No. 03-35783

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESTERN STATES PAVING CO., INC.,

Appellant

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF TRANSPORTATION AND FEDERAL HIGHWAY ADMINISTRATION,

Appellees

and

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION; Douglas MacDonald, Secretary of the Washington Department of Transportation; CITY OF VANCOUVER, Washington; CLARK COUNTY,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS APPELLEE

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ISSUE PRESENTED

Whether the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107, and the federal DBE regulations implementing that statute, 49 C.F.R. Part 26 (2000), are facially constitutional.

STATEMENT OF THE CASE

1. Introduction

As a condition for receiving federal financial assistance for highway construction under the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107, the Washington Department of Transportation (WSDOT) adopted a plan implementing a disadvantaged business enterprise (DBE) program. Appellant, Western States Paving Co., Inc. (Western States), an asphalt and paving company, but not a DBE, bids on federally-assisted highway construction projects as both a prime contractor and subcontractor in Washington.

In April 2000, Western States sued appellees WSDOT and the City of Vancouver (City), alleging that it had been denied subcontracting work on a highway project in violation of its constitutional rights because of WSDOT's DBE program. The United States, the Department of Transportation (DOT), and the Federal Highway Administration (FHWA), a DOT agency (federal defendants), intervened to defend the facial constitutionality of TEA-21 and the federal DBE regulations. In November 2000, Western States filed an amended complaint against the federal, state and local defendants, as well as Clark County, Washington, and sought a declaration that WSDOT's DBE program is unconstitutional as well as monetary damages, costs, and attorney's fees.

In September 2003, the district court granted defendants' motions for summary judgment, held that TEA-21 and its implementing regulations are

constitutional on their face and as applied, and dismissed Western States' complaint. This appeal followed.

2. The Federal DBE Regulations

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 those efforts is DOT's Disadvantaged Business Enterprise program, which enhances opportunities for socially and economically disadvantaged business enterprises (DBEs) to participate in federally-aided highway and transit programs.

A. In 1995, the Supreme Court issued its decision in *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), holding that all governmental race-conscious action must be evaluated under strict scrutiny.

On June 9, 1998, Congress enacted the Transportation Equity Act for the 21st Century (TEA-21) which authorized the expenditure of federal funds for highway construction. In one provision of that Act, Congress continued the Disadvantaged Business Enterprise program that had been enacted and reauthorized in earlier legislation.[1] TEA-21, like earlier versions of the legislation, stated "Except

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[1] See Surface Transportation Assistance Act of 1982 (STAA), Pub. L. No. 97-424, § 105(f), 96 Stat. 2100; Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, § 106(c)(2)(B), 101 Stat. 146; Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919-1921.

to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts made available for any program [under this legislation] shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." The statute stated that the term "'socially and economically disadvantaged individuals' has the meaning such term has under section 8(d) of the Small Business Act." Through that language, again identical to that in earlier congressionally authorized DBE programs, 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). The Act also included women as individuals who are to be presumed socially and economically disadvantaged for purposes of the Act, Section 1101(b)(2)(B), 112 Stat. 113, and limited DBE status to small businesses based on annual gross receipts over a three-year period.

B. In February of 1999, and in response to the *Adarand* v. *Peña* decision, DOT issued new regulations revamping its DBE program.

First, the regulations took steps to help ensure that the individuals the DBE program benefits are actually victims of discrimination. 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" regardless of race or gender. 15 U.S.C. 637(a)(6)(A). The determining factor 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. See 49 C.F.R. 26.61(b) & Pt. 26, App. E. An individual deemed presumptively socially and economically disadvantaged on account of his or her race or gender may have that presumption rebutted if a State (such as Washington) has a "reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged," 49 C.F.R. 26.67(b)(2), institutes a determination proceeding under the procedures of 49 C.F.R. 26.87, and proves by a preponderance of the evidence that the individual is not socially and economically disadvantaged. See 49 C.F.R. 26.67(a), (b)(2) & (3). Moreover, an individual's presumption of economic disadvantage is automatically rebutted if the individual's personal net worth (excluding the value of the individual's home and interest in the DBE business) exceeds $750,000. See 49 C.F.R. 26.67(a)(2) & (b)(3).

Pursuant to its authority to "establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies" as a DBE, see TEA-

21, Section 1101(b)(4), 112 Stat. 114; *Adarand* v. *Peña*, 515 U.S. at 208, DOT's regulations seek to channel the benefits of DBE certification to firms owned by individuals who are, in fact, socially and economically disadvantaged as defined in the federal regulations. DOT requires the owners of firms applying for DBE certification who are statutorily deemed presumptively disadvantaged to "submit a signed, notarized certification that [they are] in fact, socially and economically disadvantaged." 49 C.F.R. 26.67(a)(1); 49 C.F.R. 26.83(c)(7)(ii). The regulations state 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).

A firm seeking DBE certification must also disclose the owners' personal net worth, with appropriate documentation. 49 C.F.R. 26.67(a)(2)(i). If an owner's assets, excluding home and interest in the business seeking DBE status, exceed $750,000, the presumption of economic disadvantage is conclusively rebutted and the firm is ineligible for the DBE program, regardless of race, ethnicity, or gender of the owner. 49 C.F.R. 26.67(b)(1). The regulations also impose size limits on all firms. 49 C.F.R. 26.65. Anyone, including competitors, may challenge DBE certifications. 49 C.F.R. 26.87. A state or local grant recipient may investigate whether a firm or owner meets the standards for social and economic disadvantage. 49 C.F.R. 26.67(b)(2).

To help ensure that the race- and gender-conscious contracting preferences authorized by TEA-21 and DOT's DBE regulations are used only in jurisdictions where the effects of discrimination are identified, DOT's regulations require recipients of federal aid to determine the level of DBE participation expected in the absence of discrimination or its continuing effects. Under the federal DBE regulations, recipients must first determine an overall DBE participation goal. The first step in determining this overall DBE participation goal is to calculate a base goal using "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" in their own jurisdiction. 49 C.F.R. 26.45(b), (c). The second step participants must undertake is to "examine all of the evidence available" in the jurisdiction to determine whether adjustments should be made so that the resulting overall DBE participation goal realistically reflects the level of DBE participation that would be expected in the jurisdiction absent the effects of discrimination. 49 C.F.R. 26.45(d).

DOT's regulations further require recipients of federal aid to eliminate the effects of identified 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 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 participation goals for individual contracts, may be used *only* if race- and gender-neutral means will be insufficient. 49 C.F.R. 26.51(d). Quotas are prohibited, and DOT 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 of DOT financial assistance may apply to DOT for exemptions from any regulatory provision if special or exceptional circumstances not contemplated by the regulations makes compliance impractical, and they may apply to DOT for waivers from many of the provisions of the federal DBE regulations if the recipient can achieve the overall DBE participation goal through other approaches. 49 C.F.R. 26.15. No penalty is imposed on contractors or recipients for failing to meet annual overall DBE participation goals or specific contract goals so long as they act in good faith to achieve those goals. 49 C.F.R. 26.47; 49 C.F.R. 26.53. Recipients must discontinue the use of race- or gender-conscious contracting preferences if, at any point, it appears that they can achieve their DBE participation goals through race- and gender-neutral means. 49 C.F.R. 26.51(f)(1).

3. Washington's Implementation Of DOT's DBE Regulations

In July 1999, WSDOT adopted a DBE program modeled after DOT's "Sample DBE Program" (R.E. 19; 176).[2] Utilizing its DBE directory, bidders'

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[2] "R.E." reflects the excerpts of record filed with this Court by Western States. "R. __" reflects the number of a filing as reflected on the district court docket sheet. "Br." refers to the opening brief filed by Western States with this

(continued...)

lists, and census data, WSDOT calculated the relative availability of DBEs in Washington by comparing the total number of ready, willing and able DBEs to all firms, and then considered other evidence to assess non-discriminatory factors that affect DBE utilization (R.E. 20; 172, 180; S.R.E. 13). It also estimated the level of anticipated DBE participation that could be achieved with race- and gender-neutral measures by examining DBE utilization levels on construction projects with and without race-conscious contracting preferences (R.E. 21; 181-182; S.R.E. 14-15). As a result, it set an overall DBE participation goal of 14% in 2000, and 15% in 2003, of which it determined that 9% and 4.55%, respectively, could be achieved through race- and gender-neutral means (R.E. 22; 173, 180, 182; S.R.E. 14).

In April 2000, DOT approved WSDOT's DBE program (R.E. 19-20,170; S.R.E. 14). In granting approval to state DBE programs such as that of Washington, the DOT does not specifically review every substantive decision made by Washington in implementing its DBE program. For example, DOT reviews a State's goal-setting methodology for compliance with federal regulations but does not review the appropriateness of actual DBE participation goals adopted by a State based on that goal-setting methodology, because particular goal levels are not mandated under the federal regulations. In other words, DOT reviews state DBE programs to determine compliance with DOT DBE regulations, but it does not

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[2](...continued)
Court. "S.R.E." refers to the United States' Supplemental Excerpts of Record filed under separate cover along with its brief.

specifically review state DBE programs to determine whether an entire program or particular aspects of that program comports with constitutional requirements.

4. Proceedings Below

In 2003, federal, state and local defendants filed motions for summary judgment (R. 99, 101, 103). Plaintiff Western States responded that "summary disposition" was "appropriate" since "[a]ll evidence necessary for a determination [was] before the court" (R. 113).

On September 3, 2003, the district court, applying strict scrutiny, granted defendants' motions for summary judgment and held that TEA-21 and DOT's DBE regulations are facially constitutional and that the State of Washington implemented its DBE program in a constitutional manner. (R. 148; R.E. 16-33). As to the compelling interest prong of strict scrutiny, the court stated that it conducted a "detailed, skeptical, non-deferential analysis" of the evidence before Congress, found persuasive the Tenth Circuit's "comprehensive analysis and findings" as to the adequacy of the legislative record set forth in *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147 (10th Cir. 2000), cert. dismissed as improvidently granted, 534 U.S. 103 (2001), and concluded that Congress had a strong basis in evidence to support its conclusion that remedial relief was necessary to avoid "perpetuating" while also "remediating" "the effects of racial discrimination in its own distribution of federal funds" (R.E. 27).

The district court explained that the "impressive body of evidence" before Congress reflects that "the effects of private discrimination spanning many years

ha[s] impeded the ability of DBEs to compete in the highway construction marketplace * * * in virtually every aspect of business formation and operation, including, but not limited to: financing, bonding, purchasing, insuring, training and even union membership" (R.E. 27).

The district court also found that DOT's DBE regulations, 49 C.F.R. Pt. 26, are facially narrowly tailored (R.E. 27-33). The court noted that the regulations require recipients of TEA-21 funds to "consider and use race-neutral devices to the maximum extent feasible" and authorize "race-conscious methods * * * only if [recipients] cannot meet their overall goals with race-neutral methods" (R.E. 28). The court also pointed out that the regulations help ensure that a recipient's DBE program is flexible and of limited duration by expiring at the end of fiscal year 2003;[3] mandating that DBEs establish their continued eligibility annually; requiring that a recipient's annual DBE participation goal reflects the level of DBE utilization expected in the recipient's jurisdiction in the absence of discrimination; providing for the adjustment of DBE participation goals based on a consideration of non-

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[3]TEA-21 was initially set to expire on September 30, 2003. It has been extended twice while Congress has debated its reauthorization. The current extension will expire on April 30, 2004. See Surface Transportation Extension Act of 2003, Pub. L. No. 108-88, 117 Stat. 1110 (extending TEA-21 to February 29, 2004); Surface Transportation Extension Act of 2004, Pub. L. No. 108-202, 118 Stat. 478 (extending TEA-21 to April 30, 2004). Both the House and Senate have passed reauthorization legislation with identical language, although the duration of the reauthorization has yet to be determined. See Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004, S. 1072, § 1821, 108th Cong., 2d Sess. (Feb. 26, 2004); Transportation Equity Act: A Legacy for Users, H.R. 3550, § 1101(b), 108th Cong., 2d Sess. (Apr. 2, 2004).

discriminatory factors causing underutilization of DBEs; allowing recipients to apply for waivers and exemptions from many of the regulatory requirements; allowing awards of contracts to contractors who fail to achieve DBE contract goals if they act in good faith; and requiring that a recipient cease its use of race-conscious contracting measures if it meets its annual goals through race-neutral means for two consecutive years (R.E. 29-30). The court further emphasized that the federal DBE program minimizes its impact on third parties by excluding businesses owned by wealthy minorities, allowing firms owned by non-minorities to demonstrate social and economic hardship by a preponderance of evidence, and requiring that DBEs not be "over-concentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate" (R.E. 30-31).

Finally, the district court held that WSDOT implemented DOT's DBE regulations in compliance with constitutional requirements. (R.E. 32). Relying on the statistical evidence offered by WSDOT, the district court found that "[t]he evidence in Washington strongly suggests that the effects of private discrimination continue to take a toll on DBEs" in Washington state since "DBEs are allocated a far lesser share of contract dollars than the percentage of ready, willing and able DBEs would indicate." (R.E. 31).

SUMMARY OF ARGUMENT

The district court applied strict scrutiny and correctly concluded that TEA-21 and the DOT's implementing regulations are facially constitutional. As to compelling interest, the district court, consistent with every lower federal court that

has evaluated the legislative record, concluded that there was a strong basis in evidence to support Congress's conclusion that remedial action was necessary to ensure that federal funds do not reinforce identified private discrimination in the highway construction industry. The legislative record shows that Congress enacted TEA-21 against a backdrop of three decades worth of hearings, investigations, and evidence detailing the continuing effects of racial and gender discrimination, past and present, on the ability of disadvantaged business enterprises (DBEs) to compete equally for federal highway construction contracting funds.

On appeal, Western States does not challenge the district court's conclusion that "Congress[] [had] [a] compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements" when it enacted TEA-21 (R.E. 27). Rather, it argues that Congress lacked the authority to enact national legislation authorizing race-conscious contracting preferences because it did not have evidence of past discrimination in the highway construction industry in each of the 50 States and, more specifically, in the State of Washington.

Western States' argument is not supported by any precedent. Indeed, Western States does not cite a single federal court decision that supports its claim. To conclude that Congress must have evidence of identified discrimination in every State in order to enact national legislation authorizing remedial race-conscious contracting preferences in those jurisdictions where their use is manifestly

necessary would seriously undermine Congress's authority to rectify problems of discrimination that it determines affect the Nation as a whole. This is particularly true where, as here, TEA-21 and DOT's DBE regulatory provisions do not mandate the use of race-conscious remedies in every jurisdiction, limit race-conscious contracting preferences only to those jurisdictions where there is demonstrable evidence of discrimination or its effects and race-neutral efforts are an insufficient remedy, and provide sufficient discretion and flexibility to States and other federal funding recipients to develop individual DBE programs that comport with all constitutional requirements.

The district court also correctly concluded that TEA-21 and DOTs DBE regulations are facially narrowly tailored. First, the statute's race- and gender-based presumptions of social and economic disadvantage do not rigidly rely on racial and gender classifications because regulatory procedures are in place to allow the presumption of disadvantage to be rebutted and DBE status is available to non-minorities who can meet the definition of socially and economically disadvantaged. 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 address the present effects of discrimination in their jurisdiction. And even where such a need is identified, recipients may use race-conscious remedies only as a last resort. Although Western States argues that certain aspects of the regulations are sometimes ineffectual and that a recipient can deviate from the statutory and regulatory design, neither of those concerns is at issue in a facial challenge. Thus,

even if a court finds a particular state's DBE program fails to satisfy constitutional standards, such a finding would not undermine the fact that the federal statute and regulations are facially constitutional.

ARGUMENT

THE DISTRICT COURT CORRECTLY DETERMINED THAT TEA-21 AND DOT'S DBE REGULATIONS ARE 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 Constructors, Inc.* v. *Peña*, 515 U.S. 200, 237 (1995). Indeed, as this Court has recognized, a governmental entity has the authority "'to ascertain whether it is denying its citizens equal protection of the laws and, if so, to take corrective steps.'" *Coral Constr. Co.* v. *King County*, 941 F.2d 910, 920 (9th Cir. 1991) (quoting *Associated Gen. Contractors* v. *City & County of San Francisco*, 813 F.2d 922, 929 (9th Cir. 1987)) (emphasis in original), cert. denied, 502 U.S. 1033 (1992). In enacting TEA-21, Congress sought to ensure that the effects of past and present private discrimination do not "cause federal funds to be distributed in a manner" that 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 regulations rely on race-conscious criteria, they are 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* v. *Peña*, 515 U.S. at 227. Indeed, "[w]hen 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." *Id.* at 237.

Western States may not prevail in its facial challenge to the statutory and regulatory provisions merely by asserting that the DBE program *might* be applied in an unconstitutional manner. Rather, it may prevail only if the statute and regulations "could *never* be applied in a valid manner." *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 797-798 (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

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[4] The gender-conscious provisions of TEA-21 and its implementing regulations are subject to intermediate scrutiny and must be substantially related to the achievement of an important government interest. *Nguyen* v. *INS*, 533 U.S. 53, 60 (2001); *Coral Constr.*, 941 F.2d at 931-932. 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.

conceivable set of circumstances is insufficient to render it wholly invalid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). As explained below, Western States has not shown, and cannot show, that TEA-21 and DOT's DBE regulations are incapable of meeting this exacting standard.

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

The compelling interest inquiry is a question of law. Two federal courts of appeals have already applied strict scrutiny, reviewed TEA-21's legislative record, and held that there was a "strong basis in evidence" to support Congress's conclusion that remedial relief was necessary. *Sherbrooke Turf, Inc.* v. *Minnesota Dep't of Transp.* and *Gross Seed* v. *Nebraska Dep't of Transp.*, 345 F.3d 964, 969 (8th Cir. 2003), petitions for cert. pending, Nos. 03-960 and 03-968; *Adarand Constructors, Inc*. v. *Slater*, 228 F.3d 1147, 1167-1176 (10th Cir. 2000), cert. dismissed as improvidently granted, 534 U.S. 103 (2001). In fact, every federal district court and court of appeals to consider the facial constitutionality of TEA-21 and its implementing regulations has come to the same conclusion the district court reached here – that the legislative record constitutes a strong basis in evidence sufficient to permit Congress to enact TEA-21's race- and gender-conscious DBE contracting preference program. *Northern Contracting, Inc.* v. *Illinois*, No. 00-4515, 2004 WL 422704 (N.D. Ill. Mar. 3, 2004); *Sherbrooke Turf, Inc.* v. *Minnesota Dep't of Transp. & United States,* No. 00-1026, 2001 WL 1502841 (D. Minn. Nov. 15, 2001); *Gross Seed Co.* v. *United States & Nebraska Dep't of*

Roads, No. 4:00-cv-03073 (D. Neb. 2002). Cf. also *Cortez III Serv. Corp.* v. *NASA*, 950 F. Supp. 357, 361 (D.D.C. 1996) (Congress had a compelling interest to include race-conscious provisions in the SBA).

On appeal, Western States does not dispute that the district court examined TEA-21 and DOT's DBE regulations under strict scrutiny. Nor does it challenge the reliability of the evidence in the legislative record, or offer any affirmative evidence to suggest that Congress wrongly concluded that there was nationwide evidence of the continuing effects of discrimination in the highway construction industry. Similarly, Western States does not challenge the district court's finding that the legislative record, which includes "studies and statistics from all regions of the republic" as well as anecdotal evidence, constitutes an "impressive body of evidence concerning the effects of private discrimination on the ability of disadvantaged businesses to compete in the marketplace" (R.E. 27). Br. at 19 (acknowledging that "Congress had a compelling interest in eliminating discrimination and its effects in government procurement and spending * * * where it exists"). Rather, it contends, without legal precedent or evidentiary support, that Congress lacked the authority to enact TEA-21's DBE program because it did not have specific evidence of discrimination in all 50 States, including Washington. *Id.* at 2 (framing issue as whether "federal government has a compelling interest in requiring the State of Washington" to adopt a DBE program without "a 'firm basis' * * * that * * * discrimination has infected the Washington highway construction industry").

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

During the past three decades, Congress has held hearings, conducted numerous investigations, and gathered substantial evidence detailing the effects of private, and, at times, governmental discrimination on DBEs and the distribution of government contracting opportunities in a variety of industries, including highway construction. Based on that evidence, the district court correctly concluded that the record before Congress demonstrates a sufficiently "strong basis in evidence" to support TEA-21 and DOT's DBE regulations that authorize the use of race-conscious contracting preferences in jurisdictions where their use is manifestly necessary to remedy the effects of identified local discrimination.

As early as the 1970s, Congress concluded that past discrimination by private parties hindered the participation of minority-owned businesses in federal procurement. See *Summary of Activities, A Report of the House Comm. on Small Business*, H.R. Rep. No. 1791, 94th Cong., 2d Sess. 182 (1977). See also Act of Oct. 24, 1978, Pub. L. No. 95-507, Section 202, 92 Stat. 1760; 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). Indeed, Congress determined that many Americans, because "of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control," lack "full participation in our free enterprise system" and thus are "socially and

economically disadvantaged" on account of race or ethnicity. 15 U.S.C. 631(f)(1).

Throughout the 1980s and 1990s, Congress conducted congressional hearings and investigations to document the continuing effects of discrimination, past and present, on DBEs generally, and in highway contracting and construction specifically.[5] The legislative record, consistent with the district court's findings (R.E. 27), details many of the particular problems confronted by DBEs, including discriminatory barriers preventing minorities and women from obtaining loans, capital, surety bonds, competitive prices, membership in unions and trade

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[5] See R.E. 41, exhibit 2 Attached to Motion of the United States for Summary Judgment, *Appendix–The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey,* 61 Fed. Reg. 26,050 (1996) (citing approximately 30 congressional hearings since 1980 concerning minority-owned businesses). See also *Adarand* v. *Slater,* 228 F.3d at 1167-1175 (discussing in detail the evidence before Congress when it enacted TEA-21). 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* at 106, 114, 118, 241. The House Report stated that observed numerical disparities 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*, 101st Cong., 1st Sess. (1989).

associations and evidence of a continuing pattern of discriminatory networking, and bid solicitation restricting opportunities for DBEs to compete for work on federally-funded highway construction contracts. It also includes statistical studies documenting varying amounts of underutilization of black, Hispanic, Asian, Native-American and women-owned businesses in government contracts in areas throughout the country.

In 1998, in the wake of *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), in which the Supreme Court held that all governmental racial classifications, including race-conscious contracting preferences, must be evaluated under strict scrutiny, Congress decided to reauthorize the DBE program. Prior to enacting TEA-21, Congress received evidence that DBEs continue to suffer the effects of identified racial and gender discrimination that adversely affect their ability to compete equally in highway construction in the United States. The legislative record includes evidence of intentional private discrimination in awarding subcontracts, pay disparities not explained by other factors, discrimination in the provision of business loans and bonding, and the adverse consequences of an "old boy" network that effectively excluded minorities and women. See, *e.g.,* R.E. 72, 76, 85, 92-93, 144 Cong. Rec. S1409, S1413, S1422, S1429-1430 (March 5, 1998); R.E. 102, 144 Cong. Rec. S1482 (March 6, 1998). See also *Adarand* v. *Slater*, 228 F.3d at 1169-1170. For example, 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 R.E. 147, 144 Cong. Rec. H3958 (May 22, 1998) (Rep. Norton discussing M. 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)). In addition, a 1997 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 S.R.E. 105, Exhibit 1, Attached to Federal Defendants' Reply to Plaintiff's Opposition to Federal Defendants' Motion for Summary Judgment, Maria E. Enchautegui et al., Urban Institute, *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?* 36 (Dec. 1997) (Urban Institute Report); R.E. 148, 144 Cong. Rec. H3959 (May 22, 1998) (Rep. Norton discussing Urban Institute Report). The Urban Institute Report found that minority-owned businesses received 57 cents, and women-owned businesses 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. S.R.E. 72, 85, 89-92, 129, Urban Institute Report at 1, 15, 19-22, 61. Throughout the debates on TEA-21, members of Congress noted evidence showing numerical disparities in utilization of businesses owned by women and minorities. See, *e.g.,* R.E. 127-128, 144 Cong. Rec. at S5413-5414 (May 22, 1998) (Sen. Chafee discussing *State of Colorado and the Colorado Department of Transportation*

Disparity Study, Final Report 5-56, 5-59 (Apr. 1, 1998)); R.E. 66, 144 Cong. Rec. S1403 (March 5, 1998); R.E. 102, 144 Cong. Rec. S1482 (March 6, 1998).[6] See also S.R.E. 81, 84-85, 89-92, 129, Urban Institute Report at 11, 14-15, 19-22, 61. Consequently, in 1998 both houses of Congress, in bipartisan votes, rejected amendments to TEA-21 that would have eliminated DOT's DBE program. See R.E. 116, 144 Cong. Rec. S1496 (Mar. 6, 1998); R.E. 142, 144 Cong. Rec. H2011 (April 1, 1998).

2. Western States' Attack On The Legislative Record Is Not Supported By Precedent

a. Western States' claim (Br. 20) that Congress lacked authority to enact TEA-21 without evidence of discrimination in each of the 50 states is not supported by precedent. As a national sovereign, the federal government has a compelling interest in avoiding improper (discrimination-based and discrimination-reinforcing) distribution of federal funds nationwide. Thus, while a state or local government has only "the authority to eradicate the effects of private discrimination within its own legislative jurisdiction," Congress has the power to ensure that

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[6] 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, R.E. 128, 144 Cong. Rec. S5414 (May 22, 1998); in the United States as a whole, minorities own 9% of construction companies and receive 4% of construction receipts, R.E. 166, 144 Cong. Rec. S1403 (Mar. 5, 1998); white-owned construction firms receive 50 times as many loan dollars as African-American-owned firms with identical equity, R.E. 85, Cong. Rec. 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, R.E. 113, 144 Cong. Rec. S1493 (Mar. 6, 1998).

federal spending does not reinforce racial discrimination and its effects in any location where federal dollars are spent. *Croson,* 488 U.S. at 491-492 (plurality opinion). Legislation mandating the use of race-conscious contracting preferences nationwide, even in regions where discrimination does not persist, would raise more difficult questions. But where, as here, the statutory and regulatory provisions only authorize, and do not require, the use of race-conscious remedies in any particular jurisdiction unless discrimination or its effects are actually present, such a flexible and narrowly tailored use of race satisfies a facial constitutional challenge. Thus, Congress and DOT struck an appropriate balance that allows Congress to address the national problem of discrimination in highway construction contracting while authorizing the use of race-conscious contracting preferences on federally aided projects only in those jurisdictions where their necessity is manifest.

Consistent with *Croson*, several courts of appeals have held that Congress need not have evidence of discrimination in every single State to enact national, remedial race-conscious contracting preferences. *Sherbrooke Turf*, 345 F.3d at 970-971 (rejecting appellants' contention that their "facial challenges to [TEA-21's] DBE program must be upheld unless the record before Congress included strong evidence of race discrimination" in the specific States where appellants do business); *Rothe Dev. Corp.* v. *United States Dep't of Defense*, 262 F.3d 1306, 1329 (Fed. Cir. 2001) (explaining "[w]hereas 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" a race-conscious remedy). See also *Adarand* v. *Slater,* 228 F.3d at 1163 n.8 (explaining that although a city has "no authority to remedy the present effects of past discrimination in the entire construction industry nationally, * * * [t]he remediation of nation-wide problems * * * is particularly within the purview of Congress"). Western States cites no contrary authority. Moreover, to ignore precedent and conclude that Congress must have evidence of racial and gender discrimination in *every* State before it may enact national remedial legislation would seriously compromise Congress's authority to enact legislation to rectify problems of racial and gender discrimination that affect the Nation as a whole.

In any event, even though TEA-21 and its implementing regulations authorize the use of race-conscious contracting preferences nationwide, the regulations are designed to assist States and other recipients in determining when, if at all, race-conscious measures are manifestly necessary to overcome the effects of identified discrimination in a particular jurisdiction. For example, DOT's regulations require, among other things, that DBE participation goals be tied to local market conditions and that they be used only as a last resort when race-neutral measures prove inadequate to achieve the DBE participation expected in the absence of discrimination.

To the extent that Western States suggests (Br. 20) that the legislative record is deficient because "[t]here was no nationwide study presented to Congress," its claim is not supported by case law. Western States does not cite to any precedent

that holds that a national study is a prerequisite to Congress enacting nationwide measures to remedy racial and gender discrimination in those jurisdictions where such discrimination, in fact, exists. In fact, Western States acknowledges that Congress had evidence of racial and gender discrimination in varying degrees "throughout the country" (*Ibid.*). The legislative record contains numerous statistical studies detailing underutilization of minority and women contractors in various States, localities, and regions. In sum, there is sufficient evidence to support Congress's conclusion that due to identified racial and gender discrimination there are fewer opportunities for minorities and women to participate in highway construction markets throughout the Nation.

b. Western States' suggestion (Br. 19) that this Court hold that the legislative record is inadequate because the district court "did not set forth detailed findings as to the scope and content of the reports before Congress" is likewise misdirected. The issue as to compelling interest in this facial challenge is whether Congress had a strong basis in evidence to support its conclusion as to the necessity of national remedial relief. Because the specificity of a district court's findings cannot alter the evidence before Congress, the nature of the findings below do not control whether Congress had a compelling interest in enacting TEA-21. *Cf. Associated Gen. Contractors* v. *Coalition for Econ. Equity*, 950 F.2d 1401, 1416 (9th Cir. 1991) (explaining that City need not "detail each and every instance" within the legislative record it "has relied upon in support of its decision that affirmative action [in contracting] is necessary"), cert. denied, 503 U.S. 985 (1992).

In any event, the district court's findings are not deficient. The district court reviewed in detail the evidence before Congress, as well as the Tenth Circuit's analysis of the legislative record in *Adarand* v. *Slater*. The district court here found that "studies and statistics from all regions of the republic * * * demonstrate[] that the effects of * * * discrimination * * * were manifested in virtually every aspect of business formation and operation, including, but not limited to: financing, bonding, purchasing, insuring, training and even union membership" so as to "impede[] the ability of DBEs to compete in the highway construction marketplace" (R.E. 26, 27). The district court further explained the basis for its conclusion, stating, "these studies demonstrat[ing] * * * the effects of private discrimination spanning many years[,]" as well as the anecdotal evidence, "together * * * present an impressive body of evidence concerning the effects of private discrimination on the ability of disadvantaged businesses to compete in the marketplace" (R.E. 27). Consequently, Western States' attack on the district court's opinion is unwarranted.

B. DOT's DBE Regulations Are Narrowly Tailored

Even when race-conscious measures serve a compelling governmental interest, such measures must be narrowly tailored to accomplish that end. Western States' primary argument as to narrow tailoring (Br. 24; see *id.* at 24-29) is that Washington's DBE program is not narrowly tailored because there is no evidence that links Washington's program to identified discrimination in Washington. To the extent that Western States' argument is directed to Washington's implementation of

the federal DBE regulations, it has not suggested that the federal regulations are facially unconstitutional. Rather, at most, it has raised the question whether Washington's DBE program implemented the federal DBE regulations in a manner that complies with all constitutional requirements. Because Western States fails to show that there is no set of circumstances in which the federal DBE regulations can be constitutionally applied, the regulations are narrowly tailored on their face. See *Members of City Council*, 466 U.S. at 797-798; *Salerno*, 481 U.S. at 745.

1. The DBE Program Permits Race-Conscious Remedies Only Where Race-Neutral Remedies Prove Insufficient

Because of the dangers inherent in race-conscious government action, courts examine whether there has been proper "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* v. *Peña*, 515 U.S. at 237-238; *Croson,* 488 U.S. at 519 (Kennedy, J., concurring). DOT's regulations meet this standard because they are designed to assist States in ensuring that race-conscious remedies are limited to *only* those jurisdictions where discrimination or its effects are a problem and *only* as a last resort when race-neutral relief is insufficient.

First, DOT's regulations help ensure that recipients use remedial measures only when discrimination or its effects are present in the local market. As the district court noted (R.E. 30), DOT's regulations require a recipient to set overall annual goals that reflect *local* business conditions and to utilize a two-step process

when setting overall DBE participation goals; first, calculating the availability of DBEs to compete in the local market as compared to all firms, and second, adjusting that figure so that it reflects anticipated DBE participation absent the effects of discrimination. See 49 C.F.R. 26.45(b); R.E. 172, 192-193.

Moreover, even when the effects of discrimination persist within a jurisdiction, a recipient may use race-conscious contracting preferences only when race-neutral means are inadequate to remedy such discrimination. DOT's regulations provide that a recipient "must meet the maximum feasible portion of [its] overall goal, by using race-neutral means of facilitating DBE participation." 49 C.F.R. 26.51(a). See also 64 Fed. Reg. 5112 (Feb. 2, 1999) ("recipients have to give priority to race-neutral means"). Because the regulations require a recipient to determine whether and to what extent discrimination or its lingering effects actually exists within its jurisdiction and permit the use of race-conscious contracting preferences only when race-neutral measures are insufficient, they help to ensure that States and other recipients implement individual DBE programs in compliance with constitutional requirements. Accordingly, the district court correctly concluded (R.E. 32) that TEA-21 and its implementing regulations are facially narrowly tailored.

2. DOT's DBE Regulations Are Narrowly Tailored Through Flexibility And Durational Limits

Consistent with the Tenth and Eighth Circuits, the district court correctly concluded that the federal DBE regulations are sufficiently flexible and limited in

duration because they allow States and other recipients to seek "waivers and exemptions from nearly every" requirement and have "many checks and balances to ensure that the program does not outlive its usefulness" (R.E. 29-30). See *Adarand* v. *Slater*, 228 F.3d at 1179-1183; *Sherbrooke*, 345 F.3d at 971-973. As noted *supra*, flexibility is the hallmark of DOT's DBE regulations. As the district court correctly pointed out (R.E. 29), no penalty is imposed for failure to meet annual DBE participation goals. 49 C.F.R. 26.47. When a recipient establishes race-conscious DBE participation goals for a particular contract, contractors are *not* required to achieve it; they must only pursue it in good faith. 49 C.F.R. 26.53(a).

The district court also correctly concluded that TEA-21 is temporary and limited in duration (R.E. 29-30). Indeed, it emphasized that TEA-21 has built-in sunset provisions so that the race-conscious remedial measures authorized by TEA-21 will expire unless Congress chooses to reauthorize the statute. (R.E. 29).[7]

The federal regulations also require recipients regularly to reassess the necessity of race-conscious remedies (R.E. 30). For example, a state recipient must discontinue the use of all race- and gender-conscious contracting preferences in a given year if, at any point, they have met or it appears that they will exceed the overall DBE participation goal for the year. See 49 C.F.R. 26.51(f)(2). A state recipient is also required to cease its use of race-conscious measures if it achieves

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[7] *See supra* note 3, at 11.

its DBE participation goals through race-neutral means for two consecutive years and DBEs must submit an affidavit annually to reestablish eligibility and are excluded from the program if the owner's net worth, excluding the value of the owner's home and stake in the DBE business, exceeds $750,000 (R.E. 29, 31). See 49 C.F.R. 26.67(a)(2); *id.* at 26.83(j); *id*. at 26.83(c)(7)(ii). Thus, TEA-21 and its implementing regulations are "inherently and progressively self-limiting in the use of race-conscious measures." 61 Fed. Reg. 26,042, 26,048 (May 23, 1996).

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

Western States argues (Br. 26-27) that TEA-21's racial and ethnic presumptions of social and economic disadvantage are fatally over-inclusive because not every individual who is a member of a favored race or ethnic group in fact is socially and economically disadvantaged.

Western States' argument overlooks the fact that TEA-21's implementing regulations seek to channel the benefits of participation to entities who are owned by the victims of discrimination. For example, under DOT's regulations, 49 C.F.R. 26.67, the owners of firms seeking DBE designation must submit a notarized statement 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" (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" (the standard for economic disadvantage), 15 U.S.C. 637(a)(6)(A). An owner of an applicant for DBE certification must also submit documentation of personal wealth; and as the district court noted (R.E. 31), if the net worth (excluding home and interest in the business) exceeds $750,000, any presumption of economic disadvantage is automatically rebutted. See 49 C.F.R. 26.67(a)(2), (b)(1). Further, recipients must include as DBEs businesses that are owned by non-minorities who have qualified for DBE status based on individual circumstances of social disadvantage. Any DBE certification is rebuttable, 49 C.F.R. 26.67(b)(2), 26.87(a), and third parties may challenge the eligibility of particular DBEs, 49 C.F.R. 26.87. See also S. Rep. No. 4, 100th Cong., 1st Sess. 12 (1987). Finally, the regulations also provide 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). 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.").

Furthermore, the regulations at issue here are designed to avoid imposing an "unacceptable burden" on third parties. *Paradise*, 480 U.S. at 182 (plurality). The current program is aimed at redressing the identified effects of discrimination, 64 Fed. Reg. at 5096, employs race-conscious contracting preferences only as a last

resort, and requires recipients of TEA-21 funds to set DBE participation goals based on demonstrable evidence of the effects of identified discrimination in local markets. The federal regulations thus are designed to help avoid bestowing undue benefits on DBEs, and to create contracting opportunities unaffected by racial and gender discrimination. Accordingly, TEA-21 and its implementing regulations are facially narrowly tailored.

CONCLUSION

Wherefore, the district court's order granting the federal defendants' motion for summary judgment upholding the facial constitutionality of TEA-21 and DOT's implementing regulations should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The United States is unaware of any related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2004, two copies of the BRIEF OF THE UNITED STATES AS APPELLEE were served by first-class mail, postage prepaid, on the following counsel of record:

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