No. 93-1841

In the Supreme Court of the United States

OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

FEDERICO PENA,
SECRETARY OF TRANSPORTATION, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the equal protection component of the Fifth Amendment prohibits Congress from enacting a rebuttable presumption that minority-owned and controlled businesses are disadvantaged business enterprises under the Small Business Act.

2. Whether the equal protection component of the Fifth Amendment prohibits the Department of Transportation, pursuant to the Small Business Act, from offering added compensation to federal government prime contractors who subcontract ten percent or more of their contract work to disadvantaged business enterprises in order to cover the costs of assisting the disadvantaged businesses.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	20

TABLE OF AUTHORITIES

Cases:

City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989)	7, 8, 9, 12, 13, 19
Ellis v. *Skinner*, 961 F.2d 912 (10th Cir.), cert. denied, 113 S. Ct. 374 (1992)	17
Fullilove v. *Klutznick*, 448 U.S. 448 (1980)	7-8, 9, 10, 11, 12, 13, 14, 15, 18, 19
Harrison & Burrows Bridge Constructors v. *Cuomo*, 981 F.2d 50 (2d Cir. 1992)	16
Metro Broadcasting, Inc. v. *FCC*, 497 U.S. 547 (1990)	8, 12 13, 14
Milwaukee County Paver's Ass'n v. *Fiedler*, 922 F.2d 419 (7th Cir.), cert. denied, 500 U.S. 954 (1991)	13, 17
Tennessee Asphalt v. *Farris*, 942 F.2d 969 (6th Cir. 1991)	13, 17

Constitution, statutes and regulations:

U.S. Const.:	
Amend. V	7
Amend. XIV	7, 8
Act of Oct. 24, 1978, Pub. L. No. 95-507, § 221(g), 92 Stat. 1770	2
Business Opportunity Reform Act of 1977, Pub. L. No. 100-656, § 502, 102 Stat. 3887	2-3
Civil Rights Act of 1964, Tit. VI, 42 U.S.C. 2000d *et seq.*	7

Statutes and regulations—Continued:	Page
Public Works Employment Act of 1977, Pub. L. No. 95-28, § 103(f)(2), 91 Stat. 116	12
Small Business Act, 15 U.S.C. 631 *et seq.*	6
15 U.S.C. 631	2
15 U.S.C. 631(f)	15
15 U.S.C. 631(f)(2)(A)	15
15 U.S.C. 632(a)(1)	3
15 U.S.C. 637(a) (1988 & Supp. IV 1992)	3, 5, 6, 19
15 U.S.C. 637(a)(5)	3
15 U.S.C. 637(a)(6)(A)	3
15 U.S.C. 637(a)(6)(C) (1988 & Supp. IV 1992)	6, 18, 19
15 U.S.C. 637(a)(6)(C)(i) (1988 & Supp. IV 1992)	6, 18
15 U.S.C. 637(d) (1988 & Supp. IV 1992)	10
15 U.S.C. 637(d)(3)(C) (1988 & Supp. IV 1992)	3, 6, 12
15 U.S.C. 637(d)(3)(C)(i) (1988 & Supp. IV 1992)	18
15 U.S.C. 644(g)	2, 9, 11, 18
15 U.S.C. 644(g)(1)	2, 3, 10
15 U.S.C. 644(g)(2) (1988 & Supp. IV 1992)	2
15 U.S.C. 644(h)	4
15 U.S.C. 644(h)(1)	3
15 U.S.C. 644(h)(2)(D)	5
Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2100 (1982)	11
Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132:	
§ 106(a)(8), 101 Stat. 145	7, 16
§ 106(c), 101 Stat. 145	6
42 U.S.C. 1983	7
48 C.F.R. Ch. 1:	
Subchap. D, Pt. 19:	
Subpt. 19.7:	
Section 19.703	19
Subpt. 19.8	5
Subchap. H, Pt. 52, Subpt. 52.2:	
Section 52.219-8	3, 5, 6
Section 52.219-9	6
Section 52.219-13	6

Regulations—Continued: Page

49 C.F.R.:
Pt. 23, Subpt. D:
Section 23.62 19
Section 23.64(e) 3, 18
Section 23.65 ..... 3, 18
Section 23.68(c) 16
Section 23.69 19
App. A 19
App. C 3, 4, 6, 12, 18, 19
App. D 18

Miscellaneous:

Hearings on Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program Before the Senate Comm. on Small Business, 98th Cong., 1st Sess. (1983) 15

Hearings on Minority Enterprise and General Small Business Problems Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Comm. on Small Business, 99th Cong., 2d Sess. (1986) 15

Hearings on the State of Hispanic Small Business in America Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business, 99th Cong., 1st Sess. (1985) 15

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 16 F.3d 1537. The opinion and order of the district court (Pet. App. 27-37) are reported at 790 F. Supp. 240.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1994. The petition for a writ of certiorari was filed on May 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress, through the Small Business Act, requires the Executive Branch to use its purchasing power to foster the development of small businesses, including small businesses owned and controlled by socially and economically disadvantaged persons. See generally 15 U.S.C. 631 (Declaration of policy). The Act requires annual, government-wide goals to be set for purchases of supplies and services from small business enterprises and small disadvantaged business enterprises (DBEs), and sets a 20% floor for the small business procurement goal, and a 5% floor for the DBE procurement goal. 15 U.S.C. 644(g)(1). The Act requires the President to adjust the government-wide goals annually, and requires each executive agency to develop subsidiary goals appropriate to its own contracting needs and the markets from which it procures goods and services.[1] The DBE goals may be waived where not

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[1] These obligations were first codified in 1978 as an amendment to the Small Business Act, which provided that "[t]he head of each Federal agency shall, after consultation with the [Small Business] Administration, establish goals for the participation by small business concerns, and by small business concerns owned and controlled by socially and economically disadvantaged individuals, in procurement contracts of such agency." Act of Oct. 24, 1978, Pub. L. No. 95-507, § 221(g), 92 Stat. 1770, currently codified at 15 U.S.C. 644(g)(2) (1988 & Supp. IV 1992). In 1988, Congress added a requirement of annual, government-wide goals of at least 20% for small businesses and 5% for disadvantaged businesses, and simultaneously obligated agencies to continue to adopt their own goals, compatible with the government-wide goals, in an effort to create "maximum practicable opportunity" for small and disadvantaged businesses to sell their goods and services to the government. Business Opportunity Development Reform Act of

practicable.[2] The statutory definition of DBE includes a racial component, but it is not exclusively race-based.[3] It encompases businesses owned and controlled by members of racial minorities, but it also includes persons who have been subjected to "ethnic prejudice or cultural bias." Moreover, where a person is "not truly

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1988, Pub. L. No. 100-656, § 502, 102 Stat. 3887, codified at 15 U.S.C. 644(g)(1).

[2] See 15 U.S.C. 644(h)(1) (requiring justification for failure to meet goals); 49 C.F.R. 23.64(e), 23.65 (setting forth waiver criteria for Department of Transportation).

[3] The Small Business Act defines a "small-business concern" as one that is independently owned and operated, is not dominant in its field of operation, and has annual receipts not in excess of $500,000. 15 U.S.C. 632(a)(1). The Act defines "small business concern owned and controlled by socially and economically disadvantaged individuals" as a small business that is at least 51% owned and controlled by persons who are socially and economically disadvantaged. 15 U.S.C. 637(d)(3)(C) (1988 & Supp. IV 1992). "Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and other minorities" are presumed to be disadvantaged. 15 U.S.C. 637(d)(3)(C); 48 C.F.R. 52.219-8. "[A]ny other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act" is also, however, presumptively disadvantaged. *Ibid.* Section 8(a) of the Act, 15 U.S.C. 637(a), defines social and economic disadvantage in race-neutral terms. "Socially disadvantaged" persons are those who have been subjected to "racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. 637(a)(5). "Economically disadvantaged individuals" are socially disadvantaged persons who also demonstrate that their "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. 637(a)(6)(A). See also 49 C.F.R., Pt. 23, Subpt. D, App. C (Guidance for Making Determinations of Social and Economic Disadvantage).

socially and/or economically disadvantaged," his or her business may be excluded from coverage. See 49 C.F.R. Pt. 23, Subpt. D, App. C.

Agency goals established under the Small Business Act and the progress made toward their attainment are subject to ongoing congressional oversight. At the end of each fiscal year, federal agencies must report to the Small Business Administration on the extent of participation by small businesses and disadvantaged businesses in federal procurement. 15 U.S.C. 644(h). Those reports are compiled by the Small Business Administration, and submitted to the President and Congress. Oversight of DBE programs forms a substantial part of the work of two congressional committees, the Senate Committee on Small Business and the Committee on Small Business of the House of Representatives. The Urban and Minority-Owned Business Development Subcommittee of the Senate Small Business Committee and the Minority Enterprise, Finance and Urban Development Subcommittee of the House Small Business Committee conduct periodic hearings on the compliance of each agency and agency subdivision with the Small Business Act's DBE provisions. Those agencies not subjected to a full hearing in a given year nonetheless have their goals and compliance therewith monitored by the subcommittees annually.

The Central Federal Lands Highway Division (CFLHD) of the United States Department of Transportation (DOT)[4] uses a variety of methods to increase its contracting with DBEs to help meet DOT's goals

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[4] The CFLHD is one of three regional divisions within the Federal Lands Highway Program, a component of the Federal Highway Administration.

under the Small Business Act.[5] One method CFLHD uses is to provide added compensation of up to 1.5% of a total contract amount to any prime contractor who subcontracts ten percent or more of the work required under the prime contract to a disadvantaged business enterprise. Pet. App. 7. The compensation program is explained in a Subcontracting Compensation Clause (SCC) included in the standard specifications for construction of roads and bridges on federal highway projects. Def. Br. in Support of Mot. for Summary Judgment Exh. 1, at I-24. The 1.5% compensation is designed to reimburse prime contractors for the additional expenses they incur in working with a DBE subcontractor. Pet. App. 10. The program does not establish a set-aside, but leaves to the discretion of each prime contractor whether to seek disadvantaged subcontractors and to obtain the compensation offered. Pet. App. 12 n. 9.

Prime contractors' eligibility for the 1.5% compensation under the SCC is based on the disadvantaged status of the prime contractors' subcontractors. Disadvantaged businesses may, but need not, be minority-

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[5] The Small Business Act contemplates that agencies will use a range of means to achieve their annual disadvantaged-business procurement goals, including "noncompetitive negotiation" targeted to DBEs and "competition restricted to small business concerns owned and controlled by socially and economically disadvantaged individuals." See 15 U.S.C. 644(h)(2)(D). The CFLHD has used three methods to contract with small businesses and DBEs: (1) competitive bidding without affirmative action; (2) contracts with the Small Business Administration, which in turn subcontracts with DBEs, as provided by Section 8(a), 15 U.S.C. 637(a), see generally 48 C.F.R. Ch.1, Subch. D, Pt. 19, Subpt. 19.8; and (3) encouragement of DBE subcontracting by prime contractors.

owned and controlled businesses. The only race-based criterion bearing on the applicability of the SCC is the Small Business Act's rebuttable presumption that small businesses owned and controlled by members of racial minority groups are disadvantaged.[6] A presumption of disadvantage, including a presumption based on race, may be rebutted if it is shown, based on information provided from any source, that "the firm's owners are not truly socially and/or economically disadvantaged." 49 C.F.R. Pt. 23, Subpt. D, App. C; see also 15 U.S.C. 637(a)(6)(C).

2. Petitioner is a highway construction company. Pet. 4; Pet. App. 3. Petitioner does not meet any of the statutory or regulatory definitions of a small disadvantaged business enterprise. Pet. App. 11. As of September, 1989, CFLHD had conducted a process of competitive sealed bidding for a federally funded highway construction project in the San Juan National Forest known as the West Dolores Project.[7] The prime contract

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[6] The SCC expressly refers for its definition of DBE to the relevant Federal Acquisition Regulations System provisions, 48 C.F.R. 52.219-8 and 52.219-13. These regulations implement the acquisition-related sections of the Small Business Act, 15 U.S.C. 631 *et seq.* The Small Business Act itself establishes a presumption of disadvantage on the part of members of certain racial minority groups, as well as other persons already found to be socially and economically disadvantaged pursuant to section 8(a) of the Act, 15 U.S.C. 637(a). 15 U.S.C. 637(d)(3)(C) (1988 & Supp. IV 1992). See note 3, *supra*.

[7] The funding for the West Dolores project was provided by the Highway Trust Fund as special forest highway project funding under Section 106(a)(8) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 145. Although the bulk of funds authorized out of the Highway Trust Fund under STURAA were granted through states and localities, Section 106(a)(8) of STURAA also

was awarded to the lowest bidder, Mountain Gravel and Construction Company. Mountain Gravel decided to subcontract the guardrail portion of the project to another company. Petitioner bid for the subcontract, but on September 15, 1989, Mountain Gravel elected to subcontract with Gonzales Construction Co., a small business enterprise certified as disadvantaged, even though Gonzales had submitted a higher bid than had petitioner. Because the guardrail project constituted more than ten percent of the dollar amount of the contract, Mountain Gravel accordingly became entitled to the 1.5% bonus under the SCC. Petitioner challenged CFLHD's application of its subcontracting policy to Mountain Gravel as a race-based set-aside, which it contends is unconstitutional under *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989). Pet. App. 10-11.

3. On August 10, 1990, petitioner filed suit for declaratory and injunctive relief against officials of DOT, alleging that the use of the SCC violates 42 U.S.C. 1983, 42 U.S.C. 2000d *et seq.* (Tit. VI), and the Fifth and Fourteenth Amendments to the United States Constitution. Pet. App. 11. On April 24, 1991, the parties filed cross-motions for summary judgment. *Ibid.* On April 21, 1992, the district court granted defendants' motion for summary judgment, and denied petitioner's motion for summary judgment. Pet App. 27-37.

The district court rejected petitioner's argument that the challenged federal program must be given strict judicial scrutiny under *City of Richmond* v. *J.A. Croson*, holding instead that *Fullilove* v. *Klutznick*, 448 U.S. 448

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provided $55 million annually between 1987 and 1991 for federally administered forest highway projects. The funds for the West Dolores project were thus not channeled through any state or locality, but allocated directly to the CFLHD.

(1980), and *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990), establish the relevant standard:

> It is clear under these cases that race-conscious classifications established by Congress are subject to a standard of review different from that applicable to similar classifications prescribed by state and local governments.

Pet. App. 33. The court stated that "the congressional mandate behind the *Fullilove* program and this one" distinguish them from the program invalidated in *Croson*. *Ibid.*

The district court determined that nothing in the governing cases "demands that the federal government assess incidents of past discrimination in all areas of the country where federal programs apply." Pet. App. 34. Section 5 of the Fourteenth Amendment empowers Congress to enact legislation "to remedy the effects of disabling discrimination" on a national basis, and Congress exercised that power in establishing the challenged program. *Ibid.* The court was satisfied that here, as in *Fullilove*, Congress had an "abundant historical basis" to support the challenged program. *Id.* at 35. "[T]he mere fact that CFLHD implements a federal program within Colorado does not convert it into a state program requiring *Croson*-type analysis," and thus the absence of particularized findings of discrimination in Colorado did not render the program unconstitutional. *Id.* at 34.

The district court also held that the SCC is narrowly tailored. Pet. App. 35-36. The court found that the SCC is not "overinclusive" because the annual DBE certification process ensures that only legitimate qualified DBEs participate in the program. *Ibid.* It is also not "underinclusive" because firms not presump-

tively included as disadvantaged may apply for certification as DBEs and become qualified to participate. Pet. App. 36. The court noted that the waiver mechanism properly relieves federal agencies of their DBE obligations when there are not enough qualified DBEs available to achieve the agency's goal. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-24. The court held that *Fullilove*, not *Croson*, controls. Pet. App. 15. "Under *Fullilove*, if Congress has expressly mandated a race-conscious program, a court must apply a lenient standard, resembling intermediate scrutiny, in assessing the program's constitutionality." *Ibid.* "Indeed," the court observed, "the *Metro Broadcasting* majority held that even non-remedial race-conscious measures mandated by Congress are constitutionally permissible if they satisfy intermediate scrutiny." *Id.* at 19.

The court rejected petitioner's argument that, because the challenged SCC program was "fashioned and specified by an agency and not by Congress," Pet. App. 17, particularized findings of past discrimination were therefore required to justify the program under *Croson*. The court stated that "[petitioner] cites no authority, nor do we know of any, to support the proposition that a federal agency must make independent findings to justify the use of a benign race-conscious program implemented in accordance with federal requirements." *Id.* at 18.

The court of appeals found that the particular aspects of the SCC program petitioner challenges—the 10% DBE threshold and the rebuttable presumption of DBE status for minority businesses—were authorized by Congress. The court found that Congress, through Section 502 of the Small Business Act, 15 U.S.C. 644(g), authorized the agencies to exercise their own discretion

to establish goals above the 5% government-wide goal for disadvantaged small business participation in federal procurement. Pet. App. 19-20. Section 502 expressly requires that agencies establish annual goals designed to ensure the "maximum practicable opportunity" for small businesses and disadvantaged small businesses to participate in federal procurement. *Id.* at 20, quoting 15 U.S.C. 644(g)(1). The court concluded that, in implementing the Subcontracting Compensation Clause program by including SCCs in contracts with small-business prime contractors, CFLHD "did exactly what Congress explicitly directed it to do" under Section 502. Pet. App. 20. The court also emphasized that it was Congress and not the agency which established the rebuttable presumption employed in the challenged SCC program that businesses owned by members of certain racial minorities are socially and economically disadvantaged. *Id.* at 20-21.

Finally, the court of appeals ruled that the SCC is constitutional under *Fullilove* because it is narrowly tailored to achieve the significant governmental objective of providing subcontracting opportunities for DBEs. The court observed that the "qualifying criteria of the SCC program [are] not limited to members of racial minority groups," and that "minority businesses that do not satisfy the economic criteria cannot qualify for DBE status." Pet. App. 23. The court also pointed out that the 10% threshold of CFLHD's SCC "is an optional goal, *not* a set-aside," because "it is entirely at the discretion of the prime contractor whether to exercise its option under the Subcontracting Compensation Clause, or to ignore it and forego the monetary reward CFLHD offers for hiring DBEs as subcontractors." *Id.* at 12 n.9. Consistent with *Fullilove*, the SCC was, in the court's view, "'appropriately limited in * * * duration' because

federal procurement and construction contracting practices, are subject to regular 'reassessment and reevaluation by Congress.'" Pet. App. 23.[8]

ARGUMENT

Petitioner challenges the application of the Subcontracting Compensation Clause in this case as if it were a minority set-aside requirement. See Pet. 24 (referring to a "race-based quota"); Pet. 22 (referring to "a race-based[] set-aside program"). Although the Small Business Act employs race as a factor, its goals are not based on race, but on disadvantage. The reason Gonzales Construction Company, and not petitioner, received the subcontract was that Gonzales falls within the statutory definition of a small disadvantaged business enterprise, and CFLHD offered compensation to encourage Mountain Gravel to work with such disadvantaged businesses. Petitioner does not contend that it is a small disadvantaged business. Indeed, if it were a DBE similarly situated to Gonzales in every way but the race of the persons who own and operate it and had made a lower bid than Gonzales, petitioner would, no doubt, have been awarded the subcontract.

The only race-based criterion that entered even indirectly into Mountain Gravel's subcontracting decision was the statutory presumption that Gonzales, a

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[8] Petitioner's complaint erroneously alleged that the SCC relied for statutory authorization on STURAA, n.7, *supra*, and STAA, the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2100. Pet. App. 4. The district court thus mistakenly analyzed the challenged program under STAA and STURAA. The court of appeals, however, recognized that the DBE program was developed to satisfy the DOT's obligations under Section 502 of the Small Business Act, 15 U.S.C. 644(g), and upheld it pursuant to that authority.

minority-owned and controlled business, was a DBE. Petitioner has not challenged the status of Gonzales as a bona fide DBE by seeking to rebut the presumption. See Pet. 5 (referring to Gonzales as "a certified DBE"). There is no question on the record in this case that Gonzales was in fact disadvantaged, and petitioner was not. The relevant question here is thus whether CFLHD was authorized, in granting compensation under the SCC, to rely on Congress's definition of disadvantaged business enterprise, which includes a rebuttable race-based component. 15 U.S.C. 637(d)(3)(C) (1988 & Supp. IV 1992); 49 C.F.R. Pt. 23, Subpt. D, App. C.

1. In petitioner's view, *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), and *Metro Broadcasting* v. *FCC*, 497 U.S. 547 (1990), require the same level of constitutional scrutiny of the federal DBE program at issue here as *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), required of a municipal program. Pet. 7-13, 20-22. This is not the case.

Fullilove upheld a 10% minority business enterprise (MBE) program enacted by Congress in Section 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), Pub. L. No. 95-28, 91 Stat. 116, on the grounds that (1) the objective of the legislation to spend federal funds to remedy past discrimination in public contracting was within Congress's power, 448 U.S. at 472-480, and (2) the flexible use of racial and ethnic criteria as a means to accomplish that objective was constitutionally valid. *Id.* at 480-492. *Fullilove* did not employ strict scrutiny,[9] nor is such scrutiny appropriate here.

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[9] See *Metro Broadcasting*, 497 U.S. at 564 (stating that "[a] majority of the Court in *Fullilove* did not apply strict scrutiny"). Petitioner's characterization of the *Metro Broadcasting* majority

The applicability of the *Fullilove* standard to race-conscious measures adopted by Congress was underscored by *City of Richmond* v. *J.A. Croson Co.*, in which this Court acknowledged that Congress has powers that states and localities lack to adopt race-based remedial measures. 488 U.S. at 486-490 (Opinion of O'Connor, J., joined by Rehnquist, C.J. and White, J.); see *id.* at 557-561 (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.) (describing broad congressional power); see also *Tennessee Asphalt* v. *Farris*, 942 F.2d 969, 972 (6th Cir. 1991), quoting *Milwaukee County Paver's Ass'n* v. *Fiedler*, 922 F.2d 419, 423-424 (7th Cir.), cert. denied, 500 U.S. 954 (1991) (describing "[t]he joint lesson of *Fullilove* and *Croson*" that "the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities"). In determining that the City of Richmond's 30% race-based set-aside had an insufficient factual predicate of past discrimination and was insufficiently narrowly tailored to survive Equal Protection review, Justice O'Connor distinguished *Fullilove* on the ground that "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." 488 U.S. at 490.

In *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990), this Court again reaffirmed *Fullilove*, holding that intermediate rather than strict scrutiny applies to congressionally authorized race-conscious affirmative action programs:

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opinion as supported by "[o]nly four Justices," Pet. 12, is incorrect. Although Justice Stevens wrote a brief concurring opinion, *id.* at 601, he joined the majority opinion in full. *Id.* at 602.

> *Croson* cannot be read to undermine our decision in *Fullilove*. In fact, much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments.

497 U.S. at 565. The Court upheld the FCC's policies of weighing minority ownership as a favorable factor among other relevant factors when considering applications for new radio or television broadcast stations and transferring stations to minority owners in non-competitive "distress sales." The Court used an intermediate standard of review, requiring that the policies be "substantially related" to the achievement of the "important governmental objective" of broadcast diversity. *Id.* at 566. Notwithstanding that the specific details of the affirmative action program upheld in *Metro Broadcasting* were set by the FCC, and not by Congress itself, the Court held that "when a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress, we are 'bound to approach our task with appropriate deference to the Congress.'" *Id.* at 563.

2. The same remedial purpose accepted by the Court as sufficient to support the program challenged in *Fullilove* provides even stronger support for the DBE provisions of the Small Business Act. Referring to the evidence of a history of discrimination that was before Congress when it enacted the PWEA, the *Fullilove* Court observed that "much of that history related to the experience of minority businesses in the area of federal procurement," rather than their experience in local construction contracting. 448 U.S. at 478. The Small

Business Act was designed to address the very race discrimination in federal procurement referred to in *Fullilove*, and Congress had ample evidence of such discrimination before it when it adopted the Act's DBE preference and its presumption of minority business enterprise disadvantage.[10]

Although the Court in *Fullilove* did not require "preambulary 'findings'" in order to uphold the PWEA, 448 U.S. at 478, such findings are, in fact, present in the Small Business Act. The Small Business Act states its purpose to "promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy." 15 U.S.C. 631(f)(2)(A). In addition, Congress made express findings of disadvantage experienced by members of minority groups that support the presumptive inclusion of businesses owned by such persons in the preferences for disadvantaged business. 15 U.S.C. 631(f).

Contrary to petitioner's contentions, Pet. 23-24 & n.26, no separate findings of a history of state-sponsored discrimination within Colorado are required in order to

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[10] See, *e.g.*, *Hearings on Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program Before the Senate Comm. on Small Business*, 98th Cong., 1st Sess. (1983); *Hearings on the State of Hispanic Small Business in America Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business*, 99th Cong., 1st Sess. (1985); *Hearings on Minority Enterprise and General Small Business Problems Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Comm. on Small Business*, 99th Cong., 2d Sess. (1986).

support the CFLHD's use of a percentage benchmark exceeding the Small Business Act's 5% floor for the government-wide DBE goal. Petitioner contends that the subsidiary goals assigned to each agency and agency component under the Act should receive strict judicial scrutiny.[11] This contention is incorrect for at least two reasons. First, as noted, the percentages themselves are not race-based, but turn on disadvantage. Petitioner fails to meet the requirements for the SCC benefit because it is not a disadvantaged business. Second, the SCC's 10% DBE subcontracting threshold is authorized by the Small Business Act, and, indeed, is the precise percentage Congress itself has expressly required on federal highway projects.[12] The CFLHD's annual 12-15% DBE goal is also authorized by the Small Business Act. Cf. *Harrison & Burrowes Bridge Constructors* v. *Cuomo*, 981 F.2d 50, 57-58 (2d Cir. 1992) (commenting that although a set-aside "vastly greater than the ten per cent minimum" set by the federal statute might be problematic, New York's 17% goal for the state-

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[11] Petitioner refers to the 12 to 15% overall DBE goal which CFLHD was assigned in 1989. Pet. 23. The percentage figure relevant in assessing the constitutionality of the SCC and its application here, however, is the SCC's 10% DBE subcontract threshold. That was the percentage of DBE subcontracting Mountain Gravel was required to attain before being eligible for the monetary benefit the SCC promised, and it is thus the operative percentage figure in the decision petitioner challenges.

[12] Although the SCC was developed pursuant to the Small Business Act, pp. 5-6, *supra*, the funding for the West Delores Project was granted under STURAA, n.7, *supra*. Section 106(c) of STURAA includes a waiveable requirement that recipients meet a 10% DBE contracting goal. Pub. L. 100-17, 101 Stat. 145-146; 49 C.F.R. 23.68(c) (regarding waiver).

administered portion of the federal program was "within the bounds" set by the statute).

The courts of appeals have uniformly rejected any requirement of subsidiary findings at the state level when a State applies a federal program. See, *e.g.*, *Harrison & Burrowes Bridge Constructors* v. *Cuomo*, 981 F.2d 50; *Ellis* v. *Skinner*, 961 F.2d 912, 916 (10th Cir.), cert. denied, 113 S. Ct. 374 (1992); *Tennessee Asphalt*, 942 F.2d at 975; *Milwaukee County Paver's Ass'n* v. *Fiedler*, 922 F.2d at 423-424. Any such requirement would be even more unwarranted here, where a federal program is applied not by the States, but by the federal government itself.

3. Petitioner contends that the Subcontracting Compensation Clause is unconstitutional because it is insufficiently flexible and tailored to its purpose. Pet. 14-20. The court of appeals properly held, however, that the Small Business Act DBE preference, and CFLHD's implementation of it through the SCC, are carefully designed to ensure that they impose no unnecessary burdens, and are closely tailored to the precise problem Congress sought to address.

Petitioner contends that the Small Business Act lacks a required waiver provision. Pet. 14-16. That contention is incorrect in several ways. First, the SCC provision at issue in this case does not impose a goal, so no waiver is needed. Instead of requiring prime contractors to hire a certain percentage of DBE subcontractors in order to be awarded federal contracts, CFLHD contracts are awarded without regard to DBE participation, and the successful bidder is then offered the option of subcontracting ten percent or more of the project to DBEs and obtaining additional monetary compensation. If the contractor fails to take advantage of that option, it need not offer any justification to retain its contract.

Because the SCC operates as a carrot rather than a stick, it is even more flexible than the waiveable MBE goal upheld in *Fullilove*. Second, because the Small Business Act's goals are not race-based, no waiver of those goals is required. Unlike the goals upheld in *Fullilove*, which were restricted to minority businesses, the Small Business Act goals include non-minority DBES, and exclude minority businesses that are not disadvantaged. 15 U.S.C. 637(d)(3)(C)(i) (1988 & Supp. IV 1992); 49 C.F.R. Pt. 23, Subpt. D, App. C; 15 U.S.C. 637(a)(6)(C) (1988 & Supp. IV 1992). The provision for rebuttal in those cases where race does not actually correlate with disadvantage provides the same kind of flexibility and tailoring that waiver provisions provide where race-based goals are used. Third, even though no waiver is constitutionally required for race-neutral goals, regulations implementing DBE contracting requirements for DOT authorize waiver of applicable contracting goals where there are insufficient DBE contractors available to satisfy a designated goal. See 49 C.F.R. 23.64(e), 23.65 and Pt. 23, Subpt. D, App. D.

The court of appeals held that the program was "appropriately limited in extent and duration" because it is subject to regular examination by Congress. Pet. App. 23, citing *Fullilove*, 448 U.S. at 489. Contrary to petitioner's contention, Pet. 17-19, no formal termination date is needed because the DBE program is continually reviewed and adjusted to current circumstances. Cf. *Fullilove*, 448 U.S. at 523 (Powell, J., concurring). Rather than setting one static goal, as did the Public Works Employment Act reviewed in *Fullilove*, the Small Business Act requires that DBE goals be adjusted annually. The fact that Executive agencies are involved in implementing the goals through the establishment of subsidiary goals, 15 U.S.C. 644(g), adds to the program's

flexibility. The agencies know their own procurement needs in each locale in which they operate, and are closest to the industries affected by the DBE goals. A requirement that Congress formally enact each agency goal and sub-goal would not only unduly burden Congress and produce legislation on a scale comparable to the Internal Revenue Code, but would detract from the close tailoring and flexibility that is afforded by agency involvement in setting annual goals.

Petitioner also contends that the court of appeals erred in concluding that the DBE program was narrowly tailored. Pet. 19-20. As the court of appeals recognized, Pet. App. 23, however, the DBE program is better tailored than the MBE program in *Fullilove*. That program made eligible only those businesses owned and controlled by members of racial minorities. Under the Small Business Act and the SCC, on the other hand, DBE status is not limited to members of racial minority groups. Cf. *Croson*, 488 U.S. at 507 (commenting that the City should have tried race-neutral assistance to small firms before adopting a race-based quota). Eligibility as a DBE is open to any small business owner who is socially and economically disadvantaged. 48 C.F.R. 19.703; 49 C.F.R. 23.62, Subpt. D, App. A and C. Moreover, although businesses owned by members of racial minority groups are presumed to be socially and economically disadvantaged, that presumption is rebuttable. 15 U.S.C. 637(a)(6)(C) (1988 & Supp. IV 1992); 48 C.F.R. 19.703; 49 C.F.R. 23.62, 23.69, and Pt. 23, Subpt. D, App. A.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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