981 F.2d at 57, and not whether MNDOT's implementation of the DBE program independently satisfies strict scrutiny.

Sherbrooke contends (Br. 35-36) that MNDOT must satisfy strict scrutiny because the federal DBE regulations allow MNDOT discretion to set its own annual goals for DBE participation, do not require MNDOT to use a race-conscious program if it determines that race-neutral means are adequate to meet its annual goals, and provides that MNDOT cannot be disciplined simply for not meeting its annual goals. Sherbrooke fundamentally misunderstands the requirements of TEA-21 and DOT's regulations. Sherbrooke implies that recipients may accept TEA-21 funding without any corresponding obligations under the statute and regulations. To the contrary, all recipients of TEA-21 funds must determine the level of ready, willing and able DBE firms within their market, 49 C.F.R. 26.45; must set an annual goal for DBE participation pursuant to the guidelines set forth in Section 26.45, *ibid.*; and must meet the maximum feasible portion of their annual goal through race-neutral means, 49 C.F.R. 26.51. Recipients must submit their goals and other terms of their DBE program to DOT for approval before they may

participate in the federal DBE program. 49 C.F.R. 26.47. Only if a recipient cannot satisfy its goal through race-neutral methods is it permitted to use the race-conscious means contained in the regulations. 49 C.F.R. 26.51. Although recipients are not penalized for not meeting an annual goal, they must nonetheless demonstrate that they tried to fulfill the goals in good faith or be deemed in noncompliance with TEA-21's regulations. 49 C.F.R. 26.47; see also *id.*, Pt. 26, App. A. These are requirements that all recipients *must* follow if they accept DOT's funds.

While flexibility is the touchstone of the federal DBE regulations, recipients do not have discretion about complying with the DBE provisions in the regulations. Thus, far from being free to disregard the race-conscious provisions in the federal regulations, a local highway or transit authority that receives TEA-21 funding is expressly obligated to comply with those provisions or explain that it was able to meet its annual goals entirely through race-neutral means or that it failed to meet those goals despite acting in good faith. 49 C.F.R. 26.51.

Similarly flawed is Sherbrooke's argument that the federal regulations themselves require MNDOT to show that the State's implementation independently satisfies strict scrutiny (Br. 37-41). It is true that the federal regulations require that recipients will administer the federal DBE program to reflect local conditions. But nowhere do the regulations require a constitutional showing of local compelling interest. Nor is this necessary as a matter of law. See, *e.g.*, *Milwaukee County Pavers Ass'n*, 922 F.2d at 424. Indeed, if state recipients were required

independently to show that their implementation of the federal DBE program meets strict scrutiny, that would necessarily require Congress to have before it a strong basis in evidence of discrimination in all 50 States before it may enact even narrowly tailored legislation – legislation that imposes a remedy only in those markets where there is discrimination to remedy.[3] Courts have soundly rejected this argument. See *Adarand VII*, 228 F.3d at 1165 ("The fact that Congress's enactments must serve a compelling interest does not necessitate the conclusion that the scope of that interest must be as geographically limited as that of a local government."); *Rothe Dev. Corp.* v. *United States Dep't of Def.*, 262 F.3d 1306, 1329 (Fed. Cir. 2001) ("Whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, we do not think that Congress needs to have had evidence before it of discrimination in all fifty states in order to justify the 1207 program."). This Court should do likewise.

In addition, Congress has unquestioned authority under the Spending Clause, U.S. Const., Art. I, § 8, to "further broad policy objectives by conditioning 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). Sherbrooke cites no authority for the novel proposition that Congress cannot further its interest in remedying discrimination by imposing conditions on its

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[3] Legislation *mandating* the use of race-conscious remedies nationwide, even in regions where discrimination does not persist, would raise more difficult questions. But such concerns are best addressed through a narrow-tailoring analysis, not the compelling-interest inquiry.

spending unless it finds that discrimination exists in every State.

III. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE FEDERAL DBE PROGRAM IS FACIALLY CONSTITUTIONAL

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 III*, 515 U.S. at 237 (plurality). In enacting TEA-21, Congress sought 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).

To the extent DOT's DBE program relies on race-conscious criteria, it is subject to strict scrutiny.[4] 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 III*, 515 U.S. at 227. Although that standard is demanding, the Supreme Court has "dispel[led] the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Id.*

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[4] The gender-conscious provisions of TEA-21 and its implementing regulations are subject to intermediate scrutiny and thus need only be substantially related to the achievement of an important government interest. *Nguyen v. I.N.S.*, 533 U.S. 53, 60 (2001). Because the race-conscious provisions of TEA-21 and its implementing regulations meet the more rigorous standard of strict scrutiny, it is unnecessary for this Court to analyze separately the gender-conscious portions of the program under the intermediate scrutiny standard. Accordingly, for the sake of simplicity, TEA-21's race- and gender-conscious provisions are both discussed herein under the strict scrutiny standard.

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 [the Supreme Court] has set out" in its cases. *Ibid.*

With respect to Sherbrooke's facial challenge to the statutory and regulatory provisions underlying the DBE program, Sherbrooke may not prevail merely by asserting that they *might* be applied in an unconstitutional manner. Instead, Sherbrooke 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 Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 797-98 (1984) (emphasis added). A facial challenge is thus "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). As explained below, Sherbrooke has not shown, and cannot show, that DOT's DBE program is incapable of meeting this exacting standard.

A. Congress Has A Compelling Interest In Eliminating Discrimination And Its Effects In Government Spending And Procurement

"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). 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.* Although Sherbrooke does not challenge Congress's ability to use race-conscious measures to remedy private discrimination, it argues (Br. 42-58) that Congress did not have a "strong basis in evidence" for finding a national problem of discrimination in highway contracting. The district court properly rejected that argument (Add. 14).

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

The compelling interest inquiry is a question of law. As such, 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 Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 196 (1997). In *Adarand VII*, 228 F.3d at 1167-1176, the Tenth Circuit followed that methodology and correctly concluded, as a matter of law, that Congress had a compelling interest when it enacted TEA-21's contracting provisions and their predecessors. See also *Cortez III Serv. Corp.* v. *National Aeronautics & Space Admin.*, 950 F. Supp. 357, 361 (D.D.C. 1996) (Congress had a compelling interest to include race-conscious provisions in the SBA). In light of the Tenth Circuit's "painstakingly" thorough review of the evidence before Congress, it was entirely proper for the district court to rely on that analysis in finding Congress had a compelling interest to support the identical DBE provisions challenged here

(Add. 12).

As the Tenth Circuit and the district court concluded, the enormous body of evidence before Congress, accumulated over 30 years, establishes the compelling nature of Congress's interest in re-authorizing the DBE program in 1998. See *Fullilove* v. *Klutznick*, 448 U.S. 448, 503 (1980) (in reviewing the evidence supporting congressional action, courts may examine "the total contemporary record of congressional action dealing with the problems of racial discrimination against minority business enterprises") (Powell, J., concurring); see generally Expert Report of Dr. Ray Marshall (summary of evidentiary record before Congress) (SA25-79). Throughout the 1970s, a Permanent Select Committee of the House of Representatives conducted extensive hearings on the effects of discrimination on the distribution of contracting opportunities in a variety of industries (see SA80 (listing 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*, H.R. Rep. No. 1791, 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 the Supreme Court upheld in *Fullilove*, 448 U.S. at 492. "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." 448 U.S. at 477-478 (plurality); accord *id.* at 458-467, 473; *id.* at 503, 505-506 (Powell, J., concurring); *id.* at 520 (Marshall, J., concurring). 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 (1975). Congress's investigations throughout the 1980s and 1990s (see SA80-85) documented that minority-owned firms continue to suffer discrimination and its effects in a variety of ways.[5]

Congress likewise gathered extensive evidence of the incidence of discrimination in 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%

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[5] 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, 114, 118, 241 (1981) (*1980s Hearings*); *Minority Business and Its Contributions to the U.S. Economy of the Senate Comm. on Small Business: Hearing Before 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* 106, 114, 118, 241. The House Report found that the observed 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 supported that conclusion. See, *e.g.*, *The State of Small Business: A Report of the President to Congress* 362 (1994) (minority owned businesses represent 9% of total business community but receive 4.1% of federal procurement dollars); *The State of Small Business: A Report of the President to Congress* 323 (1995) (4.7% 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).

nationwide aspirational goal for DBE participation on federally-funded highway construction and mass transit projects. For two years, through at least eight hearings, Congress then investigated and evaluated the effect of that provision before renewing it 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 SA83 (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 SA84 (listing hearings)). Each time, the evidence showed that discrimination, past and present, continued to deny socially and economically disadvantaged business owners opportunities to participate in and compete for work on federal and federally-aided highway construction contracts. 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 most recently in TEA-21 in 1998, Pub. L. No. 105-178, Tit. I, § 1101(b), 112 Stat. 113.

The extensive record before Congress included evidence of the specific 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. *Adarand VII*, 228 F.3d at 1169-1170. 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. See 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) (SA86, 87, 100) (discussed by Rep. Norton, 144 Cong. Rec. H3958 (May 22, 1998)). 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." See Maria E. Enchautegui et al., Urban Institute, *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?* 36 (Dec. 1997) (Urban Institute Report) (citations omitted) (SA149) (discussed by Rep. Norton, 144 Cong. Rec. H3959 (May 22, 1998)). Congress, moreover, heard first-hand accounts of subtle and not-so-subtle discrimination in the provision of needed capital.[6]

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[6] 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 with an affiliate in bankruptcy.

(continued...)

Discrimination and entrenched patterns resulting from years of exclusion also prevent minority business owners from obtaining surety bonds, which are generally 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: An Interim Report*, H.R. Rep. No. 870, 103d Cong., 2d Sess. 14-15 (1994). 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 DBE which were not placed on white contractors." *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. 9 (1988). Again, Congress heard from individuals who had encountered difficulties created by discrimination and its

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[6](...continued)
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). Another example involved Dorinda Pounds, president of a highway construction company in Iowa, who was told by banks that they were reticent to lend her money because they knew that male contractors would shut her out and that they would not be repaid. See 144 Cong. Rec. S1430 (Mar. 5, 1998). Similarly, Janet Schutt, a highway construction contractor, testified at a Senate hearing on TEA-21 that it took her three years to secure a line of credit for her company, and that she was able to do so only from a female loan officer. See *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. 120 (1997) (*1997 ISTEA Hearing*).

lasting effects on the availability of bonding.[7]

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 or refusing to invite bids from minority-owned subcontracting firms. 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 (Apr. 1, 1998) (*Colorado Study*) (SA469, 472) (cited by Sen. Chafee, 144 Cong. Rec. S5413 (May 22, 1998)); *Louisiana Study* 69, 73 (SA276, 280).[8] Some suppliers charge higher prices to minority customers, raising their costs and rendering them less competitive. See, *e.g.*, *Colorado Study* 5-78 (SA491); *Louisiana Study* 89 (SA296); Ray Marshall & Andrew Brimmer, *Public Policy & Promotion of Minority Economic Development: City of Atlanta and Fulton County,*

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[7] See H.R. Rep. No. 870, *supra*, at 9, 16-17 (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). The Louisiana Disparity Study provides corroboration. *State of Louisiana Disparity Study, Vol. II* 91, 204-205 (June 1991) (*Louisiana Study*) (SA298, 412-413) (cited by Sen. Kennedy, 144 Cong. Rec. S1482 (Mar. 6, 1998).

[8] See also *Associated Gen. Contractors* v. *Coalition for Econ. Equity*, 950 F.2d 1401, 1415 (9th Cir. 1991) (citing reports that minority firms were "denied contracts despite being the low bidder," and were "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).

Georgia, Part II 72-77 (June 29, 1990) (minority firm in Georgia found problem so pronounced that it sent white employees to purchase supplies) (SA 582-587).

Congress also heard evidence that black, Hispanic, Asian, Native-American, and women-owned businesses were underutilized in government contracts. *E.g.*, Urban Institute Report 11, 14-15, 19-20 (SA125, 128-129, 133-134). For example, the Urban Institute Report found that minority-owned businesses received only 57 cents, and women-owned businesses received 29 cents, for every state and local contracting dollar that they should have expected to receive based on the proportion of "ready, willing and able" minority- and women-owned firms. *Id.* at 1, 15, 19-22, 61 (SA116, 129, 133-136, 173). Throughout the debates on TEA-21, members of Congress noted study after study, incident after incident, showing gross disparities in utilization.[9] See also *1997 ISTEA Hearing*, *supra*, at 55-56, 58-59, 64, 69, 74-76, 120.

Finally, the evidence showed that the 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

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[9] 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 (May 22, 1998); in the United States as a whole, minorities own 9% of construction companies but receive only 4% of construction receipts, *id.* at S1403 (Mar. 5, 1998); white-owned construction firms receive 50 times as many loan dollars as African-American-owned firms with identical equity, *id.* at S1422 (Mar. 5, 1998); 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 (Mar. 6, 1998).

zero nine months after that State's DBE program ended, while the federally funded portion (which continued to operate under DOT's DBE program) had a 12.7% participation rate. 144 Cong. Rec. S1404 (Mar. 5, 1998). 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 (1992) (discussed by Rep. Norton, 144 Cong. Rec. H3958 (May 22, 1998)). See also 144 Cong. Rec. S1409-1410, S1420-1421, S1429-1430 (Mar. 5, 1998).

Indeed, the recent GAO Report upon which Sherbrooke places great reliance (Br. 55), *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 39-40 (A740-741). 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 "underutilization of women- and minority-owned business in that industry," 144 Cong. Rec. S5414 (May 22, 1998) (Sen. Baucus), but that race-neutral alternatives sometimes cannot level the playing field.[10]

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[10] Courts often accord the views of a bill's floor managers particular weight (continued...)

In view of that record, both houses of Congress in 1998 rejected two amendments to TEA-21 that would have eliminated DOT's DBE program. See 144 Cong. Rec. S1496 (Mar. 6, 1998), H2011 (April 1, 1998). Even opponents of the DBE program agreed that there was evidence of discrimination. 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. H2000 (April 1, 1998). Based on the evidence of discrimination adduced year after year, Congress authorized the TEA-21 remedial program, and DOT promulgated regulations that make race-conscious remedies possible only upon additional analysis of local market conditions that evidence the need for remedial measures and the inadequacy of race-neutral relief. Congress clearly identified a compelling interest with a "strong basis in evidence."

2. *Sherbrooke's Objections To The Evidence Before Congress Are Unsubstantiated And Insubstantial*

In an attempt to circumvent the extensive record of discrimination before Congress, Sherbrooke asserts (Br. 44) that the record, as presented in *Adarand VII*, was unreliable because it was hampered by "misrepresentation, ignorance, and misplaced deference" and, thus, the district court erred in relying on the Tenth Circuit's analysis of the legislative record. Sherbrooke principally argues that the

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[10](...continued)
in determining legislative intent. See generally *United States* v. *Enmons*, 410 U.S. 396, 405 n.14 (1973); *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 686-687 (1978).

United States misrepresented the evidence before Congress to the Tenth Circuit (Br. 45); that the Tenth Circuit improperly considered studies concerning the lingering effects of discrimination impacting minority- and women-owned construction firms as well as floor debate statements by members of Congress concerning the TEA-21 bill (Br. 50); and that two government documents – the GAO Report and the Department of Commerce's evaluation of federal government procurement contracts – undermine the voluminous evidence of discrimination Congress considered when it enacted TEA-21 (Br. 52-55).

First, Sherbrooke contends (Br. 45-49) that DOT misled the Tenth Circuit with respect to the legislative record by citing to the Appendix – Proposed Reforms to Affirmative Action in Federal Procurement: A Preliminary Survey, 61 Fed. Reg. 26,042, 26,050-26,063 (May 23, 1996) (Compelling Interest Appendix), a list of some of the evidence before Congress when it enacted TEA-21, which, according to Sherbrooke, "contains only five possible allegations of discrimination nationwide and *no* allegations of discrimination in Minnesota."[11] That assertion is incredible in light of the enormous body of evidence of discrimination that was before Congress. See pp. 24-33, *supra*. Contrary to Sherbrooke's representations

[11] Sherbrooke also argues (Br. 43, 48-50, 60) that Congress did not have a sufficient evidentiary basis for enacting TEA-21 by citing the testimony of two federal executive branch employees concerning the evidence before Congress and whether they had individually reviewed that evidence themselves. These testimonies, however, are irrelevant to the compelling interest inquiry, which requires an examination of the evidence that was before Congress, as shown by the public record, and not what various executive branch employees knew.

(A138-149; A656-658), the legislative record contains not only specific examples of discrimination but also reveals a pattern of disparities affecting the highway construction industry that are attributable to the race and gender of the firms' owners. See pp. 24-33, *supra*; see also Federal Defendants' Supplemental Report (A654-655).[12]

Sherbrooke further contends (Br. 45-46) that the court of appeals' analysis of the legislative record is flawed because the court, relying on DOT's representations, failed to review the legislative record itself. This accusation is belied by the fact that 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, and cited additional congressional hearings and other materials not mentioned in the Compelling Interest Appendix, *e.g.*, *Adarand VII*, 228 F.3d at 1169 (statements of Toni Hawkins, M. Harrison Boyd, and Anthony Robinson).

Sherbrooke's and amicus The Associated General Contractors of America's

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[12] For instance, Sherbrooke argues (A656-658) that the Federal Defendants' Supplemental Report (A653-655), citing statistical and anecdotal evidence of discrimination before Congress, did not contain a single example of discrimination in the highway construction industry. Yet, the very first citation provided in the pleading – the testimony of Janet Schutt – involved a female-owned "small heavy highway construction company specializing in bridge rehabilitation." *1997 ISTEA Hearing*, *supra*, at 119. Schutt testified that, because of her gender, male contractors in highway construction harassed her, she was denied an opportunity to participate on committees in her trade association, and contractors and suppliers refused to talk to her. *Ibid.*

(AGC's) challenges to Congress's methods and conclusions are also without merit (Br. 49-50; Amicus Br. 24-28). Fundamentally, they misunderstand the judicial role in evaluating the existence of a compelling interest. Federal courts do not sit as peer review boards to conduct sua sponte review of congressional findings and methodologies for scientific accuracy. See *Board of Educ.* v. *Mergens*, 496 U.S. 226, 251 (1990) (plurality) ("Given the deference due 'the duly enacted and carefully considered decision of a co-equal and representative branch of our Government,'" courts should "not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical observations."). Sherbrooke's and AGC's assertion (Br. 49; Amicus Br. 24) 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 19-22 (SA133-136); *Louisiana Study* 182, 187-194 (SA389, 394-401). And Sherbrooke and AGC are incorrect in asserting (Br. 49; Amicus Br. 25-26) that the studies did not reduce the possibility that the noted disparities were caused by factors other than discrimination. Many did. See, *e.g.*, Grown & Bates at 34, 39 (SA95, 100); *Louisiana Study* A1-A6 (SA437-442). To the extent that any report fails to account for certain variables, moreover, Sherbrooke must provide evidence that the missing factor – not discrimination – accounts for the observed disparities. See *EEOC* v. *General Tel. Co.*, 885 F.2d 575, 580 (9th Cir. 1989); *Concrete Works of Colo., Inc.* v. *City & County of Denver*, 36 F.3d 1513,

1524-1525 (10th Cir. 1994). See also *Dothard* v. *Rawlinson*, 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. *City of Philadelphia*, 6 F.3d 990, 1007 (3d Cir. 1993); *Sobel* v. *Yeshiva Univ.*, 839 F.2d 18, 34 (2d Cir. 1988); *Catlett* v. *Missouri Highway & Transp. Comm'n*, 828 F.2d 1260, 1266 (8th Cir. 1987). Sherbrooke has failed to do that here.

More broadly, it is unclear what all of Sherbrooke's and AGC's vague 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 require statistical perfection, a standard that social science itself is incapable of achieving. None of Sherbrooke's or AGC's objections to the evidence casts genuine doubt about Congress's overall finding of continuing discrimination and its effects in the construction industry.[13]

Lastly, the GAO Report and the Department of Commerce's review of direct procurement contracts prove nothing. Sherbrooke's reliance (Br. 53-54) on the GAO Report is misplaced. The GAO Report specifically states that its objective "was not to address the question of whether the DBE program satisfies the

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[13] By simply criticizing 13 unspecified documents before Congress that the Tenth Circuit reviewed in *Adarand VII*, Sherbrooke fails its burden to identify specific evidence it believes unreliable and to provide the reasons for that concern. Despite the opportunity to do so, Sherbrooke has not introduced any evidence to show that the racial discrimination in the highway construction industry and its effects have ceased to exist.

requirements of strict scrutiny." See GAO Report at 82; see also *id*. at 24, 77 (A783, 725, 778). And although the report expressed concern about the difficulty of collecting relevant data regarding subcontractors, such data are available. See, *e.g.*, Urban Institute Report 15-16, 41 (SA129-130, 154). The GAO Report, in fact, omitted that information not because the information was unavailable, but rather because the GAO's mail survey did not produce the information, and because recipients of the survey did not have their data in an electronic format that would have made their accumulation and manipulation sufficiently easy. See GAO Report 52-59, 62-64, 77 (A753-760, 763-765, 778).

Sherbrooke also reads too much into the Department of Commerce's benchmark study (Br. 52-53). That study examined only *direct federal procurement* where a federal agency contracts directly with private firms – not procurement by States and localities using federal funds as in this case. In addition, the study looked only for disparities in the government's hiring of *prime contractors*, not subcontractors like Sherbrooke. See 63 Fed. Reg. 35,714, 35,716 (June 30, 1998).[14] Nor did the study evaluate the utilization of women-owned businesses. When it comes to discrimination against subcontractors on federally aided projects in localized markets, the individual state studies and the Urban

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[14] The "four conclusions" of the benchmark study that Sherbrooke lists are taken from its expert's report and are not found in any government document. Compare Br. 52-53 with 64 Fed. Reg. 52,804, 52,805 (Sept. 30, 1999); 63 Fed. Reg. at 35,714; see also Rebuttal Report by David Blanchflower at 14-16 (SA652-654).

Institute Report are a better source. See pp. 28-31, *supra*. Here, Congress and 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 their necessity is not manifest.

B. 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. Sherbrooke has failed to show that the DBE program is incapable of being administered in a way that meets that narrow-tailoring requirement. DOT's regulations seek to channel remedial benefits to victims of discrimination and proscribe race-conscious measure unless race-neutral means of combating discrimination and its effects are insufficient. Aid recipients thus may use race-conscious remedies only as a last resort. 49 C.F.R. 26.51(a). The regulations further narrowly tailor the program by reserving remedies to those individuals who have confirmed, in a notarized document and subject to possible criminal prosecution, that they have in fact been the victims of social and economic disadvantage; by limiting the geographic scope of remedies; and by limiting duration. The cumulative effect of those restrictions is to limit the use of race-conscious remedies to those situations where the effects of discrimination are stubborn, persistent, and have proven incapable of eradication through race-neutral measures. See Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 64 Fed. Reg. 5096, 5102-5103 (Feb. 2, 1999).

1. *The DBE Program Permits Race-Conscious Measures Only Where Race-Neutral Corrections Prove Insufficient*

"In determining whether race-conscious remedies are appropriate," courts begin 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, courts examine 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 510 (plurality). See also *Adarand III*, 515 U.S. at 237-238; *Croson,* 488 U.S. at 519 (Kennedy, J., concurring).

Sherbrooke argues (Br. 58-60) that neither Congress nor DOT considered race-neutral methods (or other narrow tailoring criteria, such as the DBE program's duration and burden on third parties (Br. 59-62)) in a "meaningful[]" way because Congress never identified the "discrimination and the perpetrators" that TEA-21 seeks to address. To the contrary, the record shows that Congress considered volumes of statistical evidence of the underutilization of minority- and women-owned firms in highway construction and testimony by individuals, who were discriminated against by prime contractors, suppliers, banks, and bonding companies and, as a result, were denied opportunities to compete for contracts or successfully perform contracts based on their race or gender. And Congress repeatedly attempted to use race-neutral means to eliminate the effects of this discrimination, but found such means inadequate. For example, Congress

attempted to overcome discrimination in the provision of bonding by offering bonding assistance in 1970 by establishing the Surety Bond Guarantee program, 15 U.S.C. 694(a), 694(b). Five years later, however, 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). And, in 1998, Congress rejected two amendments to TEA-21 that would have eliminated DOT's DBE program. See 144 Cong. Rec. S1496 (Mar. 6, 1998), H2011 (April 1, 1998). The federal DBE program continues to require the maximum use of race-neutral remedies, such as assistance in meeting bonding requirements, and race-conscious remedies may be invoked only as a last resort.

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 in a notarized document that they are, in fact, socially and economically disadvantaged. 49 C.F.R. 26.67(a)(1). 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, when recipients calculate the levels of DBE participation, they must adjust those figures to account for 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. 49 C.F.R.

26.45(d). Unless that analysis indicates a need for remedial action, and race-neutral mechanisms are inadequate, no race-conscious relief is authorized.

Only where there is a difference between expected DBE utilization and the levels of DBE use that would be expected absent discrimination under the above-described analysis – suggesting the persistence of discrimination or its effects – are race-conscious corrections even an option. 49 C.F.R. 26.45(b); pp. 6-7, *supra*. See also 61 Fed. Reg. at 26,049 (in direct federal procurement, race may "be relied on *only* when annual analysis of actual experience in procurement indicates that minority contracting falls below levels that would be anticipated absent discrimination" (emphasis added)). Moreover, even where that analysis suggests that the effects of discrimination persist, 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 C.F.R. 26.51(a). See also 64 Fed. Reg. at 5112 ("recipients must give priority to race-neutral means").

DOT's regulations also identify numerous race-neutral means – 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)(1); providing "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); offering small businesses "technical assistance," 49 C.F.R. 26.51(b)(3); ensuring dissemination of opportunities and guidelines to the relevant communities, 49 C.F.R. 26.51(b)(4); requiring prompt payment of all small businesses, 49 C.F.R. 26.29 – and permit state and local recipients to develop their own. In sum, DOT's regulations *require* recipients to consider the efficiency of the "array of race-neutral devices to increase the accessibility of city 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, Sherbrooke cannot show that the regulations are incapable of constitutional application.

2. *The DBE Program Is Narrowly Tailored Through Flexibility, Proportionality, And Durational Limits*

"In determining whether an affirmative-action remedy is narrowly drawn to achieve its goal," courts consider duration, the relationship between any hiring goals and the relevant pool of qualified entities, and the program's flexibility. *Paradise*, 480 U.S. at 187-188 (Powell, J., concurring). With respect to duration, the Supreme Court has explained that race-conscious remedies should "not last longer than the discriminatory effects [they are] designed to eliminate." *Adarand III*, 515 U.S. at 238. The Secretary's regulations and the terms of Congress's authorization for the DBE program impose such limits. As noted, race-conscious

remedies are permissible only as a last resort. Whenever race-conscious remedies are imposed as a last resort, 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). Hence, the regulations require aid recipients constantly to reassess their programs to ensure that race-conscious remedies remain necessary.[15] Thus, the structure "is inherently and progressively self-limiting in the use of race-conscious measures." 61 Fed. Reg. at 26,048. As "barriers to minority contracting are removed and the use of race-neutral means of ensuring opportunity succeeds," the program will "automatically reduce, and eventually should eliminate, the use of race in decisionmaking." *Ibid*. The provisions of TEA-21 authorizing the DBE program, moreover, expire at the end of fiscal year 2003, providing a built-in sunset unless Congress revisits the issue and finds sufficient grounds for renewing the program.

The DBE program further provides narrow tailoring by requiring use of the "relevant statistical pool," *Croson*, 488 U.S. at 501, in establishing DBE participation objectives, 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). The DOT DBE regulations require

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[15] The eligibility of individual participants is also constantly reassessed. DBEs must annually submit an affidavit, swearing under penalty of perjury that there have been no changes in circumstances affecting their eligibility. 49 C.F.R. 26.83(j). As a result, the DBE size and personal net-worth limitations operate as durational limits on participation.

each recipient to set annual goals reflecting local business 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. State and local recipients are explicitly directed that they cannot merely adopt the aspirational nationwide goal of 10% participation mentioned in TEA-21, or pursue a goal based on the racial composition of the local populace. 49 C.F.R. 26.41(c); 64 Fed. Reg. at 5107. Contrast *Croson*, 488 U.S. at 502 (rigid 30% quota unrelated to "how many MBE's in the relevant market are qualified").

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). 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. And nowhere in the regulations are prime contractors required to accept higher bids by DBE subcontractors (cf. Br. 63). They need only act in good faith in complying with the DBE goals in their contracts. See 49 C.F.R. Pt. 26, App. A. The flexibility of the program is further enhanced through waiver provisions, under which a recipient may be relieved from complying with most DBE regulations if it believes that

equal opportunity for DBEs can be achieved through other approaches, or if exceptional circumstances warrant a waiver. 49 C.F.R. 26.15. See 64 Fed. Reg. at 5102-5103.

3. *Congress's Use Of Racial And Ethnic Presumptions Is Not Fatally Over-Inclusive*

Sherbrooke'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 (Br. 63-65). 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, and in a variety of other ways, as described in this brief, the impact of the statute's race-based presumption on parties like Sherbrooke is sharply limited and narrowly tailored.

It is true, of course, that the race-based presumption operates when state and local recipients of federal aid conduct analyses or 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 without using race-conscious mechanisms for identifying whether racial discrimination exists. 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. The use of those criteria for that purpose, without more, does not implicate constitutional concerns, and DOT regulations are written to *prevent* the use of race-conscious remedies that might affect third parties *unless* and *until* the need for such remedies has been identified.

Sherbrooke's argument also overlooks that the Secretary's implementing regulations seek to channel the benefits of participation to entities owned by individuals who in fact have suffered social and economic disadvantage, *i.e.*,to the victims of discrimination. Under DOT's 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)(1). 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 covered net worth exceeds $750,000, any presumption of disadvantage is considered irrefutably rebutted. See 49 C.F.R. 26.67(a)(2), (b)(1). DBEs also must, on an annual basis, submit a sworn affidavit attesting that there have been no material changes in circumstances affecting their eligibility. 49 C.F.R. 26.83(j); *id.* at 26.83(c)(7)(ii). Likewise, aid recipients must include as 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). Finally, even a facially valid certification is rebuttable, 49 C.F.R. 26.67(b)(2), 26.87(a), 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. 12 (1987).

Those provisions contradict Sherbrooke'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. Sherbrooke 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. Sherbrooke 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 found by Congress to have suffered actual discrimination.

DOT's regulations also make it clear that 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 DOT's experience, the notarized statement requirement and net-worth limits have, since being implemented, affected both the number and identity of applicants. See also 61 Fed. Reg. at 26,045 ("The existence of a meaningful threat of prosecution for falsely claiming [small disadvantaged business] status, or for fraudulently using an SDB as a front in order to obtain contracts, will do much to ensure that the program benefits those for whom it is designed."). The speculative possibility that, on occasion, an undeserving individual will benefit, moreover, is no basis for invalidating the program. Because Sherbrooke 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.

The notarized statement, moreover, serves a different, non-evidentiary function: It prevents abuse and helps 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, DOT's regulations implement the statutory presumption in a manner that is designed to minimize the constitutional and policy concerns that would arise from an inflexible 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 Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984), but also the canon favoring the construction that renders the statute constitutional, *Jones* v. *United States*, 526 U.S. 227, 239 (1999), both support the Secretary's interpretation. Moreover, Congress was well aware of the Secretary's new regulations when it enacted TEA-21, see pp. 4-8, *supra*, and its "repeated references" to the new regulations and their "modes of enforcement * * * justif[y] * * * presuming" that Congress intended for the DBE program to be implemented in accordance with those regulations. Cf. *Cannon* v. *University of Chicago*, 441 U.S. 677, 697-698 (1979).

Sherbrooke's perceived need to attack the Secretary's implementation of the

statutory presumption underscores that Sherbrooke cannot meet its burden of demonstrating that the statutory DBE program is incapable of constitutional application. By limiting DBE status to those who certify in a notarized document 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 Sherbrooke may not facially challenge 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 persons may" sometimes "be called upon to bear some of the burden of the remedy." *Wygant*, 476 U.S. at 281 (plurality). But the regulations at issue here are designed to avoid imposing an "unacceptable burden" on innocent persons. *Paradise*, 480 U.S. at 182 (plurality). The current program is aimed at redressing the effects of discrimination. 64 Fed. Reg. at 5096 ("program is intended to remedy past and current discrimination against disadvantaged business enterprises, ensure a 'level playing field' and foster equal opportunity in DOT-assisted contracts"). It is designed to ensure 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. Remedies are limited to those who can attest, in a notarized document, that they are actual victims of discrimination and have suffered impaired opportunities as a result. And every effort is made to minimize the effect of necessary race-conscious remedies on innocent third parties. See, *e.g.*, 49 C.F.R. 26.33; pp. 4-8, 39-43, *supra*. The program thus is designed to avoid bestowing undue benefits on DBEs, and to create as level a playing field as constitutionally possible.

IV. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE FEDERAL DBE PROGRAM IS CONSTITUTIONAL AS APPLIED

As discussed more fully in MNDOT's brief, the district court properly found that Sherbrooke's loss of one or two projects to DBE firms, when it bids on 200 bids annually, fails to raise a genuine issue of material fact with respect to MNDOT's implementation of the federal DBE program (Add. 24). On appeal, Sherbrooke relies on statements by various state employees that they personally were not aware of specific incidences of discrimination in highway construction in Minnesota to assert that there is no evidence of discrimination in Minnesota to support using race-conscious DBE goals (Br. 43-44, 48-51, 60). Sherbrooke, however, conceded at oral argument that the state employees merely stated that they did not know of any instances of discrimination and that "[t]hey did not say there isn't" any discrimination in Minnesota (Tr. 71 (A859)). Thus, even according to Sherbrooke, the state employees' statements, taken in the light most favorable to

Sherbrooke, do not cast doubt on MNDOT's compliance with the federal DBE requirements.

DOT's DBE regulations require, *inter alia*, recipients of TEA-21 funds to establish numerical measurements, based on local DBE availability and other evidence, to assess discrimination in their own jurisdictions, 49 C.F.R. 26.45(b); to consider the array of race-neutral means before permitting the use of race-conscious mechanisms as a last resort, 49 C.F.R. 26.51; and to ensure that the DBE certification process channels the remedial benefits of the DBE program to victims of discrimination, 49 C.F.R. 26.67. MNDOT had presented evidence in the district court to show that it has complied with these requirements and other obligations of recipients contained in 49 C.F.R. Pt. 26 (see Garza Aff. at 9-16, 18-21, 23-40 (MA 9-16, 18-21, 23-40); see generally NERA Study (MA124-160)). The district court also had evidence that DOT, after reviewing MNDOT's assessment of the effects of discrimination in Minnesota and other supporting materials concerning MNDOT's implementation of the DBE program, confirmed that MNDOT's implementation of the federal program was in compliance with the federal DBE regulations (see Ashby Statement at 9-24 (SA9-24)). Sherbrooke has not challenged on appeal the accuracy of MNDOT's evidence showing that it has complied with the federal DBE regulations.

Because Sherbrooke has failed to raise a triable issue to controvert the evidence showing MNDOT's compliance with the federal DBE requirements, the district court properly concluded that, as a matter of law, MNDOT satisfied its

obligations as a recipient under 49 C.F.R. Pt. 26 (Add. 24). See *Milwaukee County Pavers Ass'n*, 922 F.2d at 424 ("[i]nsofar as the state is merely doing what the statute and regulations envisage and permit, the attack on the state is an impermissible collateral attack on the statute and regulations").

CONCLUSION

The Court should affirm the district court's denial of Sherbrooke's Rule 59 motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(C). The brief was prepared using WordPerfect 9.0 and contains 13,681 words in Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2002, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE, one copy of the SUPPLEMENTAL APPENDIX, and one 3.5" disk containing the brief's text, scanned for viruses and determined to be virus-free, were served by first-class mail, postage prepaid, on the following counsel:

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