IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-3016

GROSS SEED COMPANY,

Plaintiff-Appellant

v.

NEBRASKA DEPARTMENT OF ROADS, *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 NEBRASKA

BRIEF FOR THE UNITED STATES AS APPELLEE

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TABLE OF CONTENTS

PAGE

SUMMARY OF THE CASE 1

STATEMENT OF ISSUES 2

STATEMENT OF THE CASE 2

1. *Federal DBE Program* 4

2. *Nebraska's Implementation Of DOT's DBE Program* 8

3. *Statement Of Facts And Proceedings Below* 11

4. *Standard Of Review* 13

SUMMARY OF ARGUMENT 14

ARGUMENT 16

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE FEDERAL DBE PROGRAM IS FACIALLY CONSTITUTIONAL 16

A. Congress Has A Compelling Interest In Eliminating Discrimination And Its Effects In Government Spending And Procurement 18

1. *Congress Had Ample Evidence Of Discrimination When It Enacted TEA-21* 19

2. *Gross Seed's Objections To The Evidence Before Congress Are Unsubstantiated And Insubstantial* 28

TABLE OF CONTENTS (continued): **PAGE**

a. Strict Scrutiny Standard 28

b. Evidence of Discrimination in Highway Construction 30

B. DOT'S DBE Program Is Narrowly Tailored 36

1. *The DBE Program Permits Race-Conscious Measures Only Where Race-Neutral Corrections Prove Insufficient* 37

2. *The DBE Program Is Narrowly Tailored Through Flexibility, Proportionality, And Durational Limits* 40

3. *Congress's Use Of Racial And Ethnic Presumptions Is Not Fatally Over-Inclusive* 43

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE FEDERAL DBE PROGRAM IS CONSTITUTIONAL AS APPLIED 49

CONCLUSION 53

CERTIFICATE OF COMPLIANCE

ADDENDUM

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES: **PAGE**

Adarand Constructors, Inc. v. *Peña*, 515 U.S. 200 (1995) . . . . . *passim*

Adarand Constructors, Inc. v. *Slater*, 228 F.3d 1147 (10th Cir. 2000), cert. dismissed as improvidently granted, 534 U.S. 103 (2001) 2, 19, 22

Anderson v. *Bessemer City*, 470 U.S. 564 (1985) 13

Associated Gen. Contractors v. *Coalition for Econ. Equity*, 950 F.2d 1401, (9th Cir. 1991), cert. denied, 503 U.S. 985 (1992) 25

Board of Trs. of the Univ. of Ala. v. *Garrett*, 531 U.S. 356 (2001) 29, 35

Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 47

Chevron U.S.A. Inc. v. *Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984) 47

City of Boerne v. *Flores*, 521 U.S. 507 (1997) 29, 35

City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989) . . . . . *passim*

Cone Corp. v. *Hillsborough County*, 908 F.2d 908 (11th Cir.), cert. denied, 498 U.S. 983 (1990) 25

Cortez III Serv. Corp. v. *National Aeronautics & Space Admin.*, 950 F. Supp. 357 (D.D.C. 1996) 19

Ensley Branch, N.A.A.C.P. v. *Seibels*, 31 F.3d 1548 (11th Cir. 1994) 42

Estate of Davis v. *Delo*, 115 F.3d 1388 (8th Cir. 1997) 13

Florida Prepaid Post-Secondary Educ. Expense Bd. v. *College Sav. Bank*, 527 U.S. 627 (1999) 29

CASES (continued): **PAGE**

Fullilove v. *Klutznick*, 448 U.S. 448 (1980) 19, 20

Interstate Traffic Control v. *Beverage*, 101 F. Supp. 2d 445
(S.D. W. Va. 2000) 45

Jones v. *United States*, 526 U.S. 227 (1999) 47

Kimel v. *Florida Bd. of Regents*, 528 U.S. 62 (2000) 29, 35

Kubitz v. *Dohrn Transfer Co.*, 293 F.3d 454 (8th Cir. 2002) 14

Members of City Council of Los Angeles v. *Taxpayers for Vincent*,
466 U.S. 789 (1984) 18

Monell v. *Department of Soc. Servs.*, 436 U.S. 658 (1978) 27

Moysis v. *DTG Datanet*, 278 F.3d 819 (8th Cir. 2002) 33

Nguyen v. *I.N.S.*, 533 U.S. 53 (2001) 17

Oregon v. *Mitchell*, 400 U.S. 112 (1970) 30

Rahman X v. *Morgan*, 300 F.3d 970 (8th Cir. 2002) 13

Sherbrooke Turf, Inc. v. *Minnesota Dep't of Transp.*,
No. 02-1665 (pending in 8th Circuit) 49

Turner Broad. Sys., Inc. v. *FCC*, 520 U.S. 180 (1997) 19

United States v. *Enmons*, 410 U.S. 396 (1973) 27

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CASES (continued): **PAGE**

United States v. *Salerno*, 481 U.S. 739 (1987) 2, 18

Wygant v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986) 48

CONSTITUTION & STATUTES:

United States Constitution
Spending Clause, Art. I § 8, Cl. 1 . . . . . 29, 30
Fourteenth Amendment, Section 5 . . . . . 29, 30, 44
Fifteenth Amendment, Section 2 44

Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA),
Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919-1921 22

Public Works Employment Act of 1977, 42 U.S.C. 6705(f)(2) 20

Small Business Act (SBA), 15 U.S.C. 631 *et seq.* 4, 5, 19
15 U.S.C. 637(a)(5) 4, 44
15 U.S.C. 637(a)(6)(A) 4, 45
15 U.S.C. 637(d)(3)(C) 5

Surface Transportation Assistance Act of 1982 (STAA),
Pub. L. No. 97-424, § 105(f), 96 Stat. 2100 21

Surface Transportation and Uniform Relocation Assistance Act of 1987
(STURAA), Pub. L. No. 100-17, § 106(c)(2)(B), 101 Stat. 146 21

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Pub. L. No. 105-178, 112 Stat. 107 . . . . . *passim*
Tit. I, § 1101(b), 112 Stat. 113 22
Tit. I, § 1101(b)(2)(B), 112 Stat. 113 . . . . . 4, 5
Tit. I, § 1101(b)(4), 112 Stat. 114 5

CONSTITUTION & STATUTES (continued): **PAGE**

15 U.S.C. 694(a) 38

15 U.S.C. 694(b) 38

18 U.S.C. 1001 . . . . . 6, 46

REGULATIONS:

49 C.F.R. 26.107(e) 6, 46

49 C.F.R. 26.15 . . . . . 8, 43

49 C.F.R. 26.29 40

49 C.F.R. 26.33 49

49 C.F.R. 26.41(c) 42

49 C.F.R. 26.43 . . . . . 8, 42

49 C.F.R. 26.45 . . . . . 13, 42, 48, 51

49 C.F.R. 26.45(b) 7, 39, 51

49 C.F.R. 26.45(c) 7, 8, 52

49 C.F.R. 26.45(d) 7, 9, 39

49 C.F.R. 26.45(d)(1) 52

49 C.F.R. 26.45(f)(3) 8

49 C.F.R. 26.47 . . . . . 8, 42

REGULATIONS (continued): **PAGE**

49 C.F.R. 26.51 51

49 C.F.R. 26.51(a) 7, 9, 36, 39

49 C.F.R. 26.51(b) 7

49 C.F.R. 26.51(b)(1) 40

49 C.F.R. 26.51(b)(2) 40

49 C.F.R. 26.51(b)(3) 40

49 C.F.R. 26.51(b)(4) 40

49 C.F.R. 26.51(d) 8

49 C.F.R. 26.51(f) 41

49 C.F.R. 26.51(f)(1) 8

49 C.F.R. 26.53(a) 8, 42

49 C.F.R. 26.53(a)(2) 42

49 C.F.R. 26.61(b) 5

49 C.F.R. 26.65 6

49 C.F.R. 26.67 . . . . . 44, 51

49 C.F.R. 26.67(a) 5

49 C.F.R. 26.67(a)(1) 5, 6, 39

49 C.F.R. 26.67(a)(2) 45

REGULATIONS (continued): **PAGE**

49 C.F.R. 26.67(a)(2)(i) 6

49 C.F.R. 26.67(b) 5

49 C.F.R. 26.67(b)(1) 6, 45

49 C.F.R. 26.67(b)(2) 6, 45

49 C.F.R. 26.83(c)(7)(ii) 6, 45

49 C.F.R. 26.83(j) 41, 45

49 C.F.R. 26.87 . . . . . 6, 45

49 C.F.R. 26.87(a) 45

49 C.F.R. Pt. 26 . . . . . 2, 52
App. A 43
App. E 5

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How State and Local Governments Will Meet the Croson Standard: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 100th Cong., 1st Sess. (1989) 25

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LEGISLATIVE HISTORY (continued): **PAGE**

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 Comm. on the Judiciary, 105th Cong., 1st Sess. (1997) 24, 26

H.R. Rep. No. 468, 94th Cong., 1st Sess. (1975) 20

H.R. Rep. No. 460, 100th Cong., 1st Sess. (1987) 21

S. Rep. No. 4, 100th Cong., 1st Sess. (1987) 22, 45

144 Cong. Rec. (Mar. 5, 1998):
p. S1403 26
p. S1404 26
p. S1409-1410 27
p. S1420-1421 27
p. S1422 26
p. S1429 27
p. S1430 . . . . . 23, 27

144 Cong. Rec. (Mar. 6, 1998):
p. S1482 24
p. S1493 26
p. S1496 . . . . . 28, 38

144 Cong. Rec. (May 22, 1998):
p. S5413 25
p. S5414 . . . . . 25, 26, 27

144 Cong. Rec. (Apr. 1, 1998):
p. H2000 28
p. H2011 . . . . . 28, 38

LEGISLATIVE HISTORY (continued): **PAGE**

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p. H3958 . . . . . 23, 27
p. H3959 23

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BRIEF OF THE UNITED STATES AS APPELLEE

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 Nebraska Department of Roads (NDOR) developed and implemented a disadvantaged business enterprise (DBE) program. Gross Seed Company, which is not a DBE, provides seeding services along highways in Nebraska. Gross Seed bids on federally-assisted highway construction prime contracts and subcontracts. In March 2000, Gross Seed sued NDOR and its director (collectively, State Defendants) for a declaration that the DBE provisions in TEA-21, and the U.S.

Department of Transportation's (DOT's) implementing regulations, are unconstitutional facially and as applied, and to enjoin Nebraska's DBE program. The United States, DOT, and Federal Highway Administration (collectively, Federal Defendants) intervened in district court. In September 2000, Gross Seed filed a Second Amended Complaint, challenging the constitutionality of TEA-21 and its DBE regulations, specifically against the Federal Defendants in addition to the State Defendants. After the court conducted a seven-day bench trial, it held that the DBE program is constitutional, facially and as applied. After the district court denied Gross Seed's motion to amend the judgment or for a new trial, Gross Seed filed its notice of appeal.

STATEMENT OF THE ISSUES

1. Whether 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)
- 49 C.F.R. Pt. 26

2. Whether the federal DBE program is constitutional as applied.

STATEMENT OF THE CASE

This case arises out of Congress's longstanding and continuing effort to ensure that federal highway construction and transit funds, and the opportunities created by those funds, are distributed in a manner that does not extend or reinforce

prior and existing patterns of discrimination in those industries. One of the products of those efforts is DOT's DBE program, which provides opportunities for socially and economically disadvantaged businesses to participate in federally-aided highway and transit programs.

At trial, Ray Marshall, an economics professor designated as an expert witness, testified that, for decades leading up to the reauthorization of the DBE program in TEA-21 in 1998, Congress heard evidence of racial and gender discrimination that limits the ability of highway construction firms owned by minorities and women to compete for federally-assisted highway construction contracts on a level playing field. He described in detail the vast body of evidence of discrimination before Congress when it enacted TEA-21 (Tr. 53, 99-156, 164 (Fed. App. 49, 95-152, 160); Report of Ray Marshall at 12-24 (Exh. 700) (Fed. App. 280-292)).[1] David Blanchflower, another expert witness at trial, testified that racial discrimination continues to hinder DBE firms' access to capital that is essential for success (Tr. 709-720 (Fed. App. 325-336); Rebuttal Report of David Blanchflower (Exh. 520) (Fed. App. 342-376)). The court also heard testimony

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[1] "Br. __" refers to the relevant pages of Gross Seed's opening brief. "Tr. __" indicates the relevant pages of the trial transcript. "Exh. __-__" refers to the trial exhibit number and relevant pages of the exhibit. "Add. __" refers to the relevant pages of Gross Seed's addendum, while "Supp. Add. __" refers to the relevant pages of the Federal Defendants' addendum. "App. __" indicates the relevant pages of Gross Seed's appendix. "State App. __" refers to the relevant pages of NDOR's appendix. "Fed. App. __" indicates the relevant pages of the Federal Defendant's appendix. "Doc. __" refers to the entry number on the district court's docket sheet.

from Robert Ashby, a DOT official who helped draft the federal DBE regulations, that the federal regulations were designed to narrowly tailor the DBE program to remedy the lingering effects of discrimination in highway construction (Tr. 465).

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*), holding that the constitutionality of the federal DBE program must be evaluated under strict scrutiny, DOT issued new regulations revamping its DBE program in February of 1999. 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 (1998), 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 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, DOT's regulations also incorporate a race-based rebuttable presumption from the SBA. 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, DOT'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 when applied to individuals. 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 or economically disadvantaged, it may investigate and decertify the firm if it does not meet the requirements for social or economic disadvantage. 49 C.F.R. 26.67(b)(2). The regulations also impose size limits on all firms. 49 C.F.R. 26.65.

To ensure that the program's remedies for the effects of discrimination are tailored to local conditions, the Secretary's regulations require recipients of federal aid to establish numerical measurements, based on local DBE availability and other evidence, to assess the effects of discrimination in their own jurisdictions. DOT's regulations expressly prohibit recipients from establishing a rigid figure based on past goals, a flat 10% goal, or the racial composition of the local population. 49 C.F.R. 26.45(b). 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), and 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).

DOT'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 firms' inability to obtain bonding or financing; offering technical assistance and services to small businesses regardless of race or gender of the owner; 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 DOT will not permit recipients to use 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 adequate DBE participation can be achieved 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).

2. *Nebraska's Implementation Of DOT's DBE Program.* In March 2000, DOT approved Nebraska's current DBE program (see Statement on the U.S. Department of Transportation's Approval of Nebraska's Fiscal Year 2000 Disadvantaged Business Enterprise Program (Exh. 570) (State App. A66)). DOT concluded that NDOR's data and methodology for setting its overall goal for DBE participation satisfied goal-setting procedures in 49 C.F.R. 26.45(f)(3) (Exh. 570-13). As required by Section 26.45(c), NDOR first calculated the ratio of ready, willing and able DBEs in its jurisdiction, using its bidder's list to find 26 DBEs

received subcontracts from July 1, 1998, to June 30, 1999 (Exh. 570-13; Tr. 936-937). NDOR then found there were 239 highway construction contractors in Nebraska, based on the number of prime and subcontractors that received contracts during that time period (Exh. 570-13; Tr. 937). By dividing the total number of ready, willing and able DBEs by the total number of ready, willing and able contractors, NDOR determined the relative availability of DBEs to be 10.9% (Exh. 570-13; Tr. 937).

Pursuant to 49 C.F.R. 26.45(d), NDOR adjusted the 10.9% base ratio to 11% to reflect the DBE participation levels in both federally-assisted and non-federally-assisted contracts during the same time period (Exh. 570-13). And, as required by 49 C.F.R. 26.51(a), NDOR calculated that it could meet 2.33% of its goal through race-neutral means and 8.67% through race-conscious methods (Exh. 570-15; Tr. 939-942). NDOR reached these determinations by estimating the DBE participation that could be achieved based on the DBE participation levels in highway construction programs with goals and state programs without goals (Exh. 570-15; Tr. 939-942).

At trial, Claude Oie, the Division Head for NDOR's Construction Office that administers NDOR's construction contracts, testified that contract goals vary depending on the type and location of a project (Tr. 864, 946-947). NDOR evaluates each project to determine what DBE goals would be appropriate based on the availability and capacity for DBEs for that project (*Ibid.*). For example, NDOR does not include a goal for DBE participation on projects if only one DBE would

be ready, willing and able to do that work (Tr. 949). NDOR also monitors DBE participation throughout the year to anticipate when it expects to meet its annual overall goal and suspend any further use of goals (Tr. 1000). When NDOR met its overall DBE participation goal for fiscal year 2000, it suspended the race-conscious portion of Nebraska's DBE program for projects let in August 2000 (Tr. 974).

For fiscal year 2001, NDOR proposed to decrease its annual goal for DBE participation from 11% to 9.95% (Exh. 362-1 (State App. A86)). NDOR had commissioned MGT of America to prepare an availability and capability study to assist the State in developing its DBE participation goals for fiscal year 2001 (Tr. 954). MGT determined the appropriate geographic market for NDOR's highway construction industry, then estimated the baseline DBE availability (adjusting for any over- and under-count of DBEs), and classified their availability within Nebraska based on their geographic concentration and specialty industry codes for highway construction (see Exh. 701- 4-5 to 5-13 (State App. A199-A218)). Based on MGT's study, NDOR concluded that the availability of DBE subcontractors is 9.95% (Exh. 362 (Enclosure at 2)).

NDOR thus set 9.95% as the aspirational annual goal for DBE participation. Because the participation rate of DBEs from 1995 to 1999 in NDOR projects without race-conscious goals was 5.13%, NDOR estimated that it could meet 5.13% of its annual goal through race-neutral means and 4.82% of the goal through race-conscious means (Exh. 362 (Enclosure at 4)). DOT approved NDOR's implementation of the DBE program on May 18, 2001 (Exh. 362-1). Oie testified

at trial that NDOR was encouraged by the change in the goals from fiscal year 2000 because, in the State's opinion, it reflects the State's progress in reaching a level playing field (Tr. 975).

3. *Statement Of Facts And Proceedings Below.* In March 2000, Gross Seed, a non-DBE firm owned equally by John Gross and his wife, Peggy Gross, sued the State Defendants 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 NDOR, was unconstitutionally applied to Gross Seed. The United States, DOT, and Federal Highway Administration, a DOT agency, intervened as defendants (Doc. 30). Gross Seed filed a Second Amended Complaint against the federal and state defendants in September 2000 (Doc. 66). Gross Seed contends that it lost a subcontract on January 13, 2000, due to NDOR's DBE program (see Second Amended Compl. ¶ 50).

The district court conducted a seven-day bench trial from June 18, 2001, to June 26, 2001, during which the court heard testimony by seven witnesses and admitted 174 exhibits.

Upon completion of the trial and review of the report of Gross Seed's expert, George LaNoue, "a social scientist," the court issued a written order holding that the report's legal conclusions, such as opinions regarding what the court should consider in determining whether Congress had a compelling interest in enacting TEA-21, are inadmissible (see Supp. Add. 1 (June 29, 2001, Order)). The court

admitted the portions of LaNoue's report that define what he analyzed (but not including his legal opinions concerning the evidence of discrimination before Congress) in Sections I(A) and I(B), that discuss the Department of Commerce's benchmark limits for federal prime contracts in Section II(D)(2), and that address NDOR's implementation of the federal DBE program in Section II(G) (Supp. Add. 2; see also App. 29-126 (LaNoue Report)). Gross Seed has not appealed this order.

On May 6, 2002, the district court held that the DBE program, on it face and as applied by NDOR, satisfied strict scrutiny (Add. 1-16). The court held that the legislative history of TEA-21, combined with the statistical and anecdotal evidence of racial and gender discrimination within the construction industry presented at trial, are sufficient to demonstrate that Congress has a compelling interest to remedy the effects of discrimination in highway construction through the enactment of TEA-21 (Add. 10-12). The court further recognized that "after Congress has legislated repeatedly in [this] area * * * the need for fresh hearings and long debates" is "reduce[d]" (Add. 12).

The district court also found that the federal DBE program, as implemented through DOT's regulations, is narrowly tailored (Add. 12-16). The court noted that the regulations specifically require recipients of TEA-21 funds to "meet the maximum feasible portion of their overall goal by using race-neutral means of facilitating DBE participation" (Add. 13); that the duration of the program is limited on several levels because TEA-21 will expire at the end of fiscal year 2003, and DBEs lose their DBE certification when the net worth of the DBE owner

exceeds $750,000 (Add. 14); that Section 26.45's requirement that recipients identify ready, willing and able DBEs in the relevant geographic market avoids random inclusion of individuals as DBEs (Add. 14-15); and that recipients are required to ensure that the DBE program does not unfairly burden non-DBE subcontractors (Add. 15).

Lastly, the district court held that NDOR need not independently demonstrate that its implementation of the federal program is narrowly tailored to serve a compelling interest in Nebraska (Add. 15-16). The court stated that it is well-established that when a State participates in a heavily regulated federal program, as here, the state program needs to show only that it is in compliance with the underlying federal program (Add. 16). Thus the court concluded that NDOR's implementation of the federal DBE program is constitutional as applied to Gross Seed (Add. 16). After "review[ing] the transcript of the trial" again, the court denied Gross Seed's motion to amend the findings or, in the alternative, for a new trial (Add. 18).

4. *Standard Of Review*. In an appeal from a judgment following a bench trial, the Court reviews the district court's legal conclusions *de novo* and factual findings for clear error. See *Rahman X* v. *Morgan*, 300 F.3d 970, 973 (8th Cir. 2002); *Estate of Davis* v. *Delo*, 115 F.3d 1388, 1393-1394 (8th Cir. 1997). A district court's finding based on its "decision to credit the testimony of one or two or more witnesses * * * that is not contradicted by extrinsic evidence, * * * can virtually never be clear error." *Anderson* v. *Bessemer City*, 470 U.S. 564, 575

(1985). A denial of a motion for a new trial is reviewed for an abuse of discretion and is reversed "only if there is an 'absolute absence of evidence to support the [] verdict.'" *Kubitz* v. *Dohrn Transfer Co.*, 293 F.3d 454, 455 (8th Cir. 2002).

SUMMARY OF ARGUMENT

The district court's determination that the DBE program is facially constitutional is supported by ample trial evidence, ranging from expert testimony and reports to testimony by government officials in charge of administering the DBE programs at issue, to testimony by individuals who have been affected by the DBE programs, and finally, to the legislative record before Congress when it enacted TEA-21.

For example, the district court heard expert testimony by Ray Marshall, an economist and former Secretary of the Department of Labor, and admitted Marshall's expert report that analyzed the evidence before Congress and supports the district court's finding that Congress had a strong basis in evidence of discrimination in the highway construction industry when it enacted TEA-21. Both on direct and cross examination, Marshall testified that the legislative record 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.

The district court also heard expert testimony by Professor David Blanchflower, who explained that minorities continue to be discriminated against in access to capital, which is fundamental to starting and growing small construction companies. His conclusions are documented in his expert report. Testimony by owners of DBE firms in Nebraska – Herta Bouvia and Stanford Madlock as well as Peggy Gross, co-owner of Gross Seed and owner of a separate firm that is a certified DBE – were consistent with Blanchflower's conclusion that minority and female owners of small construction companies still experience discrimination that hinder their ability to bid successfully on construction contracts.

Whatever the alleged shortcomings of some of the studies before Congress, Congress had a sufficient evidentiary basis to enact national legislation designed to ensure that federal funds do not reinforce the continuing effects of 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, Gross Seed seeks to 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, Gross Seed'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.

As explained on pages 49-52, *infra*, the district court properly rejected Gross Seed's as-applied challenge.

This Court should therefore affirm the district court's determination that the DBE program is constitutional on its face and as applied.

ARGUMENT

I. 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 Constructors, Inc.* v. *Peña*, 515 U.S. 200, 237 (1995) (*Adarand III*) (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.[2] 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.* 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 Gross Seed's facial challenge to the statutory and regulatory

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[2] 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.

provisions underlying the DBE program, Gross Seed may not prevail merely by asserting that they *might* be applied in an unconstitutional manner. Instead, Gross Seed 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 L. A.* 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 conceivable set of circumstances is insufficient to render it wholly invalid * * *." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). As explained below, Gross Seed 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.* The district court in this case correctly found that Congress had a "strong basis in evidence," *id*. at 500, for finding a national problem of discrimination in highway contracting (Add. 11-12).

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 Constructors, Inc.* v. *Slater*, 228 F.3d 1147, 1167-1176 (10th Cir. 2000) (*Adarand VII*), cert. dismissed as improvidently granted, 534 U.S. 103 (2001), 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).

Here, the district court admitted 174 pieces of evidence, much of which makes up the enormous body of evidence before Congress, accumulated over 30 years, and heard the testimony of Ray Marshall, an economist and expert witness who analyzed that body of evidence before Congress, that supports the finding that Congress had a compelling 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 Exh. 700 (Expert Report of Dr. Ray Marshall at 12-24 (summary of evidentiary record before Congress)) (Fed. App. 280-292).

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 Fed. App. 992-997 (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 Comm. 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 Fed. App. 992-997) documented that minority-owned firms continue to

suffer discrimination and its effects in a variety of ways.[3]

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% 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 Fed. App. 995 (listing hearings)). The Senate

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[3] 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*) (Exh. 679); *Minority Business and its Contributions to the U.S. Economy: Hearing Before the Senate Comm. on Small Business*, 97th Cong., 2d Sess. 44-45, 50, 88, 95 (1982) (Exh. 641). 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 House Comm. on Small Business*, 101 Cong., 1st Sess. (1989) (Exh. 652).

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 through 1997 (see Fed. App. 992-997 (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 1992 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) (Exh. 542) (Fed. App. 468-469, 482) (discussed by Rep. Norton, 144 Cong. Rec. H3958 (May 22, 1998) (Exh. 613)). 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 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) (Exh. 578) (Fed. App. 424) (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.[4]

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[4] 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. 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) (Exh. 633). 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) (Exh. 616). 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

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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) (Exh. 537). 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 Subcomm. on Commerce, Consumer Protection and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 9 (1988) (Exh. 650). Again, Congress heard from individuals who had encountered difficulties created by discrimination and its lasting effects on the availability of bonding.[5]

The evidence showed that some prime contractors engaged in discriminatory

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[4](...continued)
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 Comm. on the Judiciary*, 105th Cong., 1st Sess. 120 (1997) (*1997 ISTEA Hearing*) (Exh. 669).

[5] 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*) (Exh. 506) (Fed. App. 591, 705-706) (cited by Sen. Kennedy, 144 Cong. Rec. S1482 (Mar. 6, 1998) (Exh. 615)).

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 the Judiciary*, 100th Cong., 1st Sess. 54 (1989) (Exh. 651); see also *State of Colorado and the Colorado Department of Transportation Disparity Study, Final Report* 5-56, 5-59 (Apr. 1, 1998) (*Colorado Study*) (Exh. 503) (Fed. App. 764, 767) (cited by Sen. Chafee, 144 Cong. Rec. S5413-5414 (May 22, 1998) (Exh. 612)); *Louisiana Study* 69, 73 (Fed. App. 569, 573).[6] Some suppliers charge higher prices to minority customers, raising their costs and rendering them less competitive. See, *e.g.*, *Colorado Study* 5-78 (Fed. App. 786); *Louisiana Study* 89 (Fed. App. 589); Ray Marshall & Andrew Brimmer, *Public Policy & Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia, Part II* 72-77 (June 29, 1990) (minority firm in Georgia found problem so pronounced that it sent white employees to purchase supplies) (Marshall-Brimmer Report) (Exh. 501) (Fed. App. 881-886).

Congress also heard evidence that black, Hispanic, Asian, Native-American, and women-owned businesses were underutilized in government contracts. *E.g.*,

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[6] 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"), cert. denied, 503 U.S. 985 (1992); *Cone Corp.* v. *Hillsborough County*, 908 F.2d 908, 916 (11th Cir.), cert. denied, 498 U.S. 983 (1990).

Urban Institute Report 11, 14-15, 19-20 (Fed. App. 400,403-404, 408-409). For example, the Urban Institute Report found that minority-owned businesses received only 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. *Id.* at 1, 15, 19-22, 61 (Fed. App. 391, 404, 408-441, 448). Throughout the debates on TEA-21, members of Congress noted study after study, incident after incident, showing gross disparities in utilization.[7] See also *1997 ISTEA Hearing*, *supra*, at 55-56, 58-59, 64, 69, 74-76, 120.

Finally, the evidence showed that in very recent years the termination of similar state and local programs almost always caused inordinate disparities to return (see Tr. 191, 250, 251 (Fed. App. 168, 214-215)). DBE participation in the state-funded portion of a Michigan highway program fell to zero nine months after that State's DBE program ended, while the federally funded portion (which continued to operate under DOT's DBE program) had a 12.7% participation rate. 144 Cong. Rec. S1404 (Mar. 5, 1998). In Tampa, after the city discontinued its

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[7] 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).

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) (Exh. 604) (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 Gross Seed places great reliance (Br. 36-42), *Disadvantaged Business Enterprises* (June 2001) (GAO Report) (Exh. 141), found that DBE contracting had "dramatically declined" when local DBE programs were terminated in the two States it examined. See GAO Report 39-40 (App. 221-222). 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 still sometimes cannot level the playing field.[8] At trial, Ray Marshall testified that this decline in DBE participation was one type of the compelling evidence that impressed members of Congress (Tr. 154 (Fed. App. 150)).

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[8] See *United States* v. *Enmons*, 410 U.S. 396, 405 n.14 (1973) (views of a bill's floor managers are accorded particular weight in determining legislative intent); *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 686-687 (1978) (same).

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 (Apr. 1, 1998) (Exh. 676). 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 (Apr. 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. As the district court found (Add. 11-12), Congress clearly identified a compelling interest with a "strong basis in evidence."

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

a. Strict Scrutiny Standard

In *City of Richmond* v. *Croson*, 488 U.S. at 500, the Supreme Court required a showing of a "strong basis in evidence" of discrimination to satisfy the compelling interest prong of the strict scrutiny test. Gross Seed asserts throughout its brief, however, that defendants must show that Congress had considered evidence of a "widespread pattern" of discrimination (Br. 21, 24-25, 34-35, 41) before Congress can remedy nationwide discrimination in highway construction.

Gross Seed borrowed this standard from cases dealing with Congress's authority to legislate pursuant to Section 5 of the Fourteenth Amendment (Br. 4 (citing *Board of Trustees of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62 (2000); *Florida Prepaid Post-Secondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627 (1999); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997)). Gross Seed's reliance on Section 5 cases, however, is misplaced. Determining the constitutionality of federal legislation enacted primarily pursuant to the Spending Clause, such as TEA-21, differs fundamentally from the standard for determining the constitutionality of Section 5 statutes. Indeed, application of strict scrutiny involves determining whether the legislation can and should achieve its purpose through narrower means, while the determination of whether Congress properly acted under Section 5 requires courts to ascertain whether the statute provides a right beyond what is provided by the Fourteenth Amendment and, if so, whether Congress had a factual predicate to justify going beyond the Constitution. No justification exists for importing the test in Section 5 cases to this case, particularly where the Supreme Court has already spoken that compelling interest is shown by a "strong basis in evidence" of discrimination. See *Croson*, 488 U.S. at 500.

To the extent discriminatory actions by States and localities have played a role in creating the effects of discrimination Congress found has hindered the ability of disadvantaged firms to compete for and win contracts, Congress's authority to enforce Section 5 of the Fourteenth Amendment provides support for

TEA-21's contracting provisions. Gross Seed's argument (Br. 24-25, 34-35, 41) that Congress must make findings about discrimination in every State before it may enact national legislation pursuant to Section 5 has been rejected. See *Oregon* v. *Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J., concurring in part). This Court need not resolve this issue, however, as Congress's ability under the Spending Clause fully supports the statute.[9]

b. Evidence of Discrimination in Highway Construction

At trial, the court not only admitted the reports and hearings from the legislative record for the TEA-21, but also heard testimony by Ray Marshall, who had analyzed the legislative materials in his expert report, that supports the court's finding that Congress had a strong basis in evidence that the effects of discrimination in highway construction continued to exist when it enacted TEA-21 (Tr. 53, 99-164 (Fed. App. 49, 95-152); Report of Ray Marshall at 12-24 (Exh. 700) (Fed. App. 280-292)). Marshall explained the factors necessary for success in highway construction – contracts, access to skilled labor, business networks, equipment and supplies, experience and expertise – and that the evidence before

[9] Alternatively, Gross Seed seizes upon a typographical error in the district court's opinion, where the court refers to intermediate scrutiny (Add. 10), to assert (Br. 19, 25) that the court applied a less exacting standard than strict scrutiny. The court's repeated references to *Adarand III* and compelling interest and strict scrutiny, however, make clear that the court was applying strict – not intermediate – scrutiny (Add. 9-15). Moreover, the court specifically stated that gender classifications are subject to intermediate scrutiny but that it would discuss only strict scrutiny because TEA-21 meets "the more rigorous standard of strict scrutiny" (Add. 9).

Congress documents how the effects of discrimination based on race and gender continue to hinder the ability of construction firms owned by minorities and women (Tr. 66-160 (Fed. App. 62-156)).[10]

On cross-examination, Gross Seed's counsel asked Marshall to walk the court through some of the materials before Congress, *e.g.*, the Urban Institute Report, Marshall-Brimmer Report, specific disparity studies (such as the City of Phoenix's disparity study and Colorado's disparity study), and debates in Congress, and explain the evidence of discrimination contained in each report or hearing (Tr. 205-301 (Fed. App. 169-265)). Ultimately, the district court stated Marshall's testimony on the specific documents served only to show whether Marshall's opinion about the evidence is justified, but that the court itself could reach its decision concerning compelling interest based on its own review of the legislative record (Tr. 221-222, 302, 305; *id.* at 306 (the court stated that it would

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[10] Consistent with Marshall's opinion that construction companies owned by minorities and women have limited access to needed capital due to discrimination (Tr. 119-121 (Fed. App. 115-117)), David Blanchflower, Professor of Economics and former chair of the Department of Economics at Dartmouth College, stated in both his testimony and expert report that minorities continue to be discriminated against in access to capital, which is of fundamental importance to starting and growing a small construction company (Tr. 709-711, 714-720, 732-735 (Fed. App. 325-327, 330-336, 338-341); Rebuttal Report of David Blanchflower at 17, 19-34 (Exh. 520) (Fed. App. 359, 361-376)). Furthermore, the court considered testimony by owners of DBE firms that participate in highway construction contracts in Nebraska that they have experienced exactly the type of discrimination that was considered by Congress when it enacted TEA-21 (see, *e.g.*, Tr. 350-352, 355-357, 374-378 (Herta Bouvia) (Fed. App. 940-950); Tr. 626-630, 634-636, 640-643, 660-673 (Stanford Madlock) (Fed. App. 953-978); Peggy Gross Dep. at 112-113, 159-162 (Exh. 600) (Fed. App. 983-988)).

"independently evaluate that evidence and determine whether the government has met its burden of proof") (Fed. App. 268)).

It is plain that the district court was persuaded by Marshall's analysis of the legislative record, and by its own review of the evidence before Congress, that Congress had a compelling interest to remedy discrimination in highway construction. Gross Seed does not challenge Marshall's report. Instead, it contends that the district court failed to properly analyze the evidence presented at trial by excluding portions of the report by its expert, George LaNoue, concerning the reliability and accuracy of the evidentiary record before Congress (Br. 25). But Gross Seed has not appealed that court order and cannot claim now that the district court erred in excluding portions of LaNoue's report, or rely in this court (Br. 25-26) on those excluded portions of the report.

Equally meritless are Gross Seed's arguments that because the district failed to cite the evidence it relied on when it concluded that a compelling interest for Congress to act exists, therefore it improperly deferred to Congress and did not review the specific documents that were before Congress (Br. 26-28). The focus on appeal is whether the district court's finding of compelling interest is supported by evidence, and not what the district court said or did not say in its order. Here, the court considered the evidence presented at the seven-day trial as well as the parties' trial briefs and post-trial briefs in reaching its decision (Add. 1), and the court specifically said it *would* review the record the government submitted. A review of the trial transcript and record reveal that the legislative materials

discussed in Section III(A)(1), *supra*, were admitted at trial and underlie the court's finding of compelling interest. Contrary to Gross Seed's representations (Br. 29-36), 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 (Tr. 53, 178-184 (Fed. App. 49, 161-167)). See pp. 20-28, *supra*; see also Index to Defendants' Trial Exhibits, filed with the Federal Defendants' Trial Brief (App. 368-414).

Gross Seed attempts to discredit this evidence by submitting two charts of its counsel's interpretation of the defendants' evidence that were not even introduced t trial (App. 415-606, 666-851). See *Moysis* v. *DTG Datanet*, 278 F.3d 819, 829 n.3 (8th Cir. 2002) ("Arguments and evidence which could, and should, have been raised or presented at an earlier time in the proceedings cannot be presented in a Rule 59(e) motion."). The chart at Tab 9 of Gross Seed's appendix was submitted with Gross Seed's post-trial brief, while the chart at Tab 17 ("Index of Federal Defendant's Trial Exhibits") was never submitted to the district court and is a blatant attempt to include arguments beyond Gross Seed's brief on appeal. In any event, these two charts prove nothing. The charts ignore the vast statistical and historical evidence of discrimination before Congress that the court reviewed, while providing information that is not necessary for finding that Congress had a compelling interest, such as the alleged perpetrator of discrimination discussed in the documents (App. 415-606, 666-851). Indeed, study after study before Congress compared the appropriate pools of "ready, willing and able" minority and non-

minority contractors in the relevant markets. See, *e.g.*, Urban Institute Report 19-22 (Fed. App. 408-411); *Louisiana Study* 182, 187-194, A1-A6 (Fed. App. 682, 687-694, 732-737); Grown & Bates at 34, 39 (Fed. App. 477, 482). Yet at no point during the trial or on appeal has Gross Seed offered any credible argument that the relevant statistical information considered by Congress is inaccurate.

To the extent that Gross Seed contends (Br. 28-29) that the district court erred in accepting evidence of discrimination in the construction sector as evidence of discrimination in highway construction, that assertion is contradicted by the trial evidence. At trial, Ray Marshall testified that, because companies are often involved in building as well as highway construction and common institutional arrangements are used throughout the entire construction section (*e.g.*, processes relating to bidding and pricing, common tools and technologies, and common work values), it is almost impossible to separate companies who work on highway construction projects from companies that perform other types of construction work (Tr. 53-65 (Fed. App. 49-61); accord Tr. 893-894 (Oie)). Indeed, Gross Seed's owner, John Gross, testified that his company provides seeding services for a variety of construction projects, including, but not limited to, highway construction projects (see John Gross Dep. at 12-13 (Exh. 599) (Fed. App. 980-981)); Randy Dean, an assistant manager at Paulsen, Inc., testified that the company works on all phases of highway construction and building construction (Tr. 1322-1323) (Fed. App. 990-991); Herta Bouvia, a female co-owner fo a DBE firm in Nebraska, testified that her company installs steel bars for reinforcing

concrete for both highway and commercial building construction projects (Tr. 344-345 (Fed. App. 938-939)); and Stanford Madlock, an owner of a DBE trucking company, testified that his company hauls aggregates for highway, commercial building, and residential projects (Tr. 623 (Fed. App. 952)). Thus, the evidence of discrimination in the construction sector is a reliable indicator of discrimination experience by these companies when they work in the highway construction sector (Tr. 54 (Fed. App. 50)). Contrary to Gross Seed's contention, *Garrett*, *Kimel*, and *City of Boerne* (Br. 28-29) are inapposite and thus do not undermine Marshall's conclusion or the district court's finding of discrimination in highway construction.

Finally, the GAO Report and the Department of Commerce's review of direct procurement contracts prove nothing. Gross Seed's reliance (Br. 36-42, 44-47, 49) 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 requirements of strict scrutiny." See GAO Report at 82; see also *id*. at 24, 77 (App. 206, 259). 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 (Fed. App. 404-405, 429). The GAO Report, in fact, omitted that information not because the data 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 (App. 234-241, 244-246, 259).

Gross Seed also reads far too much into the Department of Commerce's benchmark study (Br. 35-36, 42, 45-46). That study examined only *direct federal procurement* – where a federal agency contracts directly with private firms – not procurement by States and localities using federal assistance as in this case. In addition, the study looked only for disparities in the government's hiring of *prime contractors*, not subcontractors like Gross Seed. See 63 Fed. Reg. 35,714, 35,716 (June 30, 1998). 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 Institute Report are better sources. See pp. 23-27, *supra*. Here, TEA-21 and DOT's regulations strike a balance whereby Congress addresses the national problem of discrimination, while DOT *prohibits* 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. Gross Seed fails to show that the DBE program is incapable of being administered in a way that meets the narrow-tailoring requirement. DOT's regulations seek to channel remedial benefits to victims of discrimination and proscribe race-conscious measures 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).

Gross Seed argues (Br. 43-46) 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. 46-48)) 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. As early as 1970, Congress attempted to overcome discrimination in the provision of bonding 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; to the extent that discrimination in bonding has lessened, the use of race-conscious remedies will also lessen.

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 expected 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. 6-8, *supra*. Moreover, even where that analysis suggests that the effects of discrimination persist, race-conscious measures *cannot* be employed *unless* race-neutral means are inadequate. "[A recipient] must meet the maximum feasible portion of [its] overall goal," the Secretary's regulations provide, "by using race-neutral means of facilitating DBE participation." 49 C.F.R. 26.51(a). See also 64 Fed. Reg. at 5112 ("recipients must give priority to race-neutral means").

DOT's regulations also identify numerous race-neutral means, such as 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 rom 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. Because the regulations allow race-conscious remedies only as a last resort, Gross Seed 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 (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 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.[11] Thus, the structure "is inherently and progressively self-limiting in the use of race-conscious measures." 61 Fed. Reg. 26,042, 26,048 (May 23, 1996). 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

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[11] 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.

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 each recipient to set overall annual goals reflecting *local* business conditions and to set those goals based on the actual number of certified DBEs ready, willing and able to compete in the recipient's market. 49 C.F.R. 26.45. State and local recipients are explicitly directed that they cannot merely adopt TEA-21's aspirational nationwide goal of 10%, 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 quotas. 49 C.F.R. 26.43. And nowhere in the regulations are prime

contractors required to accept higher bids by DBE subcontractors. 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*

Gross Seed'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. 47-48, 51-52). That argument does isolate the one race-conscious aspect of the program that operates uniformly and nationwide. 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 described in this brief, the impact of the statute's race-based presumption on parties like Gross Seed 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 appropriate 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.

Gross Seed's argument also overlooks that the Secretary's implementing regulations seek to channel the benefits of participation to entities owned by the victims of discrimination. 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 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 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 Gross Seed'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. Gross Seed nowhere alleges

that such errors are necessarily commonplace, and the *possibility* of 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. Gross Seed 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 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). 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."). Gross Seed's speculative possibility that, on occasion, an undeserving individual will benefit, moreover, is no basis for invalidating the program. Because Gross Seed 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 DOT 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), support DOT's interpretation. Moreover, Congress was well aware of DOT'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).

Gross Seed's perceived need to attack DOT's implementation of the statutory presumption underscores Gross Seed's inability to 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, DOT'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 Gross Seed 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 it 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* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 281 (1986) (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. 7-8, 39-41, 43-48, *supra*. The program thus is designed to avoid bestowing undue benefits on DBEs, and to create as level a playing field as constitutionally possible.

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

Gross Seed contends (Br. 53-61) that case law and the federal DBE regulations require NDOR, as a federal aid recipient under TEA-21, to demonstrate that its implementation of the DBE program independently meets strict scrutiny. The structure of the DOT program, and the facts here (and indeed in *Sherbrooke Turf, Inc.* v. *Minnesota Department of Transportation*, No. 02-1665 (pending in this Court) as well), makes such a determination unnecessary. As argued at pp. 18-36, *supra*, the evidence before Congress was sufficient to permit Congress to find that discrimination and its continuing effects are affecting the ability of economically and socially disadvantaged persons to share equally in many venues in economic opportunities that federally assisted transportation-related contracts offer. In this case, as required by DOT regulations, Nebraska has made the necessary statistical and other analyses to show that the continuing effects of discrimination Congress found occurring around the nation are in fact present in Nebraska, demonstrating that the problems for which Congress intended to create a

national remedy are shared by socially and economically disadvantaged persons in Nebraska. That being said, the remaining analysis of Nebraska's compliance with constitutional standards should focus on whether the program as implemented by the state satisfies narrow tailoring.

Gross Seed fundamentally misunderstands the requirements of TEA-21 and DOT's regulations, which were intentionally designed to limit race-conscious remedies to only those jurisdictions where discrimination or its effects are a problem and race-neutral relief is insufficient. Gross Seed 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 make localized analyses sufficient to show that discrimination and its effects continue to be felt in the State, and to narrowly tailor TEA-21's remedial provisions. As explained at pp. 51-52, *infra*, compliance with the DOT regulations helps ensure that implementation by specific recipients will be narrowly tailored, as the regulations require, for example, recipients to use race-neutral alternatives, consider the effect of the program on third parties, take steps to ensure that beneficiaries of the program are truly eligible, and limit the duration of the program.

As discussed more fully in NDOR's brief, the district court properly found that NDOR's implementation of the federal DBE program is constitutional. Gross Seed relies on statements by Claude Oie, a state employee, that he personally was not aware of specific incidences of discrimination in highway construction in

Nebraska to assert that there is no evidence of discrimination in Nebraska to support using race-conscious DBE goals (Br. 51, 65-66). The personal beliefs or knowledge of the director of a state DBE program, however, are irrelevant to whether Nebraska had ample evidence of discrimination to implement the DBE program.[12]

More importantly, the NDOR demonstrated at trial that there was, in fact, ample evidence supporting its decisions implementing the DBE program in Nebraska. Nebraska showed, *inter alia*, its numerical measurements, based on local DBE availability and other evidence which it used to assess discrimination in its own jurisdiction, 49 C.F.R. 26.45(b); its consideration of an array of race-neutral means before it used race-conscious mechanisms only as a last resort, 49 C.F.R. 26.51; and actions it took 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. In addition, the district court had evidence that NDOR's implementation of the federal program was in compliance with federal DBE regulations (see Exhs. 362, 570) which were designed to prohibit the use of race-conscious remedies on federally aided projects in jurisdictions where their necessity is not manifest.

Gross Seed also challenges NDOR's annual goal of 9.95% DBE

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[12] Section 26.45 also does not require the state DBE director to have personal beliefs or knowledge of discrimination within the State (Tr. 473, 480-481).

participation by implying that the federal regulations require TEA-21 recipients to conduct disparity studies to support its goal (Br. 63). But Section 26.45(c) expressly states that disparity studies are only one of many methods to determine the base figure for the relative availability of DBEs (Tr. 498, 581 (Ashby testimony that federal DBE regulations do not require States to prepare disparity studies)). See 49 C.F.R. 26.45(c). Gross Seed's assertion that MGT's report failed to examine the capacity of DBEs to perform work on federally assisted contracts, as provided in 49 C.F.R. 26.45(d)(1), is similarly unavailing because the report clearly included an examination of the capacity of DBEs in Nebraska (see MGT Report at 3-10 to 3-12 (Exh. 701)).

Thus, the district court properly concluded that NDOR satisfied its obligations as a recipient under 49 C.F.R. Pt. 26 (Add. 16) and the Constitution.

CONCLUSION

The Court should affirm the judgment for defendants.

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 13,517 words in Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2003, 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 overnight delivery, on the following counsel:

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