No. 93-1841

Supreme Court of the United States

OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC., PETITIONER

v.

FEDERICO PEÑA,
SECRETARY OF TRANSPORTATION, ET AL.

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

BRIEF FOR THE RESPONDENTS

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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 choose to subcontract 10% or more of their contract work to disadvantaged business enterprises in order to cover the costs of assisting the disadvantaged businesses.

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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, and granted on

September 26, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Spending Clause, the Commerce Clause, and the Thirteenth and Fourteenth Amendments to the Constitution are reprinted at App., *infra*, 1a-2a. Pertinent provisions of the Small Business Act, 15 U.S.C. 631 *et seq.* (1988 & Supp. V 1993), and of Section 106 of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 144-146, are reprinted at App., *infra*, 2a-17a.

STATEMENT

This case concerns the constitutionality of a standard contract clause, the Subcontracting Compensation Clause (Clause or SCC), included in highway construction contracts let by the Central Federal Lands Highway Division (CFLHD) of the Federal Highway Administration (FHWA) of the United States Department of Transportation (DOT). The Clause encourages, but does not require, prime contractors to hire small disadvantaged business enterprises (DBEs) as subcontractors on federal highway construction subcontracts by offering them financial compensation for the added expenses of their employing and assisting such subcontractors. Petitioner, a losing bidder on a federal highway guardrail construction subcontract, challenges the constitutionality of the Clause, asserting that it caused the prime contractor to reject its bid and to award the subcontract to Gonzales Construction Company, a small disadvantaged business.

The Federal Lands Highway Program (FLHP)[1] includes the Compensation Clause in its prime contracts as one means to implement its statutory responsibilities under the Small Business Act (SBA), 15 U.S.C. 631 *et seq.* (1988 & Supp. V 1993), which applies to all federal agencies' contracts for goods and services. The Clause also helps the FLHP meet the requirements of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 132, which provided the funding for the highway project in this case. The SBA establishes a 5% government-wide minimum goal for participation by small disadvantaged businesses in government contracting and subcontracting, and requires each federal agency to implement that government-wide goal through subsidiary agency goals. STURAA, which applies only to DOT, establishes a goal at not less than 10% for use of small disadvantaged businesses in federally funded transportation programs.

Under both statutes, "disadvantage" requires a showing of both social and economic disadvantage. A presumption of disadvantage operates where members of specified minority groups seek to have their firms certified as disadvantaged. That presumption is rebuttable if disadvantage does not in fact exist.

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[1] The CFLHD is one of three regional divisions of the FLHP, a component of the FHWA. Each of the divisions is responsible for the design and construction of roads on federal lands, including national parks and forests. C.A. App. 320. The CFLHD includes within its jurisdiction roads on federal lands within Arizona, California, Colorado, Hawaii, Kansas, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Texas, Utah, and Wyoming. Pet. App. 9 n.7.

Under STURAA, small businesses owned by women are also presumed to be disadvantaged; expenditures with businesses owned by women thus constitute expenditures with disadvantaged subcontractors under the Clause, and are counted toward both the STURAA and SBA goals. In addition, businesses owned by men who are not members of minority groups are treated as disadvantaged under both statutes if the persons who own and control the firms are socially and economically disadvantaged. Petitioner, which did not claim that it was itself disadvantaged, did not challenge the fact that Gonzales Construction Company was disadvantaged, nor did it seek to rebut any presumption of disadvantage that may have applied to Gonzales. Petitioner instead makes a facial challenge to the Clause.

1. *Statutory background.* A. Both the SBA and STURAA establish a federal policy of doing business with small disadvantaged business enterprises.[2] The statutes seek to foster nationwide economic development by permitting small disadvantaged businesses to share in the economic benefit of the government's vast purchasing activity. The statutes also reflect Congress's belief that, by contracting with small disadvantaged business enterprises, and by working with them through a variety of business development pro-

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[2] Section 8(d)(1) of the SBA, 15 U.S.C. 637(d)(1) (Supp. V 1993), provides:

> It is the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts.

grams, the government can strengthen such businesses and thereby enhance market competition for the goods and services the government buys.

The SBA requires annual, government-wide goals to be set for contracting for supplies and services from small businesses, and also from small disadvantaged businesses. The Act sets a 5% floor for the latter goal. 15 U.S.C. 644(g)(1). The President is required to adjust that government-wide goal annually, and each executive agency is required to develop a goal appropriate to its own contracting needs and the markets from which it purchases goods and services.[3] The goals at every level may be waived where not practicable,[4] and no penalty attaches to failure to meet them.

In STURAA, enacted in 1987, Congress complemented the SBA's provisions by setting a disadvantaged business enterprise goal specific to STURAA transportation construction. Section 106(c)(1) of STURAA contained a goal of not less than 10% for disadvantaged business expenditure of federal funds appropriated under STURAA for fiscal years 1987 through 1992. Pub. L. No. 100-17, 101 Stat. 145.[5] Expenditures through disadvantaged businesses are counted toward both STURAA and SBA goals.

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[3] The subsidiary disadvantaged business contracting goal DOT assigned to the CFLHD for 1989 was approximately 12-15%. Pet. App. 9 n.7.

[4] 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 DOT).

[5] The disadvantaged business enterprise goals are now being implemented under the successor to STURAA, the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919-1921.

B. The definition of small disadvantaged business that applies under both statutes is set out in the SBA. A small business is one that is independently owned and operated, is not dominant in its field of operation, and has annual gross receipts not in excess of the level set by regulation for the industry in which the business operates. 15 U.S.C. 632(a)(1)-(3) (Supp. V 1993).[6] A small business is disadvantaged if it is at least 51% owned and controlled by persons who are both socially and economically disadvantaged. 15 U.S.C. 637(d)(3)(C) (Supp. V 1993). A "socially disadvantaged" person is one who 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 [his or her] individual qualities." 15 U.S.C. 637(a)(5). An "economically disadvantaged" person is a socially disadvantaged person who also demonstrates that 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 goals of both the SBA and STURAA are thus directed at the employment of *disadvantaged* business enterprises. That category is not limited to members of racial minority groups, nor are all members of such groups included in the disadvantaged category. Congress, however, expressly recognized in both statutes that racial discrimination in the United States

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[6] A small business, in the case of highway construction specialty subcontractors such as Gonzales and petitioner, is one whose average annual gross receipts do not exceed $7,000,000. 13 C.F.R. 121.601 (Major Group 17, SIC Code 1799).

has been a principal cause of current disadvantaged status. Congress found in the SBA that "many [socially and economically disadvantaged] persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control," and that "such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities." 15 U.S.C. 631(f)(1)(B) and (C). The SBA's subcontracting provision, Section 8(d), thus authorizes prime contractors to "presume 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) (Supp. V 1993). STURAA utilizes the SBA's definition of disadvantaged business, see Pub. L. No. 100-17, § 106(c)(1), 101 Stat. 145, except that STURAA also provides that, in the context of highway construction, "women shall be presumed to be socially and economically disadvantaged individuals," § 106(c)(2)(B), 101 Stat. 146.[7]

C. Congress's findings that disadvantage is highly correlated with race were based on extensive evidence of racial discrimination affecting government con-

[7] The Federal Acquisition Regulations, 48 C.F.R. 52.219-8 and 52.219-13, referred to in the Subcontracting Compensation Clause, J.A. 24, define disadvantaged business consistently with the SBA, and include women-owned businesses.

tracting. The SBA first made express reference to race in the 1978 Amendments to the statute. Act of Oct. 24, 1978, Pub. L. No. 95-507, §§ 201, 211, 92 Stat. 1760, 1767. Congress there recognized "[t]he fact that minority small businesses have had an especially difficult time in fully participating in the economic system," and decided that the SBA's small business development program "should be used only for developing minority and other socially and economically disadvantaged businesses." S. Rep. No. 1070, 95th Cong., 2d Sess. 16 (1978); see also H.R. Rep. No. 1714, 95th Cong., 2d Sess. 22 (1978).[8]

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[8] Representative Addabbo, the floor manager of the bill in the House, stated that "[o]ur findings clearly state that groups such as black Americans, Hispanic Americans, and Native Americans, have been and continue to be discriminated against and that this discrimination has led to the social disadvantagement of persons identified by society as members of those groups." 124 Cong. Rec. 34,097 (1978). Senator Nunn, who managed the bill in the Senate, also emphasized that "[b]ecause of present and past discrimination many minorities have suffered social disadvantagement." *Id.* at 35,408.

See S. Rep. No. 1070, *supra*, at 14 (analyzing the 1978 Amendments to SBA Section 8(a) that "establish[ed] the policy goal of developing businesses owned by socially and economically disadvantaged persons" as "also recogniz[ing] the pattern of social and economic discrimination that continues to deprive racial and ethnic minorities, and others, of the opportunity to participate fully in the free enterprise system"); *id.* at 20 ("many individuals are socially and economically disadvantaged as a result of being identified as members of certain groups, including but not limited to, black Americans and Hispanic Americans"); *id.* at 22 (directing the Small Business Administration to "recognize the historic past discrimination of minorities in their efforts to participate in the free enterprise system").

At the time of the 1978 Amendments, minority businesses constituted only 4% of the total number of firms in the United States and accounted for less than 1% of total nationwide business receipts. 124 Cong. Rec. 29,641 (1978) (remarks of Sen. Glenn); *id.* at 29,644 (statement by Sen. Heinz). A 1975 report of the Subcommittee on SBA Oversight and Minority Enterprise of the House Committee on Small Business set forth statistics showing that, "[w]hile minority persons comprise[d] about 16 percent of the Nation's population," only 3% of businesses in the United States were minority-owned. H.R. Rep. No. 468, 94th Cong., 1st Sess. 2. The report determined that those statistics were "not the result of random chance," but resulted from "past discriminatory systems [that] have resulted in present economic inequities." *Ibid.*

Since 1978, Congress has repeatedly revisited the issue of disadvantage in federal contracting caused by racial discrimination,[9] and has found that those

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[9] See, *e.g.*, *H.R. 5612, To Amend the Small Business Act to Extend the Current SBA 8(a) Pilot Program: Hearing on H.R. 5612 Before the Senate Select Comm. on Small Business*, 96th Cong., 2d Sess. (1980); *Small and Minority Business in the Decade of the 1980's (Part 1): Hearings Before the House Comm. on Small Business*, 97th Cong., 1st Sess. (1981); *Minority Business and Its Contribution to the U.S. Economy: Hearing Before the Senate Comm. on Small Business*, 97th Cong., 2d Sess. (1982); *Federal Contracting Opportunities for Minority and Women-Owned Businesses—An Examination of the 8(d) Subcontracting Program: Hearings Before the Senate Comm. on Small Business*, 98th Cong., 1st Sess. (1983); *Women Entrepreneurs—Their Success and Problems: Hearing Before the Senate Comm. on Small Business*, 98th Cong., 2d Sess. (1984); *State of Hispanic Small Business in America: Hearing Before the Subcomm. on SBA*

disadvantages continue. Consequently, each time the SBA has been amended, Congress has retained or expanded upon the findings of social disadvantage based on race.[10] When Congress amended the SBA in 1988 to add the disadvantaged business enterprise goals, it reaffirmed that the SBA's disadvantaged business contracting program is "the most significant effort of the Federal Government to reduce the effects of discrimination on entrepreneurial endeavors." 133

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and SBIC Authority, Minority Enterprise, and General Small Business Problems of the House Comm. on Small Business, 99th Cong., 1st Sess. (1985); *Minority Enterprise and General Small Business Problems: Hearing 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); *Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearings Before the Subcomm. on Procurement, Innovation, and Minority Enterprise Development of the House Comm. on Small Business,* 100th Cong., 2d Sess. (1988); *Barriers to Full Minority Participation in Federally Funded Highway Construction Projects: Hearing Before a Subcomm. of the House Comm. on Government Operations,* 100th Cong., 2d Sess. (1988) [hereinafter *1988 Barriers Hearing*]; *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. (1988); *Small Business Problems: Hearings Before the House Comm. on Small Business,* 100th Cong., 1st Sess. (1987).

[10] See Act of July 2, 1980, Pub. L. No. 96-302, § 118, 94 Stat. 840; Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 18015, 100 Stat. 370 (1986); Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, §§ 101, 207, 102 Stat. 3855, 3861-3862.

Cong. Rec. 33,314-33,315 (1987) (remarks of Rep. LaFalce upon introduction of H.R. 1807). The House Committee on Small Business specifically found that "discrimination and the present effects of past discrimination" continue to hinder minority business development, H.R. Rep. No. 460, 100th Cong., 1st Sess. 18 (1987), and that an increase in the effectiveness of the SBA was necessary "to redress the effects of discrimination on entrepreneurial endeavors," *id.* at 16.

Evidence before Congress in 1988 showed that the disadvantaged business program had thus far made unsatisfactory progress in removing discriminatory barriers to minority business success: "[O]nly six percent of all firms are owned by minorities; less than two percent of minorities own businesses while the comparable percent for nonminorities is over six percent; and the average receipts per minority firm is less than 10 percent the average receipts of all businesses." H.R. Rep. No. 460, *supra*, at 18. Federal procurement data revealed a similar pattern: In 1986, "total prime contracts approached $185 billion, yet minority business received only $5 billion in prime contracts, or about 2.7 percent of the prime contract dollar." *Ibid.* Repeating the observations that had been made a decade earlier, the Committee Report concluded that the disparity between minority and nonminority businesses' participation in the economy and in federal procurement was "not the result of random chance," but that "discrimination and the present effects of past discrimination have hurt socially and economically disadvantaged individuals in their entrepreneurial endeavors." *Ibid.*

The enactment of STURAA in 1987 was also supported by additional evidence and findings of racial and gender discrimination specific to the highway

construction industry. The Senate Committee on Environment and Public Works reported on STURAA:

> The Committee has considered extensive testimony and evidence on the bill's DBE 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. * * *
>
> * * * [B]arriers still remain, preventing minorities and women from successfully competing in the industry. Moreover, the Committee has concluded that the findings adopted by Congress in 1978 when enacting legislation covering projects under the Small Business Act, 15 U.S.C. § 631(e), apply equally to the federally-funded highway and mass transit construction projects covered by this bill.

S. Rep. No. 4, 100th Cong., 1st Sess. 11 (1987). We have collected in Appendix B, *infra*, 18a-36a, more examples of hearings, floor debates and committee reports in which Congress's choice of a limited, race-based remedy was repeatedly debated and reaffirmed.

2. *Regulatory background.* Under the Subcontracting Compensation Clause that is challenged in this case, a small business concern will be considered disadvantaged if it has been certified as such by the Small Business Administration (Administration) or any state highway agency. J.A. 24.[11] In certifying

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[11] The Administration certifies disadvantaged businesses pursuant to the Small Business Act and its implementing regulations, 13 C.F.R. Pt. 124. State highway and transportation agencies certify disadvantaged businesses for partici-

businesses as disadvantaged, the Administration determines on a case-by-case basis (a) whether a firm claiming disadvantage is actually owned and controlled by the person claiming disadvantage, (b) whether that person is socially disadvantaged, and (c) whether that person is economically disadvantaged. In making those determinations, the Administration employs a rebuttable presumption that, "[i]n the absence of evidence to the contrary," Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Subcontinent Asian Americans are socially disadvantaged. 13 C.F.R. 124.105(b). Minority status is, however, neither a sufficient nor a necessary basis for certification. Because the presumption of social disadvantage is rebuttable, members of the specified groups may nonetheless be considered not to be socially disadvantaged. In addition, people who are not members of the specified minority groups may also be treated as disadvantaged under the Clause. 15 U.S.C. 637(a)(5); 13 C.F.R. 124.105-124.106. For example, persons who have suffered ethnic or cultural bias on account of their ancestry, physical handicap,[12] or "long-term residence in an environment isolated from the main-

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pation in DOT programs pursuant to 49 C.F.R. Pt. 23. The FLHP also accepts certification by other government agencies, provided the Contracting Officer has determined that comparable procedures are followed. J.A. 24.

[12] See, *e.g.*, *Doe* v. *Heatherly*, 671 F. Supp. 1081 (D. Md. 1987) (applying nonracial inquiry into "cultural bias" to evaluate disadvantage claim by person with calligraphic dysgraphia and dyslexia), aff'd, 854 F.2d 1316 (4th Cir. 1988) (Table).

stream of American society" may be deemed socially disadvantaged. 13 C.F.R. 124.105(c)(1)(i).[13]

Small business owners who establish their social disadvantage must also demonstrate to the Administration that they are economically disadvantaged "as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. 637(a)(6)(A); 13 C.F.R. 124.106(b). The separate showing of economic disadvantage ensures that certification does not "assist concerns owned and controlled by socially disadvantaged individuals who have accumulated substantial wealth, who have unlimited growth potential or who have not experienced or have overcome impediments to obtaining access to financing, markets and resources." 13 C.F.R. 124.106(a)(1)(ii). In evaluating whether a business owner is in fact economically disadvantaged, the Administration considers the personal financial condition, business financial condition, and access to credit and capital of the individual claiming disadvantaged status. 13 C.F.R. 124.106(a)(2).[14]

Where a competitor, such as petitioner, believes that a certification of a subcontractor as disadvantaged is unwarranted, it may submit information to

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[13] The Administration "will entertain any relevant evidence in assessing [the social disadvantage] element of an applicant's case," 13 C.F.R. 124.105(c)(1)(v), and the regulations set forth factors to be taken into account, 13 C.F.R. 124.105(c)(1)(v)(A)-(C) (education, employment, business history).

[14] See, *e.g.*, *Autek Systems Corp.* v. *United States*, 835 F. Supp. 13 (D.D.C. 1993) (upholding Administration's determination that minority business owner's personal income disqualified him from participation), aff'd, No. 93-5399 (D.C. Cir. May 13, 1994).

the contracting officer and seek initiation of a protest. 13 C.F.R. 124.603(b); see generally 13 C.F.R. Pt. 124, Subpt. B. "No specific form is required" for a protest to disadvantaged status, 13 C.F.R. 124.607 (a), and it may be filed at any time before the work under the subcontract is completed, 13 C.F.R. 124.605(b)(2). When such a protest is filed, the Administration must investigate, 13 C.F.R. 124.608, and make a prompt determination as to disadvantage, 13 C.F.R. 124.609. In making that determination, the Administration is required to review "ownership and control of each protested firm as well as social and economic disadvantage regardless of the grounds specified in the protest." 13 C.F.R. 124.609(d)(3).[15]

States that certify disadvantaged businesses apply standards that generally mirror those promulgated under the SBA. 49 C.F.R. Pt. 23, Subpt. D; see Pet. App. 8. Under STURAA's implementing regulations, as under the SBA's, members of certain minority groups are rebuttably presumed to be disadvantaged. 49 C.F.R. 23.62.[16] However, state certification of dis-

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[15] The Administration has independent review responsibilities even in the absence of a protest. The SBA provides that businesses that are not in fact both socially and economically disadvantaged must be decertified or "graduated." 15 U.S.C. 636(j)(10)(F) and (H) (1988 & Supp. V 1993), 637(a)(6)(C) (Supp. V 1993); 13 C.F.R. 124.208. The financial information that disadvantaged businesses must file annually, 15 U.S.C. 637(a)(6)(B), or credible evidence coming to the attention of the Administration from any other source, 13 C.F.R. 124.101(c)(2), 124.111(c), may trigger a review, and the Administration is required to investigate and to satisfy itself that the criteria have been met, 15 U.S.C. 637(a)(6)(C)(i) (Supp. V 1993).

[16] The groups as to which the rebuttable presumption applies are virtually the same under both statutes. Both include

advantage under STURAA, like certification by the Small Business Administration, is also available to nonminorities.[17] Thus, persons such as "disabled Vietnam veterans, Appalachian white males, Hasidic Jews, or any other individuals who are able to demonstrate to the [State] that they are socially and economically disadvantaged may be treated as eligible to own and control a disadvantaged business, on the same basis as a member of one of the presumptive

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Black Americans, Hispanic Americans, Native Americans, and Asian-Pacific Americans. The STURAA regulations, however, specify "Asian-Indian Americans" in place of the SBA regulations' "Subcontinent Asian Americans." Compare 49 C.F.R. 23.62(a)-(e) ("socially and economically disadvantaged individuals") (defining precise contours of listed groups) with 13 C.F.R. 124.105(b)(1) (same).

The rebuttable presumption under DOT's STURAA regulations provides that "members of the named [minority] groups * * * are presumed to be both socially and economically disadvantaged," 49 C.F.R. Pt. 23, Subpt. D, App. C ¶ 2, while the parallel presumption in the SBA regulations applies only to social disadvantage. Under both sets of regulations, the certifying agency is entitled to consider all relevant evidence in order to ensure that the statutory disadvantage criteria are met as to each subcontractor. With respect to the rebuttal of the presumption, see 49 C.F.R. 23.62, the STURAA regulations provide that "[a]ny third party" may bring a challenge, 49 C.F.R. 23.69(b)(1); see 49 C.F.R. Pt. 23, Subpt. E, and may "present evidence that the firm's owners are not truly socially and/or economically disadvantaged, even though they are members of one of the presumptive groups," 49 C.F.R. Pt. 23, Subpt. D, App. C ¶ 2.

[17] The state agencies "may determine, on a case-by-case basis, that individuals who are not a member [*sic*] of one of the [minority] groups are socially and economically disadvantaged." 49 C.F.R. 23.62 (defining "socially and economically disadvantaged individuals"); see 49 C.F.R. Pt. 23, Subpt. D, App. A ¶ 10 (analysis of Section 23.62).

groups." 49 C.F.R. Pt. 23, Subpt. D, App. A ¶ 10 (analysis of Section 23.62). Women are also presumed to be socially and economically disadvantaged. 49 C.F.R. 23.62; see also 48 C.F.R. 52.219-13 (cited in Subcontracting Compensation Clause, J.A. 24).

3. *The Subcontracting Compensation Clause.* The Subcontracting Compensation Clause is a standard clause developed by FHWA's Federal Lands Highway Program and is used in most of the Program's sealed-bid contracts. The Clause is one of several means employed to aid DOT in implementing its statutory responsibilities to make efforts to expend contract and subcontract funds through disadvantaged small businesses. As its name suggests, the Clause is designed to offset the financial disincentives that would otherwise exist to employing and assisting disadvantaged businesses as subcontractors by covering the additional expenses associated with such employment. J.A. 24-26; Pet. App. 10; C.A. Supp. App. 33-34, 54, 108-109. In return for compensation under the Clause, the prime contractor thus must agree to

> locate, train, utilize, assist, and develop [disadvantaged businesses] to become fully qualified contractors in the transportation facilities construction field. The Contractor shall also provide direct assistance to disadvantaged subcontractors in acquiring the necessary bonding, obtaining price quotations, analyzing plans and specifications, and planning and management of the work.

J.A. 25.

Compensation is available to a prime contractor under the Clause when at least 10% of the prime contract amount is expended with one or more dis-

advantaged subcontractors. J.A. 25.[18] The Clause limits compensation to 10% of the amount actually subcontracted to disadvantaged subcontractors. In this case, the subcontract amount was $104,800; the prime contractor was thus entitled to compensation of approximately $10,000. Pet. App. 11. In addition, total compensation under the Clause may not exceed 1.5% of the prime contract amount if the prime contractor employs one disadvantaged subcontractor, or 2% of the prime contract amount if the prime contractor employs more than one disadvantaged subcontractor. J.A. 26. Thus, if Mountain Gravel and Construction Company (Mountain Gravel), the prime contractor on the project involved in this case, had subcontracted 40% of the work on a $1,000,000 project, its compensation would not be the full $40,000 representing 10% of the subcontracted amount; rather, if one disadvantaged subcontractor performed the entire 40% portion, compensation would be capped at $15,000 (i.e., 1.5% of the prime contract amount), and if more than one disadvantaged firm were involved, compensation could not exceed $20,000 (i.e., 2% of the prime contract amount). The compensation amount is deemed to be "full compensation for locating, selecting, training, and assisting DBE subcontractors; for maintaining supporting records; and for supplying all facilities and services to complete this DBE subcontracting provision." *Ibid.* The Clause does not impose any requirement that prime contractors subcontract with any disadvantaged subcontractors; a prime contractor remains fully eligible to be awarded a contract whether or not it does

[18] This 10% threshold can be modified "based on the availability of eligible subcontractors." C.A. Supp. App. 39-40, 52-53, 103.

so. See Pet. App. 7; J.A. 25 (eligibility for compensation); C.A. Supp. App. 96.[19]

4. *Proceedings below.* A. In September 1989, the CFLHD awarded Mountain Gravel a prime contract for a federally funded highway construction project in the San Juan National Forest known as the West Dolores project. Pet. App. 9. The contract included the Subcontracting Compensation Clause. *Id.* at 10. Mountain Gravel solicited bids to subcontract the guardrail installation portion of the contract. In subcontracting, Mountain Gravel was not required to accept the lowest bid. Although petitioner submitted a slightly lower bid, Mountain Gravel awarded the guardrail subcontract to Gonzales, a certified small disadvantaged business, and thus received compensation under the Clause. *Id.* at 10-11. Petitioner did not seek disadvantaged status for itself, did not

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[19] The mechanism of prime contractors assisting disadvantaged businesses in a mentor-like relationship was proposed to Congress by the American Association of State Highway and Transportation Officials (AASHTO) in a hearing that preceded the passage of STURAA. See *The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act: Hearing Before the Subcomm. on Transportation of the Senate Comm. on Environment and Public Works,* 99th Cong., 1st Sess. 101 (1985) ("The management of a highway contracting organization requires many skills, including knowledge of estimating and bidding, the employment and administration of managers, technicians and laborers, and the overall financial management of the business. These skills are not easily learned[.] * * * In time, it can be expected that as expertise is acquired, many of today's subcontractors will become prime or general contractors if they so desire. To help this process along, we believe in AASHTO that wider usage of the mentor-protege concept, the formation of partnerships between new DBE and WBE firms and established contracting organizations, holds great promise.").

question Gonzales's actual disadvantaged status, and did not seek to rebut any presumption that might have been applied to Gonzales in the certification process.

On August 10, 1990, petitioner filed suit for declaratory and injunctive relief against officials of DOT, alleging that the use of the Clause violates 42 U.S.C. 1983, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and the Fifth and Fourteenth Amendments to the Constitution. On cross-motions for summary judgment, the district court granted summary judgment for respondents. Pet. App. 27-37. The court rejected petitioner's argument that the challenged federal program must be subjected to strict judicial scrutiny under *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), holding instead that *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), and *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990), establish the relevant standard. The district court was satisfied that here, as in *Fullilove*, Congress had an "abundant historical basis" to support the challenged program. Pet. App. 35 (quoting *Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.)). "[T]he mere fact that CFLHD implements a federal program within Colorado does not convert it into a state program requiring *Croson*-type analysis." Pet. App. 34.

The district court held that the Clause is narrowly tailored to serve Congress's important objectives. Pet. App. 35-36. The court found that the Clause is not "overinclusive," because the annual certification process ensures that only legitimately disadvantaged subcontractors participate in the program. *Ibid.* It is also not "underinclusive," because disadvantaged

firms that are not presumptively disadvantaged may apply for certification and become qualified to participate. *Id.* at 36. The court further noted that the waiver mechanism properly relieves federal agencies of their disadvantaged business obligations when there are not enough qualified disadvantaged businesses available to achieve the agency's goal. *Ibid.*

B. The court of appeals affirmed. Pet. App. 1-24. In an undivided opinion, the court held, as had the district court, that *Fullilove*, not *Croson*, controls. *Id.* at 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 program was also "fashioned and specified by an agency and not by Congress," Pet. App. 17, particularized findings of past discrimination were 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 program petitioner challenges were specifically authorized by Congress. In including the Subcontracting Compensation Clause in prime contracts, the CFLHD thus "did exactly what Congress explicitly directed it to do" under the SBA. *Id.* at 20.

Finally, the court of appeals held that the Clause is constitutional because it is narrowly tailored to achieve the important governmental objective of providing opportunities for minority subcontractors. "The qualifying criteria of the SCC program [are] not limited to members of racial minority groups," and "minority businesses that do not satisfy that economic criteria cannot qualify for DBE status." Pet. App. 23. The court also pointed out that the 10% threshold for using disadvantaged subcontractors in the Clause "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." *Id.* at 12 n.9. The SCC program was " 'appropriately limited in * * * duration' because federal procurement and construction contracting practices are subject to regular 'reassessment and reevaluation by Congress.' " *Id.* at 23 (quoting *Fullilove*, 448 U.S. at 489 (opinion of Burger, C.J.)).

SUMMARY OF ARGUMENT

I. A. Petitioner has brought a facial constitutional challenge to the use of the Subcontracting Compensation Clause on the ground that it incorporates race-based classifications. The Clause, however, is substantively based on *disadvantaged* status; race plays a role in the operation of the Clause only through a rebuttable presumption that small businesses owned and controlled by members of racial minority groups are disadvantaged. That presumption may be set aside or rebutted if a minority subcontractor is not actually disadvantaged. In addition, the compensation program challenged by petitioner applies to encourage the utilization of disadvantaged subcontractors who are not members of minority groups.

Petitioner also mischaracterizes goals set under the Small Business Act as "race-based set-asides." Those goals, however, are neither based on race nor are they used to set aside funds exclusively for minorities. The goals do not apply to all minority businesses, but only to those owned by disadvantaged minorities. The goals also apply to government contracting with women and members of other disadvantaged groups. Because the percentage levels of the goals are not tied to race, they are not subject to heightened constitutional scrutiny.

B. Petitioner lacks standing to challenge the use of the rebuttable presumption associated with the Subcontracting Compensation Clause. Petitioner failed to show that the presumption was applied to the successful bidder in this case, or that, if it was applied, it led to an incorrect determination of disadvantage. Nor did petitioner show that it was itself disadvantaged. Petitioner, moreover, seeks only future relief, to which it is not entitled on a record that demonstrates, at best, only remote and speculative future harm.

C. Nor is the challenged Clause correctly viewed as conferring a racial preference. The Clause does not create an artificial incentive to subcontract with disadvantaged businesses. It seeks instead to remove disincentives to using such businesses by compensating prime contractors for the additional expenses and time associated with that use. Specifically, the Clause requests that prime contractors train and assist disadvantaged subcontractors, and, where they agree to do so, it offers them compensation to offset the cost to them of such additional effort.

D. Because the challenged presumption was enacted by Congress as a remedial measure based on legislative findings of racial discrimination affecting minority business opportunity, intermediate scrutiny

is the appropriate standard of constitutional review. The presumption is, however, constitutional under any degree of scrutiny. It serves a compelling remedial objective, and, because rebuttable and nonexclusive, is closely tailored to serve that objective. Congress determined that a remedy was necessary based on its findings that racial discrimination continues to impair minority access to subcontracting opportunities in federal procurement generally, and in road construction specifically.

E. The presumption challenged in this case is more narrowly tailored than any race-based remedial measure this Court has yet considered. It is not underinclusive, because it provides the same compensation for contracting with nonminority-owned as with minority-owned disadvantaged small businesses. It is not overinclusive, because it is accompanied by procedures to exclude minorities who are not in fact disadvantaged. The Clause imposes no fixed requirement of subcontracting with disadvantaged businesses and is neither a set-aside nor a quota. The presumption employed under the Clause is also appropriately limited in duration, because it is subject to active and ongoing congressional assessment of its continuing necessity.

II. Finally, this Court should reaffirm its decision in *Fullilove*. As clarified by this Court's subsequent decisions in *Croson* and *Metro Broadcasting*, *Fullilove* has provided a workable standard of constitutional review of race-conscious measures adopted by Congress after extensive factfinding and deliberation. There is no conflict in the Circuits regarding the proper application of *Fullilove*. The decision in that case reflects appropriate judicial respect for congressional determinations on matters of race that touch federal spending programs.

ARGUMENT

I. THE SUBCONTRACTING COMPENSATION CLAUSE IS CONSTITUTIONAL

A. The Clause Is Based On Social And Economic Disadvantage; Minority Racial Status Plays Only A Procedural Role Through A Rebuttable Presumption Of Such Disadvantage

Petitioner challenges the Subcontracting Compensation Clause on its face. Although that Clause employs a presumption of disadvantage that is based on racial group membership, the presumption is rebuttable and nonconclusive. The presumption therefore plays a procedural rather than a substantive role in the contracting program that employs the Clause. The program is, at the same time, open to subcontractors who have been the targets of ethnic prejudice or cultural bias, as well as to those subcontractors who have been victims of racial prejudice.[20] All subcontractors covered by the Clause also must, in addition to having suffered social disadvantage caused by group prejudice or bias, have suffered economic disadvantage.

A member of a racial minority group who has not himself or herself been the victim of racial prejudice is thus not to be treated as disadvantaged under the challenged program. Nor is such a minority group member to be treated as disadvantaged, even if he or she has been the victim of racial prejudice, if that prejudice has not resulted in economic disadvantage to him or her. On the other hand, subcontractors who are not racial minorities *are* to be included in the program if they are both economically and so-

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[20] The program also broadly covers all disadvantage caused by racial prejudice—not only racial prejudice directed against racial minorities. Cf. *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

cially disadvantaged. Women subcontractors constitute the largest category of nonminorities who are included. Members of ethnic minorities are also covered. In addition, the Conference Report on the 1978 SBA Amendments refers to the potential disadvantaged status of "a poor Appalachian white person," see H.R. Rep. No. 1714, *supra*, at 22, and the regulations under STURAA give disabled Vietnam veterans and members of Hasidic Jewish sects as other illustrations of the program's reach beyond racial minorities, see 49 C.F.R. Pt. 23, Subpt. D, App. A ¶ 10.

The Subcontracting Compensation Clause program is thus a program based on *disadvantage*, not on race. There is no constitutional impediment to legislative action based on such disadvantage beyond the requirement that the means be nonarbitrary and rationally related to the objective. Government regulation "in the social and economic field" requires only the most relaxed judicial scrutiny. See *Dandridge* v. *Williams*, 397 U.S. 471, 484 (1970). Congress's decision to foster the economic development of small disadvantaged businesses clearly serves legitimate objectives—improving the disadvantaged businesses' stability and business competence, and enhancing competition in the marketplace for government contracts—and the means chosen by Congress to achieve those objectives are just as clearly rationally related to the legislative ends.

Petitioner's facial challenge to the CFLHD's goals depends entirely on its inaccurate assertion that they are race-based. Petitioner erroneously equates disadvantaged businesses with *minority* businesses, asserting that, "[w]hile Congress may have had a basis for the adoption of a program authorizing the set-aside of 5 percent of government contracts *on the basis of race*, * * * the decision by the CFLHD to

adopt a program in which 12 to 15 percent of its contracting funds are apportioned *on the basis of race* is without the factual basis required by this Court." Pet. Br. 20 (emphasis added); see *id.* at 47-49. However, all percentages that petitioner refers to—including the 5% SBA goal, the 10% STURAA goal, the 12-15% CFLHD goal, and the 10% subcontracting threshold in the SCC—reflect expenditures with disadvantaged businesses of all types, nonminority-owned as well as minority-owned. Petitioner's incorrect characterization of the goals as race-based leads it to focus on the level of the goals, and on how and by whom they are set. If petitioner seeks to challenge the Clause as race-conscious, the proper focus of that challenge is on the only aspect of the program that is race-based: the race-based rebuttable presumption used in some certification determinations under the Subcontracting Compensation Clause.

B. Petitioner Lacks Standing To Challenge The Use Of The Race-Based Rebuttable Presumption

The Subcontracting Compensation Clause employs a race-based criterion in the limited form of a rebuttable presumption of disadvantage flowing from minority group membership. As we explain below, that presumption, although calling for intermediate scrutiny under the Court's equal protection precedents, easily passes constitutional muster. As a preliminary matter, however, we believe that petitioner has failed to demonstrate, as it must, that it has standing to challenge the limited procedural use of that racial criterion in the Compensation Clause program. Petitioner has completely failed to show that the presumption affected the award of the subcontract in this case to another bidder, and petitioner has also failed to allege or prove that the future

relief it seeks would affect its business opportunities.

Petitioner challenges its loss of a subcontract that was awarded to a certified disadvantaged business enterprise, arguing that the contract award was the result of a racial preference, but has failed to establish that race played any role whatever in the challenged award. First, petitioner never alleged or proved that the basis of Gonzales Construction Company's certification as a disadvantaged business was its ownership and control by a member of a racial minority group. Petitioner submitted no evidence regarding the criteria actually used in that certification.[21] So far as the record reveals, Gonzales may have been certified as a disadvantaged business because of ownership and control by a woman, by an ethnic minority, or by a physically disabled person, or on some other ground.[22] There has thus been no showing that the race-based rebuttable presumption, which is the only racial component of the challenged program, was actually applied so as to affect the award of the subcontract in this case.

Second, petitioner failed to establish that, even assuming that Gonzales's ownership by a racial minority group member was the basis of the certification, the owner was not socially and economically disadvantaged. Although the SBA and STURAA regulations provide a procedure through which any interested person may challenge whether a certified

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[21] Petitioner did not depose or otherwise seek discovery from the owner of the Gonzales firm, nor from any of the state or SBA officials involved in disadvantaged business certifications.

[22] Petitioner simply refers repeatedly and consistently to Gonzales as a disadvantaged business enterprise, or "DBE," without indicating the basis of the finding of disadvantage. See, *e.g.*, J.A. 18 (Complaint); Pls. Answers to Defs. Interrog. 16; Pet. 5; Pet. Br. 11; see J.A. 30.

disadvantaged subcontractor is actually disadvantaged, 13 C.F.R. Pt. 124, Subpt. B; 49 C.F.R. 23.69, petitioner chose chose not to take advantage of that procedure. A challenge by petitioner to Gonzales's certification would have required the certifying agency not simply to confirm the race of those who own and control the company, but to review and verify the company's actual disadvantaged status. See 13 C.F.R. 124.608-124.609; 49 C.F.R. Pt. 23, Subpt. D, App. C. If Gonzales is actually disadvantaged and if petitioner, as appears, see Pet. Br. 24 n.21, had a fair opportunity to challenge that status but chose not to do so, petitioner can hardly claim now that any rebuttable presumption used to determine that Gonzales was disadvantaged was unconstitutional.

Nor has petitioner ever claimed or established that it is itself disadvantaged. Thus, petitioner cannot challenge the rebuttable presumption on the ground that it unconstitutionally prefers minorities by making it easier for them than for nonminorities to be certified as disadvantaged.

The abstract nature of petitioner's claim is further underscored by its failure to show that the relief it seeks would actually affect its business. Petitioner does not seek retrospective relief for Mountain Gravel's failure to award it the subcontract. Rather, petitioner seeks only to enjoin and declare unlawful the future use of the Clause by the FHLP. J.A. 22-23. Petitioner thus has standing only if it faces " 'actual or imminent' injury." *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2138 (1992). The asserted future harm upon which petitioner's claim is based is, however, both remote and highly contingent. In the 18 years that petitioner has been in the guardrail construction business, the subcontract on the West Dolores project is the only subcontract that

petitioner has allegedly lost due to the Subcontracting Compensation Clause. Pls. Answers to Defs. Interrog., Attachs. 1, 3. In Colorado, where petitioner bids, the only agency using the Clause is the CFLHD, which has on average less than one guardrail subcontract per year in each State. Defs. Answers to Pls. Interrog. 13. Petitioner has not always bid on government subcontracts, and when it did it most often failed to make the lowest bid. Pls. Answers to Defs. Interrog. 9, Attach. 1. In addition, most highway construction projects on which petitioner bids are not administered by the CFLHD, but by the State, and therefore do not include the Subcontracting Compensation Clause. Finally, if petitioner lost future contracts under the Clause to disadvantaged businesses owned by nonminorities, an injunction against use of the racial presumption in the Clause would provide it no relief. All these factors make the "links in the chain of causation between the challenged Government conduct and the asserted injury * * * far too weak for the chain as a whole to sustain [petitioner's] standing." *Allen* v. *Wright*, 468 U.S. 737, 759 (1984).[23]

Petitioner, in sum, has not established—nor does it appear to have—any factual basis for challenging

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[23] *Northeastern Florida Chapter of Associated General Contractors* v. *City of Jacksonville*, 113 S. Ct. 2297 (1993), is not to the contrary. That case was brought by an association of 240 contractors and subcontractors that regularly bid on contracts affected by the challenged set-aside, in contrast to petitioner here, which faces only the most speculative chance that it will be affected by the challenged program. The program in *City of Jacksonville* was also fundamentally different from the one at issue here, because it was an exclusively minority program, whereas the Clause here neither prevents petitioner from obtaining certification as a disadvantaged business nor, even if not so certified, from bidding on and obtaining subcontracts on prime contracts including the Clause.

the constitutionality of the only factor of any kind in the Compensation Clause program that is based on minority racial status. As we show below, the rebuttable presumption, in the context of a program that seeks not to give a preference, but to alleviate discriminatory barriers that would otherwise imperil disadvantaged subcontractors, is unquestionably constitutional. On the present record, however, the only aspect of the Compensation Clause open to challenge is its implementation of Congress's decision to increase the share of federal procurement business allocated to disadvantaged subcontractors, whether minority or not. There can be no serious question as to the legitimacy of that congressional objective.

C. The Clause Does Not Constitute A Preference For Disadvantaged Subcontractors

Petitioner's constitutional attack on the Subcontracting Compensation Clause depends not only on petitioner's incorrect assertion that the Clause focuses on race rather than disadvantage, but also on its contention that the Clause constitutes a "bonus" or "reward" (Pet. Br. 9 & n.9, 10 & n.12, 11) to prime contractors to induce them to prefer contracting with disadvantaged subcontractors. That contention is also factually erroneous.

Rather than constituting a preference for disadvantaged subcontractors, the Compensation Clause is designed to remove barriers that would otherwise exist to the free participation by disadvantaged businesses in bidding for subcontracts on federal highway projects. As explained by the text of the Clause itself and by the legislative record, disadvantaged subcontractors, who by definition must have diminished capital resources and credit opportunities, will, without assistance, often be unable to compete with more affluent subcontractors for work on gov-

ernment projects. The Clause is part of a FLHP effort to encourage prime contractors on federal highway projects to lend that needed assistance and to be willing to utilize disadvantaged subcontractors despite the extra costs associated with that effort.

As the Clause notes, among the additional costs of employing disadvantaged subcontractors are payments to assist the subcontractors to get bonding, the expense and time involved in providing assistance in business, financial and labor management, and technical planning and organization of the subcontracted work. J.A. 25-26. The prime contractor is required to keep records "documenting these activities and shall make them available for Government review upon request." J.A. 25. If those extra expenses were not negated by the Clause, disadvantaged subcontractors would often either be denied needed assistance, be forced to submit higher bids than more affluent subcontractors who face fewer disadvantages, or be excluded from government procurement business altogether. Any of those results would conflict with Congress's objectives of using its procurement program to spur economic development and of encouraging healthy price competition on government projects.[24]

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[24] Petitioner has made no effort to show that the compensation figure used under the Clause exceeds the costs of doing business with disadvantaged subcontractors so as to constitute a preferential "bonus" or "reward." In addition, compensation is initially calculated at 10% of the dollar amount of the subcontracts placed with disadvantaged businesses, but cannot exceed 2% of the amount of the prime contract. Thus, any affirmative incentive it might provide in a particular situation would, in all events, be a limited one.

D. The Rebuttable Presumption Of Disadvantage Is Based On Congressional Findings Of Racial Discrimination And Serves The Compelling Governmental Objective Of Remedying Past Discrimination

In amending the SBA since the mid-1970's, and in enacting STURAA in 1987, Congress identified past and continuing racial discrimination, specifically including discrimination in the highway construction industry, as having impaired the ability of minorities to participate in economic activity, and it sought to ensure that federal procurement spending not compound the effects of that discrimination, but rather help to remedy it. In this effort, Congress chose to utilize, in addition to other means, a narrow and flexible rebuttable presumption of disadvantage applicable to racial minorities seeking to participate in federal contracting activity. Insofar as petitioner has standing to raise the issue, this case presents the question whether, in assessing the disadvantaged status of a particular small business, the CFLHD may properly rely on certifications of disadvantage in which the presumption has been employed.[25]

The presumption itself is both nonconclusive and rebuttable. Certifying agencies are to presume disadvantage if a subcontractor is a member of any of

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[25] As noted, petitioner has not identified the certification process actually used in this case. For that reason, it is unclear which regulations are at issue—those under the SBA or those under STURAA. Accordingly, in order to reverse the decision below, this Court would have to find all potentially applicable regulations facially unconstitutional. See *Reno* v. *Flores*, 113 S. Ct. 1439, 1446 (1993) (citing *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)). So long as the "projected administration give[s] reasonable assurance that the program will function within constitutional limitations," *Fullilove* v. *Klutznick*, 448 U.S. 448, 490 (1980) (opinion of Burger, C.J.), the program must be upheld.

a list of minority groups, or, in the case of the agencies implementing STURAA, is a women. The overriding statutory obligation of the certifying agencies remains that of determining whether each small business is, in fact, socially and economically disadvantaged; the agency may rely on the presumption only in the absence of contrary information. Where available information shows, for example, a lack of economic disadvantage, the presumption must be disregarded. Moreover, unlike a court, the certifying agency is entitled to implement independent investigative procedures to satisfy itself that the statutory criteria are being met.[26] In addition, in any case in which a non-disadvantaged business believes application of the presumption may result in discrimination against it, it may trigger an investigation into whether the minority business has truly suffered both social and economic disadvantage.

1. *Race-based remedial action by Congress is subject to intermediate scrutiny.* This Court has never applied strict scrutiny to a remedial, race-conscious measure adopted by Congress, and should not do so here, where the program involves neither a quota, a set-aside, nor any other kind of substantive racial preference. Cf. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 499 (1989). The rebuttable presumption employed in programs under the SBA and STURAA is instead subject to the intermediate standard of review set forth in this Court's decisions

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[26] See Federal Highway Administration, U.S. Dep't of Transportation, *Disadvantaged Business Enterprise (DBE) Program Administration Participant's Manual* 65 (Apr. 1990) (advising state agencies to require applicants for disadvantaged business certification to submit gross receipts for at least three previous years and income tax returns for each owner); STURAA § 106(c)(4), 101 Stat. 146.

in *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990), and *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980).

Intermediate scrutiny applies because of Congress's broad powers in matters of race. Those powers derive from an "amalgam" of sources, *Metro Broadcasting*, 497 U.S. at 564 n.11 (quoting *Fullilove*, 448 U.S. at 473 (opinion of Burger, C.J.)), including Congress's "institutional competence as the National Legislature," as well as its constitutional powers under the Spending Clause,[27] the Commerce Clause,[28] and the enforcement clauses of the Civil War Amendments, *Metro Broadcasting*, 497 U.S. at 563. Unlike the States and localities, Congress is a co-equal branch, and the Court is bound to give its decisions "great weight." *Fullilove*, 448 U.S. at 472 (opinion of Burger, C.J.). Congress's role as the national legislature—a bicameral, representative body subject to presidential veto—makes it less likely than state or local governing bodies to be captured by parochial and biased interests. It thus does not present the "height-

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[27] Article I, Section 8, Clause 1. See *Fullilove*, 448 U.S. at 474 (opinion of Burger, C.J.); *Metro Broadcasting*, 497 U.S. at 563. "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 (citing *Norwood* v. *Harrison*, 413 U.S. 455, 465 (1973)).

[28] Congress has vast powers under the Commerce Clause, Article 1, Section 8, Clause 3, to regulate any activity that "has a real and substantial relation to the national interest." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 255 (1964); *EEOC* v. *Wyoming*, 460 U.S. 226 (1983); *id.* at 248 (Stevens, J., concurring); *Hodel* v. *Indiana*, 452 U.S. 314, 323-324 (1981); *Katzenbach* v. *McClung*, 379 U.S. 294, 304 (1964).

ened danger of oppression from political factions" present in smaller political units. *Croson*, 488 U.S. at 523 (Scalia, J., concurring in the judgment).[29] Moreover, in the event that Congress should err in its choice of a remedy, its broadly representative character provides a check.

In matters of race, the Civil War Amendments expressly granted "additional powers to the Federal government," and specifically to Congress, and laid "additional restraints upon those of the States." *Croson*, 488 U.S. at 491 (opinion of O'Connor, J.) (quoting the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 68 (1873)).[30] "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Fullilove*, 448 U.S. at 483 (opinion of Burger, C.J.); *id.* at 508-510 (Powell, J., concurring).[31]

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[29] See also *Fullilove*, 448 U.S. at 473 (opinion of Burger, C.J.) (federal legislation represents not a conclusion reached "by a single judge or a school board, but a considered decision of the Congress and the President").

[30] "[I]t is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, see U.S. Const., Amdt. 14, § 5—and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed." *Croson*, 488 U.S. at 521-522 (Scalia, J., concurring in the judgment).

[31] As those Justices who addressed the issue in *Croson* took care to point out, Congress has powers that States and localities lack to act in an affirmative, race-conscious manner. 488 U.S. at 486-493 (opinion of O'Connor, J., joined by Rehnquist,

Congress's powers under Section 5 of the Fourteenth Amendment supported the federal race-conscious measures in both *Fullilove*, 448 U.S. at 483-484 (opinion of Burger, C.J.), and *Metro Broadcasting*, 497 U.S. at 564-565, and similarly authorize the rebuttable presumption of disadvantage at issue in this case. "Congress, unlike any state or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *Croson*, 488 U.S. at 490 (opinion of O'Connor, J.) (citing *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966)) ("Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.")); see also *Fullilove*, 448 U.S. at 476 (opinion of Burger, C.J.). Because Congress in this area has constitutionally coordinate power to define racial inequality and to devise appropriate remedies, the Court must accord special respect to congressional judgment regarding both means and ends.

Congress's remedial powers under the Thirteenth Amendment similarly require deference to its identification of private discrimination and its choice of remedy. The enforcement clause of the Thirteenth Amendment is a source of uniquely federal power "to enact laws 'direct and primary, operating upon the acts of individuals, whether sanctioned by State legis-

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C.J., and White, J.). Judge Posner in *Milwaukee County Pavers Ass'n* v. *Fielder*, 922 F.2d 419, 423-424 (7th Cir.), cert. denied, 500 U.S. 954 (1991), articulated the same principle.

lation or not.'" *Runyon* v. *McCrary*, 427 U.S. 160, 179 (1976) (quoting *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968)).

Petitioner errs in contending that Congress's Section 5 powers are not relevant here because this case "involves a federal program implemented by a federal agency" and "no state or local government is involved." Pet. Br. 33 n.29. The legacy of discrimination that Congress aimed to remedy in STURAA and the SBA is a history not only of private,[32] but also of state-sponsored discrimination.[33] Nothing in the Fourteenth Amendment requires that a federal remedy for such discrimination be *implemented* only through the States.[34] Congress's powers under the Thirteenth Amendment do not, in all events, turn on state responsibility for past and present racial discrimination.

2. *Intermediate scrutiny applies here.* It is thus "of overriding significance" to this case that the rebuttable presumption of disadvantage "ha[s] been

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[32] Discriminatory practices by prime contractors, banks, unions, vocational schools, and the like are among the practices Congress sought to redress by expressly recognizing racial minorities as disadvantaged in highway construction and devising measures to remedy disadvantage in federal contracting. Some illustrations of the bases for Congress's action are touched upon in Appendix B, and in the materials referred to therein.

[33] See, *e.g.*, *Minority Business Participation in Department of Transportation Project: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 185 (1985); *1988 Barriers Hearing* 82, 117.

[34] Under STURAA, however, Congress in fact chose in large part to implement its remedial program through the States: The vast majority of the funds allocated under STURAA—approximately 98%—is for aid to the States, which is also spent subject to STURAA disadvantaged business enterprise contracting provisions.

specifically approved—indeed, mandated—by Congress." *Metro Broadcasting*, 497 U.S. at 563. Although agency regulations define some aspects of the rebuttable presumption, Congress made the "critical determinations." *Fullilove*, 448 U.S. at 468 (opinion of Burger, C.J.). Congress thus determined that persons who are "socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices" "include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities." 15 U.S.C. 631(f)(1)(B) and (C). It also determined that, in subcontracting, those minorities may be "presume[d]" to be disadvantaged. 15 U.S.C. 637(d)(3)(C) (Supp. V 1993). The Administration and DOT each elaborated on those determinations in their regulations by outlining evidence relevant to determinations of social and economic disadvantage, 13 C.F.R. 124.105-124.106; 49 C.F.R. Pt. 23, Subpt. D, App. C, and by spelling out the procedures available for rebutting the presumption, 13 C.F.R. Pt. 124, Subpt. B; 49 C.F.R. 23.69; 49 C.F.R. Pt. 23, Subpt. D, App. C. The role of the agencies in "flesh[ing] out this skeleton, pursuant to delegated rulemaking authority," does not make the crucial race-based, remedial determination any less the decision of Congress. *Fullilove*, 448 U.S. at 468 (opinion of Burger, C.J.).

The appropriate constitutional test for determining the validity of the rebuttable presumption of disadvantage is set forth in the plurality opinion of Chief Justice Burger in *Fullilove* and in the majority opinion in *Metro Broadcasting*. Relying on *Fullilove*, this Court in *Metro Broadcasting* held that "benign race-

conscious measures mandated by Congress * * * are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." *Metro Broadcasting*, 497 U.S. at 564-565. In a facial challenge such as is presented in this case, "given a reasonable construction and in light of its projected administration, if [the Court] find[s] the [minority business enterprise] program on its face to be free of constitutional defects, it must be upheld as within congressional power," *Fullilove*, 448 U.S. at 480-481 (opinion of Burger, C.J.). "[D]oubts must be resolved in support of the congressional judgment that this limited program is a necessary step to effectuate the constitutional mandate for equality of economic opportunity." *Id.* at 489.

Petitioner does not ask this Court to overrule *Fullilove*. Rather, it contends that Chief Justice Burger's opinion effectively applied strict scrutiny, and urges this Court to so hold. Pet. Br. 26-27; Pet. 7-11. But the Court observed in *Metro Broadcasting* that "[a] majority of the Court in *Fullilove* did not apply strict scrutiny to the race-based classification at issue," 497 U.S. at 564—an observation with which the dissenting Justices in that case agreed. See *id.* at 608 (O'Connor, J., dissenting) ("the Court correctly observes that a majority [in *Fullilove*] did not apply strict scrutiny"). In any event, whatever label is given to the degree of scrutiny employed in *Fullilove*, the result there requires validation of the presumption challenged here, which is as strongly justified and more narrowly tailored than the set-asides at issue in *Fullilove*.[35]

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[35] Petitioner also does not question the validity of the Court's decision in *Metro Broadcasting*, but seeks to distin-

3. *Congress had a firm and compelling basis to act.* Although Congress "need not make specific findings of discrimination to engage in race-conscious relief," *Croson*, 488 U.S. at 489 (opinion of O'Connor, J.); see also *Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.), the presumption at issue here is in fact supported by explicit congressional findings that minorities are disadvantaged in participating in highway construction projects because of racial discrimination and its continuing effects. See pp. 7-12, *supra*; App., *infra*, 18a-34a. As it did in enacting the Public Works Employment Act of 1977 (PWEA) at issue in *Fullilove*, Congress in the SBA and STURAA sought to ensure that state and private entities receiving federal funds and contracts would not employ procurement practices that Congress had decided "might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities." *Fullilove*, 448 U.S. at 473 (opinion of Burger, C.J.). Census data available to Congress further demonstrate that minorities in the construction industry, and in the economy generally,

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guish it as applicable only to non-remedial affirmative action in which First Amendment interests are at stake. Pet. Br. 28-31. Intermediate scrutiny applicable to a non-remedial race-conscious program, however, should, *a fortiori*, apply to a remedial program such as this one, given that the interest in remedying racial discrimination is the most compelling reason the Court has yet identified for race-based legislative distinctions. See *Metro Broadcasting*, 497 U.S. at 611 (O'Connor, J., dissenting). The First Amendment interests at stake in *Metro Broadcasting* did not contribute to the Court's view that a lesser level of scrutiny was required, but rather factored into the determination whether, under the intermediate test the Court employed, the government had established a sufficiently "important governmental objective[]." *Id.* at 565.

have continued to lag far behind whites in securing economic opportunities. Appendix C to this brief sets forth census figures showing that, although there have been modest improvements in some respects since 1978, the participation of racial minority groups in the construction industry, and the economic benefit they derive from construction work they do, continue to lag far behind that of whites. Such data, as well as all legislative materials, are relevant to the determination that Congress was acting to remedy the effects of prior discrimination, since "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Metro Broadcasting*, 497 U.S. at 572 (quoting *Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.)); see also *Metro Broadcasting*, 497 U.S. at 572 (quoting *Fullilove*, 448 U.S. at 502-503 (Powell, J., concurring)).

Congress may act broadly both in identifying discrimination and in fashioning a remedy for it.[36] In *Croson*, which concerned action taken by a city council, not Congress, the plurality rejected the appellee's view that "the city must limit any race-based remedial efforts to eradicating the effects of its own prior discrimination." 488 U.S. at 486 (opinion of O'Connor, J.). Congress may also act with the forward-looking goal of increasing opportunities for

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[36] "Congress may identify and redress the effects of society-wide discrimination." *Croson*, 488 U.S. at 490 (opinion of O'Connor, J.); see also *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 287 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored,' or 'substantially related,' to the correction of prior discrimination by the state actor").

those who have been disadvantaged by racial discrimination. "A central purpose of the Fourteenth Amendment is to further the national goal of equal opportunity for all our citizens," but remedying past harms need not be done without "studying their probable impact on the future." *Croson*, 488 U.S. at 511 (Stevens, J., concurring in part and concurring in the judgment); see *Metro Broadcasting*, 497 U.S. at 601 (Stevens, J., concurring).

E. The Clause Is Narrowly Tailored To Achieve Congress's Constitutional Objectives

Although satisfaction of intermediate scrutiny is all that is required, the Subcontracting Compensation Clause is sufficiently narrowly tailored to satisfy even the most stringent constitutional scrutiny. Indeed, the use of the rebuttable presumption of disadvantage under the SBA, rather than a fixed set-aside for minorities, is the very program that the petitioners in *Fullilove* advocated as an acceptable, because "less onerous," alternative to the program they challenged in that case. Brief for Petitioner, General Building Contractors of New York State, Inc., at 30 (No. 78-1007). The *Fullilove* petitioners emphasized that SBA disadvantaged business certifications are not limited to minorities, but are "structured to assisting businesses of socially and economically disadvantaged individuals." *Ibid.* They favorably characterized the certification program in this case as "similar to the race-conscious approach taken by Harvard College in its admission program, which Justice Powell has found constitutional." *Id.* at 30 n.37 (citing *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 316 (1978)).

1. *The Clause is not underinclusive.* The race-conscious affirmative measures this Court has previ-

ously approved, unlike the Clause at issue here, have not allowed minority business enterprises to participate. See, *e.g.*, *Metro Broadcasting*, 497 U.S. at 630 (O'Connor, J., dissenting) (opportunity to compete for licenses in distress sales "depends entirely upon race or ethnicity"). The criteria for qualification for disadvantaged status under the SBA and STURAA, in contrast, allow businesses owned by persons who are not members of minority groups to participate when they establish their social and economic disadvantage. 48 C.F.R. 19.703; 49 C.F.R. Pt. 23, Subpt. D., Apps. A and C.

2. *The Clause is not overinclusive.* At the same time, the Clause is not overinclusive, because it does not include all minority-owned businesses in its coverage, without regard to whether they have in fact suffered from social or economic disadvantage. In *Fullilove*, where all minority-owned contractors *were* included, the Court was satisfied that the 10% set-aside there was sufficiently tailored because the program included: (1) administrative scrutiny to weed out "minority-front entities," (i.e., businesses that purported to be owned and controlled by members of racial minority groups but that were in fact nonminority-owned and -controlled businesses), 448 U.S. at 487-488 (opinion of Burger, C.J.); (2) procedures for a prime contractor to obtain a waiver of the set-aside requirement in order to avoid dealing with a minority business that was "attempting to exploit the remedial aspects of the program by charging an unreasonable price, *i.e.*, a price not attributable to the present effects of past discrimination," *id.* at 488; and (3) procedures permitting the set-aside goals to be waived when the grantee could show that its "best efforts will not succeed or have not succeeded in achieving the statutory 10% target for minority

firm participation within the limitations of the program's remedial objectives," *ibid.* The Clause here is significantly more closely tailored to ensure that only disadvantaged minorities benefit from the subcontracting program.

The rebuttable presumption employed under the Clause is a fitting response to Congress's findings of competitive business disadvantage due to racial discrimination. The presumption responds to those findings in a manner designed effectively to ameliorate the insidious harms caused by racial discrimination, while neither limiting the remedy to race nor benefitting minorities who are not in fact disadvantaged. Congress recognized that the racial minorities to whom the presumption applies have been pervasively subjected to social and economic disadvantages—especially in the construction industry, where racial discrimination has been particularly virulent and tenacious—because of discrimination against them. The rebuttable presumption recognizes that it is factually accurate in most cases to presume that such disadvantage has affected a small minority subcontractor. By enacting a presumption, rather than a conclusive determination, Congress recognized the realities that not all minority group members have equally borne the brunt of racial discrimination and that other bias-related disadvantages may equally affect the ability of small businesses to compete for government contracts.

The use of the presumption thus operates to focus the inquiry on disadvantage by indicating a result in the absence of additional evidence. See *St. Mary's Honor Center* v. *Hicks*, 113 S. Ct. 2742 (1993). Such a presumption is valid if it rests on "a sound factual connection between the proved and inferred facts."

NLRB v. *Baptist Hospital, Inc.*, 442 U.S. 773, 787 (1979).[37] Chief Justice Burger in *Fullilove* found the minority business set-aside there adequately tailored precisely because it effectively operated as a presumption subject to rebuttal: Congress assumed that minority business enterprise prices would reflect the effects of discrimination, and that, in the absence of discrimination, minority participation in federal construction projects would be approximately 10%. Crucial to the finding of narrow tailoring, however, was that "each of these assumptions may be rebutted in the administrative process." *Fullilove*, 448 U.S. at 487 (opinion of Burger, C.J.); see *Croson*, 488 U.S. at 489 (opinion of O'Connor, J.) (noting with approval that, in *Fullilove*, both " 'assumptions' could be 'rebutted' by a grantee seeking a waiver of the 10% requirement"). Here, the very participation of a minority business enterprise in the program is subject to proof of actual disadvantage if the rebuttable presumption of disadvantage is brought into question.[38]

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[37] It is "only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976) (quoting *Mobile, J. & K.C.R.R.* v. *Turnispeed*, 219 U.S. 35, 43 (1910)). Because the "process of making the determination of rationality is, by its nature, highly empirical, * * * significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." *Ibid.* (quoting *United States* v. *Gainey*, 380 U.S. 63, 67 (1965)).

[38] The statutes and the regulations contain provisions more forceful and extensive than those in the program reviewed in *Fullilove* to prevent the minority presumption from being abused by nonminority, non-disadvantaged business "fronts"

3. *The Clause does not involve a fixed quota or set-aside.* A third way in which the Clause is narrowly tailored is that it does not establish a racial set-aside or reflect any fixed or rigid racial quota. Specifically, the SBA's overall goals for the use of disadvantaged small businesses do not, contrary to petitioner's repeated contention (Pet. Br. 20, 47, 48), function as set-asides. They are benchmarks against which the procuring agencies, the Small Business Administration, Congress, and the President may measure the agencies' performances in contracting with those businesses. As petitioner itself explained in the court of appeals:

> The mere setting of a "goal" does no harm. This is because a goal, in and of itself, has no substantive effect. Constitutional problems arise only when a public entity grants a race-based preference to one class of persons in order to achieve a goal. Thus, the question of the means used to achieve a racial goal is entirely separate from the setting of the goal itself.

Adarand C.A. Br. 19.

Nor does the particular program challenged here —the Subcontracting Compensation Clause—establish any set-aside or percentage contracting requirement. Agreeing to subcontract with disadvantaged businesses is *not* a contractual condition of eligibility for award of the prime contract. Contractors are entirely free to contract with any subcontractor they

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posing as disadvantaged businesses. See 15 U.S.C. 645(d) (providing that misrepresentations of disadvantaged status in order to obtain contracts are punishable by up to 10 years' imprisonment and/or $500,000 fine); 13 C.F.R. 124.5, 124.6, 124.103, 124.104, 124.108, 124.109; 49 C.F.R. Pt. 23, Subpt. D, App. C (other eligibility considerations, addressing requirement of ownership and control); 49 C.F.R. 23.51-23.53.

believe will best and most economically do the job. They are affirmatively encouraged to utilize and support disadvantaged businesses by the opportunity to recover the additional costs attending that use and support, but there are no sanctions or penalties if a prime contractor elects not to take advantage of that opportunity. Because prime contractors are not obligated to accept the lowest bidder on subcontracts, no "legitimate, firmly rooted expectation" is disturbed by the Clause. *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U.S. 616, 638 (1987). Nor does it appear that a disproportionate number of subcontracts is directed toward disadvantaged subcontractors through use of the Clause. In fact, non-disadvantaged businesses obtain more than 95% of the subcontracting dollars on federal contracts.[39]

4. *The rebuttable presumption is of limited duration.* Finally, the rebuttable presumption applicable under the Subcontracting Compensation Clause is "appropriately limited in extent and duration," because the statutes that establish it are subject to regular "reassessment and reevaluation by the Congress." *Fullilove*, 448 U.S. at 489 (opinion of Burger, C.J.). STURAA, like the PWEA, is an appropriations measure of finite duration. The SBA, though of more permanent nature, is also subject to periodic and extensive congressional oversight. The SBA requires annual reporting to Congress and the President. 15 U.S.C. 631b, 644(h) (1988 & Supp. V 1993). Congress also frequently holds hearings on the operation of the SBA's disadvantaged business

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[39] In Fiscal Year 1987, "only 3.1 percent of the federal procurement prime subcontracting awards were performed by minority businesses" and "only $1.5 billion in subcontracts were directed to minority firms out of a total of $63 billion." S. Rep. No. 394, 100th Cong., 2d Sess. 81, 82 (1988).

enterprise programs. See Appendix B, *infra*, 18a-36a. Congress closely follows the efforts of federal agencies to utilize disadvantaged businesses, and the SBA allows the goals to be set by the agencies at lower levels as circumstances warrant.

The high degree of congressional concern is a forceful indication that *under*-utilization of disadvantaged businesses is the acute social and economic problem facing the Nation; petitioner's claim that the program at issue here unfairly over-utilizes minority businesses finds no support in either the record or facts of this case or in the unusually extensive legislative record developed by a Congress deeply concerned with both economic development and racial justice. Congress can, moreover, confidently be expected to prevent any expansion of its programs that would give undue competitive advantages to disadvantaged businesses; such advantages would be entirely inconsistent with Congress's purposes to stimulate national economic activity and to improve the efficiency of federal procurement.

II. PRINCIPLES OF STARE DECISIS SUPPORT THE CONTINUING VITALITY OF *FULLILOVE* v. *KLUTZNICK*

This Court should not depart from the fundamental constitutional principle of *Fullilove* that Congress has unique powers to enact race-based remedies. That principle was reaffirmed in *Croson*.[40] No conflict has developed in the lower courts as to the proper interpretation or application of *Fullilove*. See,

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[40] 488 U.S. at 490-491 (O'Connor, J., joined by Rehnquist, C.J., and White J.) ; *id.* at 521-522 (Scalia, J., concurring in the judgment) ; *id.* at 557-558 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting). See also *Metro Broadcasting*, 497 U.S. at 606-609 (O'Connor, J., dissenting) ; *id.* at 634 (Kennedy, J. dissenting).

e.g., Harrison & Burrowes Bridge Constructors, Inc. v. *Cuomo*, 981 F.2d 50, 57 (2d Cir. 1992); *Ellis* v. *Skinner*, 961 F.2d 912, 915 (10th Cir.), cert. denied, 113 S. Ct. 374 (1992); *Tennessee Asphalt Co.* v. *Farris*, 942 F.2d 969, 975 (6th Cir. 1991); *Milwaukee County Pavers Ass'n* v. *Fielder*, 922 F.2d 419, 423-424 (7th Cir.), cert. denied, 500 U.S. 954 (1991); see also *O'Donnell Construction Co.* v. *District of Columbia*, 963 F.2d 420, 423 (D.C. Cir. 1992); *id.* at 429 (Ginsburg, J., concurring). The central rule of *Fullilove* has in no way "been found unworkable," *Planned Parenthood* v. *Casey*, 112 S. Ct. 2791, 2809 (1992), and no new principle of law has called its correctness into question. This Court should continue to sustain Congress's vital role in remedying the effects of racial discrimination that continue to burden the Nation's economy and political life by reaffirming *Fullilove*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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