No. 15-1827

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MIDWEST FENCE CORPORATION,

Plaintiff-Appellant

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
THE HONORABLE HARRY D. LEINENWEBER, No. 1:10-cv-05627

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

The jurisdictional summary in the appellant's brief is complete and correct.

STATEMENT OF THE ISSUE

Whether the federal regulations implementing the United States Department of Transportation's Disadvantaged Business Enterprise (DBE) transportation contracting program, 49 C.F.R. Pt. 26, are narrowly tailored to a compelling government interest.

STATEMENT OF THE CASE

Plaintiff in this case challenged the constitutionality of both federally-funded, and wholly state-funded, transportation contracting programs. This brief addresses the federal program. With respect to the federal program, plaintiff challenged the federal regulations that create the program, as well as the implementation of the program by the Illinois Department of Transportation (IDOT). The district court applied strict scrutiny and granted summary judgment to the federal and state defendants. The court upheld both the facial constitutionality of the federal regulations and IDOT's implementation of the federal program as applied to plaintiff. On appeal, plaintiff's challenges to the federal program address only whether the district court erred in granting summary judgment on the narrow tailoring of the federal program.

1. The Federal DBE Transportation Program

a. Since 1983, Congress has repeatedly authorized the DBE program of the U.S. Department of Transportation (USDOT).[1] The program seeks to create equal

[1] See Highway Improvement Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2100; Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c), 101 Stat. 146; Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919-1921; Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998); Safe, Accountable, Flexible, Efficient, Transportation Equity Act—A Legacy for Users, Pub. L. No. 109-59, § 1101(b), 119 Stat. 1156 (2005); Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, § 411, 124

(continued…)

opportunity in the arena of federally-funded highway, transit, and airport projects by ensuring that public dollars do not discriminate or perpetuate the effects of discrimination in the ability of racial minorities and women to compete for federally-funded contracts. Courts, properly applying strict scrutiny, have uniformly upheld the facial constitutionality of the program.[2]

Congress reauthorized the current program in the 2012 Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. No. 112-141, § 1101(b), 126 Stat. 405, 414-416. In doing so, Congress found that "discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally-assisted surface transportation markets across the United States." *Id.* § 1101(b)(1)(A). In reaching that determination, Congress "received and reviewed testimony and documentation

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(…continued)
Stat. 78-79 (2010). A separate statute authorizes the application of the DBE program to airport funds. See 49 U.S.C. 47101.

[2] See *Associated Gen. Contractors of Am.* v. *California Dep't of Transp.*, 713 F.3d 1187 (9th Cir. 2013); *Western States Paving Co., Inc.* v. *Washington State Dep't of Transp.*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006); *Sherbrooke Turf, Inc.* v. *Minnesota Dep't of Transp.*, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004); *Adarand Constructors, Inc.* v. *Slater (Adarand VII)*, 228 F.3d 1147 (10th Cir. 2000), cert. granted sub nom. *Adarand Constructors, Inc.* v. *Mineta*, 532 U.S. 967 (2001), cert. amended, 532 U.S. 967 (2001), and cert. dismissed, 534 U.S. 103 (2001); see also *Geyer Signal, Inc.* v. *Minnesota Dep't of Transp.*, No. 11-321, 2014 WL 1309092 (D. Minn. Mar. 31, 2014); *Northern Contracting, Inc.* v. *Illinois*, No. 00-4515, 2004 WL 422704 (N.D. Ill. Mar. 3, 2004).

* * * from numerous sources, including congressional hearings and roundtables, scientific reports, reports issued by public and private agencies, news stories, reports of discrimination by organizations and individuals, and discrimination lawsuits." *Id.* § 1101(b)(1)(C).

In particular, a 1996 report submitted to Congress by the U.S. Department of Justice analyzed more than 30 congressional hearings and 50 reports on the discrimination faced by minority-owned businesses in federal contracting. See *Appendix—The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26,050 (May 23, 1996) (1996 Compelling Interest Report). A 2010 update to that report analyzed more than 39 congressional hearings, 47 reports, and 75 state and local government studies conducted since 2000 that examined whether race and gender discrimination "remain a significant obstacle for minority and women entrepreneurs." See *Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: An Update to the May 23, 1996 Review of Barriers for Minority- and Women-Owned Businesses* (2010 Compelling Interest Update), R. 15-1 at 1-2. These studies did not merely tally differences in the rates at which enterprises owned by minorities and women gain contracts. Instead, they sought to determine whether neutral and legitimate factors accounted for the differences in utilization—and found that, even after

controlling for such legitimate factors, disparities indicating the presence of discrimination persisted.

In enacting MAP-21, Congress found that those data and studies "demonstrate[d] that discrimination across the United States poses a barrier to full and fair participation in surface transportation-related businesses of women business owners and minority business owners." Pub. L. No. 112-141, § 1101(b)(1)(D). Congress concluded that the testimony and documentation "provide[d] a strong basis" to continue the DBE program to try to remedy the ongoing effects of that discrimination on female and minority entrepreneurs. *Id.* § 1101(b)(1)(E).

b. To that end, the program establishes an aspirational nationwide goal for state recipients of federal highway funding: to spend at least 10% of federal highway funds with small businesses "owned and controlled by socially and economically disadvantaged individuals," also known as DBEs. Pub. L. No. 112-141, § 1101(b)(3); 49 C.F.R. 26.41. Under applicable federal law, certain racial and ethnic minorities, and women, are presumed to be socially and economically disadvantaged. Pub. L. No. 112-141, § 1101(b)(2)(B); 15 U.S.C. 637(d); 49 C.F.R. 26.5, 26.67(a). Controlling owners who are eligible to benefit from that presumption still must certify to the State that they are, in fact, socially and economically disadvantaged, and must provide documentation to the State that

establishes their economic disadvantage. 49 C.F.R. 26.67(a). No business can qualify for DBE status if the controlling owner's net worth exceeds $1.32 million or if the firm's gross receipts for the previous three fiscal years average more than $23.98 million. 49 C.F.R. 26.65(b), 26.67(a)-(b). The presumption of social and economic disadvantage is rebuttable, and a complaint process exists that permits challenges to the finding that any business is a DBE. 49 C.F.R. 26.87(a). Controlling owners not eligible for the presumption may apply for DBE certification and can be certified if they prove both social and economic disadvantage by a preponderance of the evidence. 49 C.F.R. 26.67(d).

c. Federal regulations delegate to each State that receives federal highway funds the responsibility of implementing the DBE program in a manner tailored to state market conditions and the discrimination that those market conditions reveal.

States must establish a state-specific overall goal for DBE participation in their federally-funded transportation projects. 49 C.F.R. 26.45(a)(1). States must conduct a two-step process to determine that overall goal. First, a State must determine the relative availability of DBEs who are "ready, willing and able" to participate in federally-funded projects. 49 C.F.R. 26.45(b). Federal regulations provide a non-exhaustive list of examples and techniques by which a State can determine its base availability figure, including the use of disparity studies, DBE directories, and census data. See 49 C.F.R. 26.45(c)(1)-(5). Second, a State must

examine local evidence to determine what adjustments, if any, to the base figure are necessary. 49 C.F.R. 26.45(d). States must consider the "current capacity of DBEs" based on "the volume of work DBEs have performed in recent years" and factors affecting "opportunities for DBEs to form, grow and compete," such as barriers to financing, bonding, and insurance. 49 C.F.R. 26.45(d). This two-step process results in an overall percentage goal that reflects the State's own "determination of the level of DBE participation [in these projects the State] would expect absent the effects of discrimination." 49 C.F.R. 26.45(b).

States must use race- and gender-neutral means to the maximum extent possible to achieve their overall goal. 49 C.F.R. 26.51(a). Federal regulations provide a non-exhaustive list of ways in which a State can seek to promote DBE participation without resorting to race- and gender-conscious means, including providing technical assistance to all small businesses on obtaining bonding and financing and by establishing a program to assist start-ups. 49 C.F.R. 26.51(b).

If a State predicts that it cannot achieve its overall goal solely through race- and gender-neutral means, the State must meet any unmet portion of the overall goal by setting contract-specific DBE subcontracting goals on projects that have subcontracting possibilities. 49 C.F.R. 26.51(d)-(e). If at any point during the year the State determines that it will exceed its overall goal, the State then "must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use

of contract goals does not result in exceeding the overall goal." 49 C.F.R. 26.51(f)(2).

States are provided extensive flexibility in their implementation of the federal program. States must submit to USDOT their goal methodology every three years but may adjust their overall goal at any time to reflect changed circumstances. 49 C.F.R. 26.45(f)(1)(i)-(ii). If a State fails to meet its overall goal, it will not be penalized by USDOT unless USDOT finds that the State failed to administer its program in good faith. 49 C.F.R. 26.47(a). A State also may be granted an exemption or a waiver from the goal-setting provisions if it demonstrates to USDOT that there are special circumstances or that it can achieve its DBE program objectives through other means. 49 C.F.R. 26.15. States also determine whether bidders on state contracts have made good-faith efforts to satisfy individual contract-goal requirements by either obtaining enough DBE participation to meet the goal or documenting adequate efforts to meet it.[3] 49 C.F.R. 26.53(a)(2); see also 49 C.F.R. Pt. 26, App. A (examples of actions a bidder can take to demonstrate good faith efforts toward meeting a subcontracting goal).

[3] A State's determination that a prime bidder has demonstrated good faith efforts to meet a contract's DBE goal without actually having met the goal is sometimes described as a "good faith efforts waiver." In fact, it is not a waiver, but a means recognized under USDOT's regulations by which a prime bidder can satisfy a contract's DBE goal requirement. See R. 371-7. Waivers, on the other hand, may be requested by States that seek to implement their federal program in a way that differs from regulatory requirements. 49 C.F.R. 26.15.

If a State determines that, in the achievement of subcontracting goals, the use of DBEs in a particular line of work has unduly burdened the opportunity of non-DBEs in that line of work, the State must address that overconcentration. 49 C.F.R. 26.33. In addition, a State may use "incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific [overconcentrated] field." 49 C.F.R. 26.33(b).

2. Illinois' Implementation Of The Federal DBE Transportation Program

Illinois implements its federal DBE transportation program through IDOT. After considering the market conditions to be expected absent discrimination, IDOT has established a statewide overall goal of 22.7% DBE participation in federally-funded transportation projects. App. 10. IDOT reached that determination based on a 2004 availability study conducted by National Economic Research Associates and a 2011 disparity study conducted by Mason Tillman & Associates. App. 10. The 2011 study found a disparity between DBE availability and utilization on thousands of IDOT contracts after conducting a regression analysis to control for race- and gender-neutral factors. App. 10-11. The study also reviewed anecdotal evidence of instances of discrimination and harassment and concluded that, "on both prime contracts and subcontracts in the Illinois road construction industry, DBEs were significantly underutilized." App. 11.

As discussed above, Illinois exercises wide discretion in the contract-by-contract implementation of its federal DBE program. See App. 11. While USDOT reviews the methodology by which IDOT establishes its overall goal,[4] USDOT does not routinely review IDOT's individual contract goal determinations, but may do so to ensure compliance with DBE program requirements. See 49 C.F.R. 26.51(e)(3). IDOT decides on which contracts to set a DBE goal, identifies a target goal for the contract, and submits the contract goal to another state agency, the Illinois Bureau of Small Business, for approval. App. 11; see 49 C.F.R. 26.51(e).

3. Proceedings Below

a. Plaintiff Midwest Fence Corporation, a non-DBE fencing and guardrail contractor in Illinois, sued federal and state agencies and officials challenging, *inter alia*, the constitutionality of the federal DBE program. App. 2-3, 15-16. Plaintiff also challenged the constitutionality of state DBE transportation programs for wholly state-funded highway and transportation projects, which this brief does

[4] IDOT last submitted its goal methodology to the federal government in April 2013 for FY 2013-2015, which USDOT approved. R. 368-10, 368-17.

not address. See App. 16. Plaintiff alleged that the federal program violates the Equal Protection Clause both facially and as-applied.[5] App. 15-16.

Specifically, plaintiff sued USDOT and its Secretary in his official capacity, and the Federal Highway Administration and its Administrator in his official capacity. App. 3. The Federal Highway Administration is a subcomponent of USDOT. The USDOT, through the Office of the Secretary and the Federal Highway Administration, oversees the federal DBE program. Plaintiff also sued IDOT and the IDOT Secretary in his official capacity, as IDOT implements the federal DBE program for the State of Illinois. App. 1-3.

b. All parties filed cross motions for summary judgment on August 4, 2014. After extensive briefing, the district court granted summary judgment in favor of the federal and state defendants on March 24, 2015. App. 72-73.

The court upheld the facial constitutionality of the federal DBE program. App. 44, 72. At the outset, the court stated that it was "not the first to consider the constitutionality of the Federal Program, which numerous appellate and district courts have previously upheld," including the Eighth, Ninth, and Tenth Circuits. App. 33 (citing *Western States*, *Sherbrook Turf*, and *Adarand VII*). The court then applied strict scrutiny to the program, and held that Congress had a compelling

[5] Plaintiff further alleged that the program violates the Civil Rights Act of 1866 and Title VI of the Civil Rights Act of 1964 but then voluntarily dismissed those claims against the federal defendants. R. 100.

interest supporting the limited use of race and gender in the DBE program, and that the USDOT's regulations are narrowly tailored. App. 44.

The court held that Congress had a strong basis in evidence for concluding that race- and gender-conscious methods were necessary to advance the compelling interest of remedying race and gender discrimination in the highway construction industry. App. 38. The court found persuasive the "extensive body of testimony, reports, and studies" submitted to Congress over the past three decades and analyzed in an expert report submitted to the court. App. 34-36. The court found that the evidence before Congress demonstrated that, compared to non-DBEs, businesses owned by minorities and women suffer lower utilization, lower earnings, lower rates of business formation, and greater difficulty obtaining business loans. App. 34-36.

The court also held that the federal program created by the regulations and that guides a State or locality's implementation of the DBE program was narrowly tailored. App. 39-40. The court reviewed factors that other courts have used to examine the narrow tailoring of a government program under strict scrutiny and held that the federal program satisfied all of them.

First, the court found that the regulations require a "serious, good faith consideration of workable race-neutral alternatives," because States may use race- and gender-conscious measures *only* if race-neutral alternatives prove insufficient

to combat the effects of race- and gender-based discrimination. App. 40 (quoting *Grutter* v. *Bollinger*, 539 U.S. 306, 339 (2003)). Second, the court found the program sufficiently limited and flexible due to the short-term nature of Congress's reauthorizations and the ability of States to request a waiver from the program's requirements when necessary. App. 40-41. Third, the court found that the DBE program was well tied to local market conditions because the two-step goal-setting process each State must perform is based on local business availability and data, whereas the program's statutory nationwide 10% goal is merely aspirational. App. 41-42.

Fourth, the court found that the regulations, if properly implemented by the State, minimize the program's burden on non-DBEs because its "presumption of social and economic disadvantage is rebuttable, and persons who are not presumptively disadvantaged may nonetheless qualify as DBEs." App. 42. In addition, States must address DBE overconcentration in lines of contract work, which prevents any one type of business from being significantly harmed by the DBE program. App. 42. Finally, the court found that the program was not over-inclusive because the evidence submitted to Congress described nationwide disparities for all minority groups. App. 43-44.

c. The court rejected plaintiff's challenge to the implementation of the federal program. App. 63, 73. The court construed it as a challenge to IDOT's

implementation of the federal program, not to the underlying federal regulations, "[b]ecause the Federal Program is applied to Midwest through IDOT." App. 45. The court examined IDOT's implementation of the program and held that it satisfied strict scrutiny. App. 63.

First, the court found that, when IDOT implements the federal program, it may rely on the federal government's compelling interest in remedying race and gender discrimination in the road construction industry as the predicate for its use of race or gender in issuing contracts and subcontracts. App. 45. Second, on narrow tailoring, the court found that IDOT, as required by federal regulations, (a) provided evidence of the effects of discrimination in the Illinois road contracting industry, (b) properly calculated DBE availability, (c) reasonably found a lack of overconcentration, (d) employed virtually all of the race-neutral methods suggested in the federal regulations, and (e) made its program sufficiently limited and flexible due to short-term reauthorizations and the granting of requests for good-faith efforts "waivers" of contract goals. App. 55, 57, 59-60. Indeed, the court stated, IDOT had granted plaintiff's previous waiver request which, the court reasoned, "demonstrates the flexibility of the Federal Program in practice." App. 61, 63.

SUMMARY OF THE ARGUMENT

The district court correctly applied strict scrutiny in holding that the federal DBE transportation program is constitutional on its face. On appeal, plaintiff does

not challenge the district court's holding that the federal program is supported by evidence before Congress establishing a compelling interest for the limited remedial use of race and gender in the DBE program, or that the DBE program properly advances that compelling interest in creating a nation-wide remedy to address the ongoing effects of discrimination against minorities and women.

Instead, plaintiff challenges only the narrow tailoring of the federal program. As the district court held, however, the program satisfies all six factors courts have used to examine narrow tailoring: it (1) allows race-conscious remedies only as a last resort, (2) has a limited duration, (3) requires States to set their annual overall goal and individual contract goals based on local market data, (4) provides extensive flexibility to States, (5) limits the burden placed on third parties, and (6) avoids being over- or under-inclusive. In addition, the federal program provides sufficient guidelines and examples with which States can assess bidders' good faith efforts toward meeting individual contract goal requirements. This Court thus should follow the Eighth, Ninth, and Tenth Circuits in holding that the USDOT DBE program satisfies the constitutional requirement of narrow tailoring.

The district court also properly construed plaintiff's as-applied challenge as addressing the manner in which IDOT is implementing the federal program. The federal regulations establish the ways in which a State should implement the DBE program in a narrowly tailored manner. A court therefore evaluates an as applied

challenge to the federal program by examining the manner in which the State has implemented it.

In contrast, an as-applied challenge to the federal regulations themselves (and not to the State's implementation) would necessarily depend on a finding that the regulations require the State to implement the program in an unconstitutional manner. There was no such finding, because there is no provision of the regulations—and plaintiff points to none—that would require a State to violate the Constitution. Instead, the regulations promote state implementation that is properly narrowly tailored to local harm. For example, the regulations require States to use race and gender only as a last resort and only if based on local market data indicating the effects of discrimination. In addition, under the federal regulations, the DBE program is not limited only to minorities and women; non-minorities may gain entrance to the program by demonstrating both social and economic disadvantage. States also must address any overconcentration in a line of work to avoid unduly burdening third parties.

ARGUMENT

THE FEDERAL PROGRAM IS NARROWLY TAILORED ON ITS FACE

The federal DBE transportation program uses race- and gender-conscious criteria to remedy the ongoing effects of discrimination based on race and sex in

federal contracting. The program thus triggers strict scrutiny.[6] *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 217 (1995). To satisfy strict scrutiny, the program "must serve a compelling governmental interest" and "be narrowly tailored to further that interest." *Id.* at 235.

It is well established that remedying the effects of past or present discrimination is a compelling government interest. *Shaw* v. *Hunt*, 517 U.S. 899, 909 (1996); see *Adarand*, 515 U.S. at 237 ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."). The federal government must justify reliance on this compelling interest with "a strong basis in evidence" for concluding that race- or gender-based remedial action is necessary. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (citation and internal quotation marks omitted). The remedial action then must be narrowly tailored to achieve that interest.

On appeal, plaintiff does not challenge the district court's holding that the federal program advances a compelling interest. Plaintiff challenges neither

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[6] The gender-conscious provisions are subject to intermediate scrutiny. *United States* v. *Virginia*, 518 U.S. 515, 532-533 (1996). Because the federal program satisfies the more exacting strict scrutiny, this Court need not analyze the race- and gender-conscious provisions of the program separately. See *Western States Paving Co., Inc.* v. *Washington State Dep't of Transp.*, 407 F.3d 983, 990 n.6 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

Congress's strong basis in evidence for reauthorizing the program in 2012, nor the State's ability to rely on that compelling interest in its implementation.[7] Instead, plaintiff challenges only aspects of the narrow tailoring of the federal program.

This Court reviews de novo whether a government program satisfies strict scrutiny. *Northern Contracting, Inc.* v. *Illinois*, 473 F.3d 715, 720 (7th Cir. 2007). In reviewing a grant of summary judgment, this Court construes all evidence in the light most favorable to the non-moving party. *Mintz* v. *Caterpillar Inc.*, 788 F.3d 673, 679 (7th Cir. 2015).

Plaintiff's facial challenge to the narrow tailoring of the statutory and regulatory scheme of the federal program is a "difficult challenge." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Plaintiff carries the "heavy burden" of "establish[ing] that no set of circumstances exist under which" the scheme "would be valid." *Ibid.* Indeed, every court of appeals that has examined the facial constitutionality of the USDOT DBE program under strict scrutiny, including the narrow tailoring of the regulations USDOT revised in 1999, has upheld the program. *Adarand Constructors, Inc.* v. *Slater (Adarand VII)*, 228 F.3d 1147 (10th Cir. 2000), cert. granted sub nom. *Adarand Constructors, Inc.* v. *Mineta*, 532 U.S. 967 (2001), cert. amended, 532 U.S. 967 (2001), and cert. dismissed, 534 U.S. 103

[7] See *Northern Contracting, Inc.* v. *Illinois*, 473 F.3d 715, 720-721 (7th Cir. 2007) (holding that a State may properly rely on the federal government's compelling interest in its local implementation of the federal DBE program).

(2001); *Sherbrooke Turf, Inc.* v. *Minnesota Dep't of Transp.*, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004); *Western States Paving Co., Inc.* v. *Washington State Dep't of Transp.*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006); *Associated Gen. Contractors of Am.* v. *California Dep't of Transp.*, 713 F.3d 1187 (9th Cir. 2013).

Here, the district court correctly held that the federal program is narrowly tailored on its face. App. 44. The USDOT's regulations that govern implementation of the program satisfy all six factors courts have used to examine narrow tailoring. This Court should join the Eighth, Ninth, and Tenth Circuits in holding that the federal program is sufficiently narrowly tailored. See *Adarand VII*, 228 F.3d at 1187; *Sherbrooke Turf*, 345 F.3d at 973; *Western States*, 407 F.3d at 995.

A. The Federal Program Satisfies All Six Narrow Tailoring Factors

Courts use six factors to examine whether a government program satisfies strict scrutiny's narrow tailoring requirement: "(1) the availability of race-neutral alternative remedies; (2) limits on the duration of the * * * programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness." *Adarand VII*, 228 F.3d at 1178; see also *Sherbrooke Turf*, 345 F.3d at 971-973 (applying the factors); *Western States*, 407 F.3d at 993-

995 (same). Plaintiff challenges only factors five and six, and raises a separate vagueness challenge to the program. None of plaintiff's arguments has merit.

1. The Program Allows Race-Conscious Remedies Only As A Last Resort

Plaintiff does not dispute that the federal program requires States to promote DBE participation through race- and gender-neutral remedies. States may use race- and gender-conscious remedies *only* after they have determined they cannot meet the level of DBE participation reflecting a lack of discrimination through race- and gender-neutral means alone. See 49 C.F.R. 26.51(a). For example, any time "a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal," the participation of the DBE counts toward achievement of the State's overall DBE goal even though DBE status was irrelevant to the award of the contract or subcontract. 49 C.F.R. 26.51(a). In addition, federal regulations provide an extensive, non-exhaustive list of examples and techniques by which a State can bolster DBE participation without resorting to race- and gender-conscious means. These examples include providing technical assistance to all small businesses on bonding and financing efforts, emerging technologies, goal contracting procedures and opportunities, business management skills, and start-up management. 49 C.F.R. 26.51(b). States also must describe the race- and gender-

neutral steps that they will take to foster competition by small businesses. 49 C.F.R. 26.39.

In addition, a State must continually assess the efficacy of its race- and gender-neutral efforts. Only if those efforts will not totally achieve the State's overall goal may a State use race- and gender-conscious subcontracting goals. 49 C.F.R. 26.51(a) and (d). Moreover, a State must reduce or eliminate the use of subcontracting goals if at any point the State determines that it will exceed its overall goal for the year. 49 C.F.R. 26.51(f)(2).

Together, these regulatory requirements ensure the "serious, good faith consideration of workable race-neutral alternatives" required of strict scrutiny. *Grutter* v. *Bollinger*, 539 U.S. 306, 339 (2003). They further limit the use of race- and gender-based contract awards to the minimum required to attempt to remedy the ongoing effects of discrimination. See *Adarand VII*, 228 F.3d at 1178-1179; *Sherbrooke Turf*, 345 F.3d at 972; *Western States*, 407 F.3d at 993-994.

2. The Program Is Of Limited Duration

Plaintiff does not dispute that the federal program limits its duration in two significant ways. First, the program has a sunset provision whereby the program lasts only as long as its underlying authorization act allows, which as of the writing of this brief is October 29, 2015. See Surface Transportation and Veterans Health Care Choice Improvement Act, Pub. L. No. 114-41, 129 Stat. 444 (2015).

Congress must, and thus far has, reevaluated the need for the program with each new reauthorization.

Second, States must regularly reassess the need for race- and gender-conscious remedies throughout their implementation of the federal program. States must determine whether individual businesses are socially and economically disadvantaged and therefore eligible to participate or remain in the program. 49 C.F.R. 26.67(a). States also must cease using race- and gender-conscious means if the remedial need for their use no longer exists; if a State will exceed its overall goal for the year or, in consecutive years, achieves its overall goal using race- and gender-neutral means, race- and gender-conscious efforts must cease. 49 C.F.R. 26.51(f)(2)-(3). The federal program's inherent durational limits thus ensure that the race- and gender-conscious elements of the program "will not last longer than the discriminatory effects [they are] designed to eliminate." *Adarand*, 515 U.S. at 238 (citation omitted); see *Adarand VII*, 228 F.3d at 1179-1180; *Sherbrooke Turf*, 345 F.3d at 972; *Western States*, 407 F.3d at 994.

3. The Program Provides States Extensive Flexibility

Plaintiff does not dispute that States are provided flexibility in their implementation of the federal program. States may adjust their overall DBE participation goal at any time to reflect changes in local circumstances. 49 C.F.R. 26.43(a), 26.45(f)(1)(i)-(ii). If a State fails to meet its overall goal, it cannot be

penalized by the federal government unless the State fails to administer its program in good faith. 49 C.F.R. 26.47(a). USDOT also grants waivers from the contract goal-setting provisions of the federal program if a State demonstrates special circumstances or can achieve its overall DBE program objectives through other means. 49 C.F.R. 26.15. The use of quotas is prohibited. 49 C.F.R. 26.43(a).

States are further provided flexibility in their implementation of the contract goal-setting portion of the federal program. States decide, based on local market realities, which contracts should receive a DBE goal and what that DBE goal should be. See 49 C.F.R. 26.51(e). States also determine whether a prime bidder has complied with the program by either meeting the contract goal or demonstrating good faith efforts to meet it. 49 C.F.R. 26.53(a). Under the regulations, no goal for an individual contract ever amounts to a hard line, because good faith efforts toward the goal necessarily suffice to satisfy the requirement.

The federal program therefore "provides for a flexible system of contracting goals that contrasts sharply with the rigid quotas invalidated in *Croson*." *Western States*, 407 F.3d at 994; see also *Adarand VII*, 228 F.3d at 1180-1181; *Sherbrooke Turf*, 345 F.3d at 972.

4. The Program Requires States To Set Both Their Annual Overall Goal And Individual Contract Goals Based On Local Market Data

Plaintiff does not dispute that States must implement the federal program by using local market data to set goals and maximize race- and gender-neutral means.

States must set their overall DBE goal based on *local* market data. 49 C.F.R. 26.45. The program's statutory national 10% goal is aspirational only and cannot be used in a State's goal setting unless supported by local data. 49 C.F.R. 26.41(b)-(c). Rather, a State must determine the relative availability of DBEs "ready, willing and able" to participate in federally-funded projects by analyzing market conditions *in that State*. 49 C.F.R. 26.45(b). The State must also examine local evidence to determine what adjustment, if any, is necessary to the base figure to identify "the level of DBE participation [the State] would expect absent the effects of discrimination." 49 C.F.R. 26.45(b) and (d).

States must implement race- and gender-neutral means to the maximum extent possible. As discussed above, federal regulations provide an extensive, non-exhaustive list of possible race- and gender-neutral means that States may use to implement their program. 49 C.F.R. 26.51(a)-(b). If those efforts prove insufficient, only then may a State decide, again based solely on local market conditions, on which contracts to set a DBE goal and what the target DBE goal should be. See 49 C.F.R. 26.51(e). In setting a contract goal, States should consider "the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract." 49 C.F.R. 26.51(e)(2).

The federal program thus "tie[s] the goals for DBE participation to the relevant labor markets" in each State. *Sherbrooke Turf*, 345 F.3d at 972. This

local assessment is a critical part of the federal program. It ensures that race or gender is used in contract awards based only on *local* market conditions, and only where necessary to meet a goal that is based on the relative ability of DBEs in the appropriate local market to perform federally-funded transportation contracts and on the level of discrimination artificially keeping DBEs from that level of participation.

This local assessment stands "in stark contrast to the program struck down in *Croson*, which 'rest[ed] upon the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.'" *Sherbrooke Turf*, 345 F.3d at 972 (alteration in original) (quoting *Croson*, 488 U.S. at 507); see also *Adarand VII*, 228 F.3d at 1182; *Western States*, 407 F.3d at 994-995. The federal goal-setting process that depends on an analysis of local markets and uses race- and gender-neutral efforts as much as possible easily satisfies narrow tailoring.

5. The Program Limits The Burden Placed On Third Parties

The federal program properly limits the burden it places on non-minority male contractors. As a threshold matter, the program is open to *all* small business owners who are socially and economically disadvantaged. 49 C.F.R. 26.67(a) and (d). Non-minority male business owners can and have qualified as DBEs, while wealthy minority and women business owners may be disqualified from the

program. See 49 C.F.R. 26.67(b) and (d). In addition, the federal program requires that States maximize race- and gender-neutral efforts, many of which benefit all small businesses, and examples of which include assisting all small businesses on bonding, financing, and managing a start-up. See 49 C.F.R. 26.51(a) and (b).

As stated above, the federal program also permits the use of race- and gender-conscious measures only if race- and gender-neutral means will be insufficient to remedy existing discrimination. 49 C.F.R. 26.51(a) and (d). In addition, a State must cease using race- and gender-conscious measures if it discovers during the year that the State will exceed its overall DBE goal for the year. 49 C.F.R. 26.51(f)(2)-(3). The program further requires States to address any overconcentration of DBEs in a particular line of work to avoid unduly burdening non-DBEs in that line of work. 49 C.F.R. 26.33.

By using these safeguards to ensure that third parties are not unduly burdened, the federal program satisfies narrow tailoring. The "government is not disqualified from acting in response" to the "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country." *Adarand*, 515 U.S. at 237. In "effectuating a limited and properly tailored remedy to cure the effects of prior discrimination," asking non-minorities to share in the burden of remedying the discrimination "is not impermissible."

Wygant v. *Jackson Bd. of Educ.*, 476 U.S. 267, 281 (1986) (opinion of Powell, J.) (citation omitted).

Here, minority status under the federal program is "made relevant in the program, but it is not a determinative factor" for DBE eligibility. *Sherbrooke Turf*, 345 F.3d at 973. In addition, "the current regulations are designed to increase the participation of non-minority DBEs" as well as minority- and women-owned DBEs. *Adarand VII*, 228 F.3d at 1183. Thus, the federal program "is designed to minimize the burden on non-minorities" with "all the features of a narrowly tailored remedial program." *Western States*, 407 F.3d at 995.[8]

Plaintiff nevertheless argues that the federal program unconstitutionally burdens third parties because "DBEs will never actually compete for the whole pie" of contracting dollars on which the State's overall DBE goal is based. Appellant Br. 57. Thus, plaintiff argues, the use of contract goals necessarily unconstitutionally burdens "small, vulnerable non-DBEs" because a contract's DBE goal is based on the entire value of the contract, but achieved "only from subcontractor dollars." Appellant Br. 56-60. Plaintiff is mistaken.

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[8] Plaintiff perhaps exemplifies the limited burden placed on third parties by the federal program: "from 2007 to 2010, Midwest still out-earned the most competitive fencing and guardrail DBEs by $38 million, and had higher subcontracting receipts than three out of four of the most competitive fencing and guardrail DBEs." App. 56.

As an initial matter, nothing in the federal program prohibits DBEs from competing for prime contracts. In fact, the program explicitly contemplates their ability to compete equally by requiring States to report DBE participation as prime contractors and makes efforts to develop that potential. The federal program defines race- and gender-*neutral* means—which States are required *to maximize*—to include "any time a DBE wins a prime contract through customary competitive procurement procedures" or, for that matter, "is awarded a subcontract on a prime contract that does not carry a DBE contract goal," 49 C.F.R. 26.51(a). DBEs thus can and do compete for the "whole pie" on which a State's overall DBE goal is based, and DBE progress toward the State's annual overall goal is not exclusively through subcontracts awarded due to DBE status.

In addition, courts have uniformly rejected plaintiff's argument that the federal program's contract-goal framework constitutes an *unconstitutional* burden on non-DBE subcontractors. Although the use of contracting goals may result in bids submitted by some non-DBE firms "being rejected in favor of higher bids from DBEs," "this fact alone does not invalidate" the federal program. *Western States*, 407 F.3d at 995. Asking non-minorities to share in the burden of remedying the discrimination "is not impermissible." *Wygant*, 476 U.S. at 281 (citation omitted). Thus, "the [mere] possibility that innocent parties will share the

burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored." *Adarand VII*, 228 F.3d at 1183.

Rather, the relevant question for narrow tailoring is whether the burden on non-DBEs by the implementation of the federal program is unduly burdensome "as compared with *overall* construction contracting opportunities." *Fullilove* v. *Klutznick*, 448 U.S. 448, 484 (1980) (emphasis added), abrogated on other grounds by *Adarand*, 515 U.S. at 220. The assessment of the burden on third parties must be viewed in the context of the overall and continuing implementation of the program, not on the specifics of one or two contracts. As designed by the regulations, the program is not unduly burdensome overall. See *Western States*, 407 F.3d at 995 (finding the USDOT contract goal-setting program to be a permissible burden on non-DBEs); *Adarand VII*, 228 F.3d at 1183 (same).

The manner in which States must establish their annual goals under the regulations is designed to ensure that third parties are not overly and unfairly burdened. The program requires that States narrowly tailor their overall goals, from which any contract goals are derived, to the relative availability of DBEs who are "ready, willing and able" to participate on federally-funded projects. 49 C.F.R. 26.45(b). This assessment is based on a study of local conditions. States may use race- and gender-conscious measures to remedy discrimination against those owners only if race- and gender-neutral remedies will be insufficient. 49 C.F.R.

26.51(a) and (d). States then set individual contract goals by considering "the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract." 49 C.F.R. 26.51(e)(2).

Moreover, the program provides the additional safeguard of requiring States to address any overconcentration of DBEs in a particular line of work. 49 C.F.R. 26.33. This prevents any individual non-DBE from being "frozen out" by a State's implementation of its contract goal-setting program. To nevertheless strike down such a narrowly-tailored program with such focused safeguards would "render strict scrutiny effectively fatal, in contravention of Justice O'Connor's clear statements to the contrary." *Adarand VII*, 228 F.3d at 1183 (citing *Adarand*, 515 U.S. at 237). Indeed, under plaintiff's logic, any federal program designed to remedy active discrimination and its effects "would be unconstitutional because of the burden upon non-minorities." *Western States*, 407 F.3d at 995.

6. The Program Is Neither Over-Inclusive Nor Under-Inclusive

The federal program limits DBE eligibility to those business owners who are socially and economically disadvantaged because of discrimination, regardless of minority status. 49 C.F.R. 26.67; see 15 U.S.C. 637(a)(5) and (6)(A). Controlling owners who are eligible to benefit from a presumption of disadvantage under the federal program still must certify and document for the State that they are, in fact, socially and economically disadvantaged. 49 C.F.R. 26.67(a). At the same time,

controlling owners who are not eligible for a presumption of disadvantage may apply for DBE certification and prove social and economic disadvantage by a preponderance of the evidence. 49 C.F.R. 26.67(d). This individualized determination contrasts with "an unconstitutionally sweeping, race-based generalization" of eligibility and further ensures a narrow tailoring of the remedial program. *Adarand VII*, 228 F.3d at 1186.

Plaintiff argues to the contrary by asserting that the federal program "provide[s] preference where there has been no discrimination" because the disparity studies submitted to Congress and analyzed in an expert report below did not prove "that the disparities are caused by discrimination." Appellant Br. 68-69. Plaintiff also argues that the federal program is over-inclusive because there is no evidence that those groups receiving a presumption "are disadvantaged to the same extent." Appellant Br. 68.

Plaintiff is incorrect. As an initial matter, plaintiff misunderstands the evidence that was before Congress when it reauthorized the federal program. Congress had a "strong basis in evidence" to justify a compelling interest in remedying discrimination, the strength of which the district court credited and which plaintiff does *not* challenge on appeal. The legislative record established that minority- and women-owned businesses experience significant disparities nationwide in utilization as compared to non-minority, male-owned businesses,

even after accounting for race- and gender-neutral market factors. See App. 38-39; 2010 Compelling Interest Update, R. 15-1 at 5-10; Report of Defendant's Expert Dr. Jon Wainwright, R. 371-3 at 38.

Such utilization disparities are the linchpin of "an inference of discriminatory exclusion." *Croson*, 488 U.S. at 509; see *Adarand VII*, 228 F.3d at 1173 ("The disparity between minority DBE availability and market utilization in the subcontracting industry raises an inference that the various discriminatory factors the government cites have created that disparity."). Congress has tailored the presumption of disadvantage in the federal program to precisely those minority groups that the evidence demonstrates continue to suffer from the effects of discrimination. Compare 15 U.S.C. 637(d), with 2010 Compelling Interest Update, R. 15-1 at 6. This is what narrow tailoring requires.[9]

[9] Plaintiff's assertion that not all groups receiving a presumption have been discriminated against to the same extent is therefore inapposite. The ample statistical and anecdotal evidence before Congress demonstrated the ongoing discrimination and continuing effects of past discrimination for all groups receiving a presumption of disadvantage, and consequently substantial evidence supported Congress's conclusion that discrimination against those groups continues to be a national problem warranting a nation-wide remedy, albeit one implemented locally in ways tailored to local conditions. *Western States*, 407 F.3d at 992; *Sherbrooke Turf*, 345 F.3d at 970; *Adarand VII*, 228 F.3d at 1175-1176. The regulations further require that each State determine its overall DBE goal based on the relative availability of DBEs ready, willing, and able to participate in federally-funded projects. *Adarand VII*, 228 F.3d at 1182. This requirement sufficiently "ensures that each State sets a minority utilization goal *that reflects the realities of its own labor market*." *Western States*, 407 F.3d at 995 (emphasis

(continued…)

More fundamentally, plaintiff misunderstands the nature of the federal program. Despite some minorities being entitled to a presumption of social and economic disadvantage, DBE status is open to any small business whose controlling owners are socially and economically disadvantaged in the local market. 49 C.F.R. 26.67(d). And, as discussed above, even those business owners who receive a presumption of disadvantage still must certify that they are, in fact, socially and economically disadvantaged in the local market, as well as document their economic disadvantage. 49 C.F.R. 26.67(a). This individualized determination of eligibility is central to the narrow tailoring of the federal program and prevents both over- and under-inclusiveness.

B. The Federal Regulations Are Not Unconstitutionally Vague

As discussed above, the federal program provides extensive flexibility to States in their implementation of the contract goal-setting portion of the federal program. States decide on which contracts to set a locally-determined DBE goal and what the target DBE goal should be. See 49 C.F.R. 26.51(e). States also determine whether a prime bidder satisfies a contract goal by meeting the goal or demonstrating good faith efforts to meet it. 49 C.F.R. 26.53(a).

(…continued)
added); see *Sherbrooke Turf*, 345 F.3d at 972. Moreover, States may seek a waiver from the program's goal-setting requirements based on special circumstances due to local market conditions. 49 C.F.R. 26.15.

Plaintiff challenges as unconstitutionally vague the federal regulation that allows prime bidders to satisfy individual contract goals by demonstrating good faith efforts to meet them. Appellant Br. 61-64. Specifically, plaintiff argues that "[n]o one knows when a contractor can, or should, win a contract when it does not meet a DBE goal, because the decision is based on a 'judgment call.'" Appellant Br. 61. Plaintiff alleges that the "good faith efforts" standard is so vague that contractors are discouraged from using it. Appellant Br. 61. Plaintiff is wrong.

In raising a vagueness challenge to the validity of a civil program, plaintiff must demonstrate that the program "is impermissibly vague in all of its applications." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). "Central to the doctrine is the requirement that there be minimal guidelines to govern the discretion of those who enforce the statute or regulation in question." *United States* v. *Pitt-Des Moines, Inc.*, 168 F.3d 976, 987 (7th Cir. 1999). For example, in *Chicago Board of Realtors, Inc.* v. *City of Chicago*, 819 F.2d 732, 739 (7th Cir. 1987), this Court rejected a vagueness challenge to new leasing standards for residential property because the municipal code "describe[d] with adequate specificity the mutual rights and obligations" under the new standards and provided twenty-seven examples to illustrate the meaning of a particular term.

Here, federal regulations similarly provide sufficient guidelines and examples by which States can assess whether a prime contractor made good faith efforts toward meeting individual contract goal requirements. See 49 C.F.R. Pt. 26, App. A. As this Court recently stated, the regulations instruct States to consider "the quality, quantity, and intensity of the different kinds of efforts that the bidder has made." *Dunnet Bay Constr. Co.* v. *Borggren*, 799 F.3d 676, 699 (7th Cir. 2015) (quoting 49 C.F.R. Pt. 26, App. A, § II). The regulations provide "a non-mandatory, non-exclusive, and non-exhaustive list of actions to be considered in determining whether a bidder made good faith efforts." *Ibid.* For example, States can consider whether a bidder solicited the interest of all certified DBEs capable of performing work on the contract "through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices)"; "[p]rovid[ed] interested DBEs with adequate information about the plans, specifications, and requirements of the contract"; made efforts to assist interested DBEs in "obtaining bonding, lines of credit, or insurance," as well as "necessary equipment, supplies, materials, or related assistance or services"; or used the assistance of minority and women community organizations "to provide assistance in the recruitment and placement of DBEs." *Id.* at 699-700 (quoting 49 C.F.R. Pt. 26, App. A, § IV).

The regulations further require that, in determining whether a bidder has made good faith efforts, States "must review the performance of other bidders in meeting the contract goal." 49 C.F.R. pt. 26, App. A, § V; see *Dunnet Bay*, 799 F.3d at 700 (quoting § V). As an example, the regulations provide: "[W]hen the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional efforts, the apparent successful bidder could have met the goal." 49 C.F.R. Pt. 26, App. A, § V; see *Dunnet Bay*, 799 F.3d at 700 (quoting § V). Similarly, "[i]f the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, [States] may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts." 49 C.F.R. Pt. 26, App. A, § V.

IDOT's implementation of the good faith efforts provision further belies plaintiff's claim that the provision is too vague for contractors to use it. Plaintiff filed suit in 2010 and yet, as recounted by this Court in *Dunnet Bay*, IDOT granted 32 of 58 good faith effort requests in 2009 and 21 of 35 requests in 2010. 799 F.3d at 681. Indeed, plaintiff has itself requested and been granted a good faith effort request in the past, and makes no allegation of ever having made a request that IDOT denied, much less arbitrarily. See Appellant Br. 62; App. 62-63.

In short, the federal regulations provide the requisite guidance and standards constitutionally required to govern States' implementation of the good faith efforts provision in the federal program. The regulations are not unconstitutionally vague.

C. Plaintiff's Purported As-Applied Challenge To The Federal Regulations Is Actually An As-Applied Challenge To The State's Implementation Of The DBE Program

The district court properly construed plaintiff's as-applied challenge to the federal regulations as actually applying to the manner in which IDOT implements the federal program. App. 15-16. Each State implements its own federal DBE transportation program within the guidelines the federal regulations provide, 49 C.F.R. Pt. 26. Individual States submit to USDOT their goal methodology, which USDOT reviews for compliance with federal regulatory requirements. 49 C.F.R. 26.45(f)(1) and (3). Beyond that, the "DBE program affords grantee States substantial discretion." *Sherbrooke Turf*, 345 F.3d at 973. States decide on which contracts to set a DBE goal and what that contract goal should be; the federal government does not routinely review a State's individual contract goal determinations or whether they comport with constitutional requirements. Instead, "the regulations delegate to each State that accepts federal transportation funds the responsibility for implementing a DBE program that comports with [the federal regulations]." *Western States*, 407 F.3d at 989. A so-called "as-applied" challenge to the federal program thus requires a court "to examine the program *as*

implemented by th[e] States." *Sherbrooke Turf*, 345 F.3d at 973 (emphasis added); see also *Western States*, 407 F.3d at 995-1002.

Plaintiff argues to the contrary by asserting that an unconstitutional implementation of the regulations "may also arise by virtue of a requirement of the regulations under the set of circumstances that exist in Illinois." Appellant Br. 49. Plaintiff is incorrect and misunderstands the requirements of strict scrutiny. If the federal regulations actually *required* a State to take unconstitutional action, that would indeed be cause for an as-applied challenge to the regulations. As discussed above, however, they do not. Instead, the regulations provide a narrowly tailored method for States to use when implementing the program.

Plaintiff's argument, which centers on its perceived undue burden because of the federal program's contract-goal framework, proves the point. Appellant Br. 49. As discussed above in Section I.A.5, courts have uniformly rejected the argument that the loss of an individual subcontract because of contract goals renders the program an undue burden. *Western States*, 407 F.3d at 995; *Adarand VII*, 228 F.3d at 1183. The use of contract goals "will inevitably"—and permissibly—"result in bids submitted by non-DBE firms being rejected in favor of higher bids from DBEs." *Western States*, 407 F.3d at 995. If DBEs become overconcentrated in a particular line of work over time, then the regulations require that the State address the overconcentration. 49 C.F.R. 26.33. For example, a State may use "incentives,

technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific [overconcentrated] field." 49 C.F.R. 26.33(b). A State also may vary its use of contract goals "to ensure that non-DBEs are not unfairly prevented from competing for subcontracts." 49 C.F.R. 26.33(b). The federal regulations therefore require that a State *avoid* unduly burdening non-DBEs in its implementation of the federal program. If there is an undue burden on non-DBEs in a particular State, it is because the State has failed to follow the federal regulations, not because the federal regulations have themselves caused or required the burden.

In short, in this context, an "as-applied" challenge to the federal program is actually an as-applied challenge to the State's implementation of the program, and not a challenge to the federal regulations themselves. *Western States*, 407 F.3d at 995-1002; *Sherbrooke Turf*, 345 F.3d at 973. Whether IDOT properly implemented the federal program is a separate inquiry that is addressed in IDOT's brief.

CONCLUSION

This Court should affirm the district court's judgment that the federal DBE program is facially constitutional and that an as-applied challenge to the program concerns the program's implementation by the State.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) contains 8839 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

s/ Robert A. Koch
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Dated: October 26, 2015

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2015, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Robert A. Koch
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