No. 16-975

In the Supreme Court of the United States

MIDWEST FENCE CORPORATION, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
T.E. WHEELER, II
Acting Assistant Attorney General
DIANA K. FLYNN
ROBERT A. KOCH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

As authorized by statute, the United States Department of Transportation has promulgated regulations requiring state agencies that receive federal funding for highway-construction projects to adopt their own programs to facilitate participation by disadvantaged business enterprises (DBEs) in federally funded contracts. The federal regulations establish general requirements governing state agencies' DBE programs, but they give state agencies substantial discretion to develop and implement their own programs, including discretion to decide what goals to set for DBE participation and what measures to employ to achieve those goals. Petitioner is a non-DBE business that claims it has been harmed by the Illinois Department of Transportation's DBE program. The court of appeals held that petitioner may not assert an as-applied equal-protection challenge against the federal government concerning the Illinois agency's implementation of its program. The court rejected on the merits petitioner's as-applied challenge to the state agency's conduct. The questions presented are as follows:

1. Whether the court of appeals correctly held that an as-applied equal-protection challenge to implementation of a state agency's DBE program may be brought only against the state agency that implements the challenged program, and not against the federal government.

2. Whether the court of appeals correctly upheld the Illinois Department of Transportation's implementation of its DBE program based on the facts and market conditions present in Illinois.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 840 F.3d 932. The opinion of the district court (Pet. App. 51a-117a) is reported at 84 F. Supp. 3d 705.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 2016. The petition for a writ of certiorari was filed on February 2, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States Department of Transportation's (Department or DOT) disadvantaged business enterprise (DBE) program, as implemented through 49 C.F.R. Pt. 26, seeks to remedy past discrimination and to create a level playing field on which businesses

owned and controlled by minorities and women can compete for federally funded highway-construction projects and other DOT-assisted contracts. The Department's regulations require state transportation agencies that receive federal funding to adopt their own DBE programs, subject to broad requirements prescribed in the federal regulations. See *ibid.*

a. Congress created the federal DBE framework in the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2100. The statute establishes a goal that ten percent of covered federal transportation-project funding be "expended with small business concerns owned and controlled by socially and economically disadvantaged individuals," "[e]xcept to the extent that the Secretary [of Transportation] determines otherwise." *Ibid.* Congress has reauthorized the program several times, including in July 2012, shortly before the operative complaint in this case was filed. See Moving Ahead for Progress in the 21st Century Act (MAP-21 Act), Pub. L. No. 112-141, § 1101(b), 126 Stat. 414-416; Pet. App. 64a.

In reauthorizing the DBE program in 2012, Congress found that, "while significant progress has occurred due to the establishment of the disadvantaged business enterprise program, 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," and those "continuing barriers * * * merit the continuation of the [DBE] program." MAP-21 Act § 1101(b)(1)(A) and (B), 126 Stat. 414-415. In reaching that determination, Congress "received and reviewed testimony and documentation * * * from numerous sources, including congressional hearings and round-

tables, scientific reports, reports issued by public and private agencies, news stories, reports of discrimination by organizations and individuals, and discrimination lawsuits." § 1101(b)(1)(C), 126 Stat. 415. Congress concluded that the evidence before it "provide[d] a strong basis" to continue the DBE program. § 1101(b)(1)(E), 126 Stat. 415. In 2015, while petitioner's appeal in this case was pending, Congress again reauthorized the DBE program and reiterated the MAP-21 Act's findings. See Fixing America's Surface Transportation Act (FAST Act), Pub. L. No. 114-94, § 1101(b), 129 Stat. 1323-1325 (23 U.S.C. 101 *et seq.*).

The current statute continues to establish a goal that at least ten percent of funds made available for federal highway-construction projects "be expended through small business concerns owned and controlled by socially and economically disadvantaged individuals," unless the Secretary "determines otherwise." FAST Act § 1101(b)(3), 129 Stat. 1324. It directs that certain racial and ethnic minorities, as well as women, be presumed to be socially and economically disadvantaged. See § 1101(b)(2)(B), 129 Stat. 1324; 15 U.S.C. 637(d). Each State is required annually to "survey and compile a list of" the small-business concerns in the State and to notify the Secretary of Transportation of the percentage of such businesses that are controlled by individuals who are women, socially and economically disadvantaged individuals, or both. FAST Act § 1101(b)(4), 129 Stat. 1324-1325.

b. The Department has promulgated regulations governing state agencies' DBE programs. 49 C.F.R. Pt. 26. The regulations do not establish a single nationwide DBE contracting regime for federally funded transportation contracts. Rather, they require state

agencies that receive federal funding to "have a DBE program" of their own that meets certain criteria set forth in the regulations. 49 C.F.R. 26.21(a). The regulations establish a general framework for state agencies to determine whether a business is a DBE. With respect to encouraging DBE participation, although the regulations prescribe general requirements for state agencies' programs, they leave each state agency with broad discretion to develop and implement its own DBE program in a manner tailored to state market conditions.

i. The Department's regulations define a DBE as a business that is majority-owned or controlled by individuals "who are both socially and economically disadvantaged." 49 C.F.R. 26.5. A socially and economically disadvantaged individual is defined as a person "who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member[] of groups and without regard to his or her individual qualities." *Ibid.* "The social disadvantage must stem from circumstances beyond the individual's control." *Ibid.* In determining economic disadvantage, any "individual whose personal net worth exceeds $1.32 million" is per se not economically disadvantaged. 49 C.F.R. 26.67(d). And even if a business's owners are disadvantaged, the business cannot be a DBE if its average annual gross revenue (including the revenue of its affiliates) in the prior three years exceeds $23.98 million (a figure that is adjusted annually by the Department) or if the business does not meet the definition of a "small business" under Small Business Administration standards applicable to the type of work the business seeks to perform on Department-assisted contracts. 49 C.F.R. 26.65.

Ordinarily, to be certified as a DBE, a business must affirmatively prove to the relevant state agency that the persons who own and control the business are socially and economically disadvantaged. 49 C.F.R. 26.61(b). Certain racial and ethnic minorities, as well as women, are presumed to be socially and economically disadvantaged, 49 C.F.R. 26.67(a), but such business owners still must certify that they are, in fact, socially and economically disadvantaged and must provide documentation of their economic disadvantage. *Ibid.* The presumption is rebuttable. If a state agency has a reasonable basis to believe that a business owner is not socially and economically disadvantaged, it can evaluate *sua sponte* the owner's eligibility to participate or to remain in the agency's DBE program. 49 C.F.R. 26.67(b). A complaint process also exists to challenge the finding that any business is a DBE. 49 C.F.R. 26.87(a). If the presumption is rebutted, the business's owner must prove social and economic disadvantage by a preponderance of the evidence. 49 C.F.R. 26.67(d).

ii. The regulations direct that, every three years, each state agency must set its own state-specific "overall goal" for participation by DBEs in those projects. 49 C.F.R. 26.45(a)(1), (f)(1)(i), and (iv). The overall goal is expressed as a percentage of the federal funds the agency will receive in the following three years, and it "reflect[s] [the agency's] determination of the level of DBE participation [it] would expect absent the effects of discrimination." 49 C.F.R. 26.45(b); see 49 C.F.R. 26.45(e). In setting its overall goal, a state agency must rely on "demonstrable evidence of the availability of ready, willing and able DBEs." 49 C.F.R. 26.45(b). A state agency "cannot simply rely on either the 10 percent national goal" set forth in the statute, on the

agency's "previous overall goal," or on "past DBE participation rates in [its] program without reference to the relative availability of DBEs in [its] market." *Ibid.*; see 49 C.F.R. 26.41(b) and (c) (explaining that "the statutory 10 percent goal" of DBE participation "is an aspirational goal at the national level," and that it "does not authorize or require" state agencies to set overall goals "at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent").

The federal regulations require each state agency to follow a two-step process to determine its overall goal, but that process accords state agencies considerable flexibility. First, the agency must determine a "base figure for the relative availability of DBEs" for its federal contracts. 49 C.F.R. 26.45(c). The regulations provide a non-exhaustive list of "examples of approaches that [state agencies] may take" to determine the base level, such as consulting DBE directories and census data, or examining findings of a "valid, applicable disparity study." 49 C.F.R. 26.45(c)(1) and (3). The examples are "provided as a starting point," and "[o]ther methods or combinations of methods to determine a base figure may be used." 49 C.F.R. 26.45(c).

Second, the state agency then must examine local evidence to determine whether to adjust that base figure. 49 C.F.R. 26.45(d). The regulations direct state agencies to "consider[]" "many types of evidence," such as the "current capacity of DBEs" based on "the volume of work DBEs have performed in recent years"; factors affecting "opportunities for DBEs to form, grow and compete," including barriers to financing, bonding, and insurance; and data regarding employment, education, and apprenticeship programs. 49 C.F.R. 26.45(d).

After an overall goal is initially adopted, a state agency may further adjust it at any time "to reflect changed circumstances." 49 C.F.R. 26.45(f)(1)(ii).

iii. Once the state agency sets its overall goal for DBE participation, it must attempt to meet that goal using race- and gender-neutral means to the maximum extent possible. 49 C.F.R. 26.51(a). The regulations provide an extensive, non-exhaustive list of race- and gender-neutral approaches that a state agency may employ. 49 C.F.R. 26.51(b)(1)-(9). For example, a state agency may offer all small businesses technical assistance in obtaining bonding and financing, or it may establish a program to assist start-ups "in fields in which DBE participation has historically been low." 49 C.F.R. 26.51(b)(2) and (7).

If a state agency predicts that it will be unable to achieve its overall goal solely through race- and gender-neutral means, it generally must attempt to achieve any unmet portion of the overall goal by setting specific "contract goals" for DBE participation. 49 C.F.R. 26.51(d) and (e)(2). A contract goal does not establish a mandatory minimum level of DBE participation; rather, the prime contractor need only "make[] good faith efforts to meet it." 49 C.F.R. 26.53(a). Indeed, the regulations expressly prohibit the use of "quotas for DBEs," and they forbid state agencies to "set[]aside contracts for DBEs" except "in limited and extreme circumstances, * * * when no other method could be reasonably expected to redress egregious instances of discrimination." 49 C.F.R. 26.43. They further bar state agencies and their contractors and subcontractors from "discriminat[ing] on the basis of race, color, national origin, or sex in the award and performance of any [Department]-assisted contract." 49 C.F.R. 26.13(a).

Use of contract goals, moreover, is subject to significant limitations. A state agency may establish contract goals only for contracts "that have subcontracting possibilities." 49 C.F.R. 26.51(e)(1). And although agencies may establish contract goals for any such contract, they are "not required to set a contract goal on every [DOT]-assisted contract" that has subcontracting possibilities. 49 C.F.R. 26.51(e)(2). In addition, if at any point during the year a state agency determines that it will exceed its overall goal, it "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).

If a state agency ultimately cannot achieve its overall goal consistent with these limitations, it does not automatically lose federal funding. An agency's failure to meet its overall goal cannot cause it to "be penalized" or deemed to be in "noncompliance" with the regulations if the agency "administer[s] [its] program in good faith." 49 C.F.R. 26.47(a). A state agency also may request an exemption or waiver from the regulations' requirements in certain circumstances. 49 C.F.R. 26.15.

State agencies also must attempt to avoid undue burdens on non-DBE firms. 49 C.F.R. 26.33(a). If DBE firms become "so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work," the agency "must devise appropriate measures to address this overconcentration." *Ibid.* Such measures "may include the use of 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. In exchange for federal funding, the Illinois Department of Transportation (IDOT) has adopted its own DBE program for federally funded projects. Pet. App. 6a. Petitioner is an Illinois guardrail and fencing company that bids on highway construction projects, typically as a subcontractor. *Id.* at 2a. Petitioner is not owned by a socially or economically disadvantaged individual and therefore does not qualify as a DBE. *Ibid.* Petitioner alleges that its non-DBE status hindered it in competing for IDOT contracts. *Id.* at 14a. It brought this suit against the Department, IDOT, and components and officials of each of those agencies, alleging that the federal DBE regulations and the state agency's implementation of them violate equal-protection principles both facially and as applied. *Id.* at 2a, 64a-65a.[1]

The district court granted summary judgment in favor of the federal and state defendants. Pet. App. 51a-117a. The court rejected petitioner's facial challenge to the federal DBE program. *Id.* at 90a. Applying strict scrutiny, it held that Congress had a strong basis in evidence to support the limited use of race and gender in the DBE program, and that the federal regulations

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[1] As a matter of state law, Illinois requires its agencies to "implement a [DBE] program" for "State-funded" contracts "using the federal standards and procedures" applicable to federally funded contracts. 30 Ill. Comp. Stat. Ann. 575/6(d) (West 2009); see Pet. App. 6a. Another state agency, the Illinois State Toll Highway Authority (Tollway), adopted its own DBE program but received no federal funding during the relevant period; the Tollway therefore "was not subject to the federal regulations." Pet. App. 8a. Petitioner also challenged the Tollway's DBE program, *id.* at 8a-10a, 37a-39a, but it is governed by state law. This response accordingly does not address petitioner's challenge to the Tollway's state-law program, which does not implicate the federal statute or regulations.

are narrowly tailored to furthering the compelling interest of remedying discrimination. *Id.* at 80a-90a.

The district court also rejected petitioner's as-applied challenge. Pet. App. 107a. It construed petitioner's as-applied argument as a challenge to IDOT's implementation of the federal DBE program "[b]ecause the Federal Program is applied to [petitioner] through" the state agency. *Id.* at 91a. The court then examined Illinois' implementation of the DBE program and held that it satisfied strict scrutiny. *Id.* at 91a-107a.

3. The court of appeals affirmed. Pet. App. 1a-50a.

a. Applying strict scrutiny, the court of appeals upheld the facial constitutionality of the federal DBE program. Pet. App. 18a, 26a. Because petitioner "d[id] not challenge the national compelling interest in remedying past discrimination," the court examined only whether the federal regulations are narrowly tailored to achieving that objective. *Id.* at 17a. It concluded that the DBE program on its face is narrowly tailored to the government's compelling interest. *Id.* at 18a-26a. Applying the four narrow-tailoring factors articulated in *United States* v. *Paradise*, 480 U.S. 149, 171 (1987) (opinion of Brennan, J.), the court expressly joined the Eighth, Ninth, and Tenth Circuits, each of which has applied substantially the same analysis and has upheld the federal DBE program against a facial equal-protection challenge. Pet. App. 18a (collecting cases); see *id.* at 26a.

The court of appeals rejected petitioner's argument that "a 'mismatch' in the way contract goals are calculated" renders the regulations facially invalid because it "results in a burden that falls disproportionately on specialty subcontractors." Pet. App. 22a. Petitioner contended that this "mismatch" arose because the federal

regulations require each state agency to calculate its overall DBE-participation goal as a percentage of all of its federally assisted contracts, but state agencies may adopt contract goals only for contracts that have subcontracting possibilities. *Ibid.* Petitioner argued that, when a state agency finds it necessary to rely on contract goals to increase DBE participation, the agency will disproportionately allocate subcontractor dollars to DBEs, placing a burden on non-DBE subcontractors like petitioner. *Ibid.* The court of appeals held that the potential for such disproportionate burdens "does not render the program facially unconstitutional." *Id.* at 23a. Instead, the court explained, the extent of the burden will inform the constitutional analysis of a particular state agency's implementation of the program. *Ibid.*

b. The court of appeals also rejected petitioner's as-applied challenge to the federal DBE regulations. Pet. App. 16a-18a, 33a, 44a-50a. It agreed with the district court that the state agency, not the federal respondents, "is the correct party to defend a challenge to its implementation of its program." *Id.* at 18a. "A principal feature of the federal regulations," the court of appeals explained, "is their flexibility and adaptability to local conditions." *Id.* at 17a. That flexibility "is important to the constitutionality of the program," and it "makes the states, not [the Department], primarily responsible for implementing their own programs in ways that comply with the Equal Protection Clause." *Id.* at 18a.

The court of appeals upheld IDOT's implementation of its DBE program. Pet. App. 27a-50a. It agreed with other circuits that "have held that a state agency is entitled to rely on the federal government's compelling interest in remedying the effects of past discrimination to justify its own DBE plan for highway construction

contracting." *Id.* at 33a. The court then examined IDOT's implementation of its DBE program using this Court's *Paradise* factors and held, based on the specific facts and market conditions present in the State, that Illinois's implementation of its DBE program was narrowly tailored. *Id.* at 44a-50a.

ARGUMENT

The decision below rejecting petitioner's facial and as-applied equal-protection challenges to the federal DBE regulations does not warrant further review. In this Court, petitioner does not challenge the court of appeals' holding that the regulations on their face are narrowly tailored to a compelling governmental interest. That holding accords with decisions of every other court of appeals to address the issue.

Petitioner does assail (Pet. 10-15, 17-20) the court of appeals' rejection of its as-applied challenge to the federal regulations. But the Seventh Circuit correctly held, in accordance with decisions of the Eighth and Ninth Circuits, that petitioner's as-applied challenge is properly directed to the state agency's implementation of its own DBE program; that the state agency rather than the federal government is therefore the proper defendant for that claim; and that any infirmity in Illinois's implementation decisions would not cast doubt on the constitutionality of the federal regulations. The court then addressed and rejected petitioner's equal-protection challenge to IDOT's conduct. Unless petitioner also obtains review and reversal of that ruling, the court of appeals' identification of the state agency as the proper defendant therefore will have no practical effect on the outcome of the suit.

The Seventh Circuit's decision rejecting petitioner's as-applied challenge to the state agency's implementation of its DBE program also does not warrant review. Petitioner contends (Pet. 15-17, 20-21) that the court of appeals erred and broke with other circuits by holding that a state agency's compliance with federal regulations forecloses any as-applied challenge to the state's own program. But the decision below expressly rejected that view. Pet. App. 45a n.3. The court of appeals simply concluded that petitioner had failed to substantiate its argument with evidence here. Petitioner also challenges (Pet. 22-32) the court of appeals' analyses of particular market conditions in Illinois and the details of the state agency's program. Those holdings, which the state respondents are best positioned to address to the extent a response is necessary, are highly factbound and do not warrant this Court's review.

1. Petitioner's challenge to the federal DBE program does not warrant this Court's review.

a. Petitioner does not seek review of the court of appeals' rejection of its facial challenge to the federal DBE program. Although petitioner asserted a facial challenge to the Department's regulations, both courts below rejected that challenge. Pet. App. 16a-26a, 80a-90a. In holding that the regulations are narrowly tailored to the government's compelling interest in remedying past discrimination, the Seventh Circuit expressly joined every other court of appeals to address the issue, all of which have applied strict scrutiny and upheld the regulations against facial challenges. See *Western States Paving Co.* v. *Washington State Dep't of Transp.*, 407 F.3d 983, 995 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006); *Sherbrooke Turf, Inc.* v. *Minnesota Dep't of Transp.*, 345 F.3d 964, 967-968 (8th Cir. 2003), cert.

denied, 541 U.S. 1041 (2004); *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000), cert. granted, 532 U.S. 941, cert. amended, 532 U.S. 967, and cert. dismissed, 534 U.S. 103 (2001). In this Court, petitioner does not contest that ruling, but instead describes its claim (Pet. 3) as asserting "an as-applied constitutional challenge."

b. Petitioner thus does contest (Pet. 10-15, 17-20) the Seventh Circuit's rejection of its as-applied challenge to the federal DBE regulations. That issue does not warrant review.

i. The court of appeals correctly held that petitioner's as-applied challenge to the federal regulations is in substance a challenge to the state agency's implementation of its own DBE program, and that the state agency is therefore the proper defendant for petitioner's as-applied claim. See Pet. App. 17a-18a. The regulations promulgated by the Department do not establish the state DBE program in which petitioner seeks to participate. Rather, the federal regulations required IDOT to adopt its own DBE program, within broad parameters. See 49 C.F.R. 26.21(a). The regulations give each state agency wide discretion to develop its own program in light of local circumstances. See pp. 5-8, *supra*. As the court of appeals explained, "[a] principal feature of the federal regulations is their flexibility and adaptability to local conditions." Pet. App. 17a. For example, the regulations empower state agencies themselves "to set DBE participation goals," and to devise "'appropriate measures' to address overconcentration" of DBEs. *Id.* at 18a (quoting 49 C.F.R. 26.33 and citing 49 C.F.R. 26.45).

The Seventh Circuit correctly recognized that "[t]he flexibility in the regulations makes the states, not [the

Department], primarily responsible for implementing their own programs in ways that comply with the Equal Protection Clause." Pet. App. 18a. How a state agency elects to exercise its discretion within the broad boundaries the regulations establish is the state agency's prerogative. Petitioner cites nothing in the regulations that compels state agencies to develop or implement their DBE programs in ways that are not narrowly tailored to remedying past unconstitutional discrimination. To the contrary, the regulations expressly forbid "quotas," and they permit set-asides only in "extreme circumstances" where no other measure could "redress egregious instances of discrimination." 49 C.F.R. 26.43. The regulations further expressly forbid the state agency and its contracting partners from "discriminat[ing] on the basis of race, color, national origin, or sex." 49 C.F.R. 26.13(a). If a particular state agency implemented its own DBE program in a way that was not narrowly tailored to a compelling interest, that conduct would not fairly be attributed to the federal regulations or the federal government. The state agency rather than the federal government therefore is "the correct party to defend a challenge to its implementation of its [own] program." Pet. App. 18a.

Petitioner argues (Pet. 17) that this holding "violates Supreme Court precedent that allows for as-applied challenges to regulations authorized by" Section 5 of the Fourteenth Amendment. That argument reflects a misunderstanding of the decision below. The court of appeals did not hold that as-applied challenges are unavailable in this context. A plaintiff may assert an as-applied challenge to the implementation of a DBE program against the party—here, IDOT—that adopted the program and applied it to the plaintiff. But petitioner

may not assert an as-applied challenge against the federal government concerning a state agency's exercise of its own discretion in implementing a state program. Petitioner's reliance (Pet. 17) on *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), is misplaced, because *City of Boerne* involved neither an as-applied challenge nor a federal regulation. See *id.* at 536 (holding that Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, exceeded Congress's authority under the Fourteenth Amendment).

ii. Petitioner does not contend that this aspect of the Seventh Circuit's analysis creates a circuit conflict. The decision below accords with the only other federal appellate decisions to address the issue. In *Sherbrooke Turf*, the Eighth Circuit held that, because the federal regulations "afford[] grantee States substantial discretion" in developing and implementing their own DBE program, an as-applied challenge "requires [courts] to examine the program as implemented by those States." 345 F.3d at 973. The court accordingly analyzed whether the DBE programs of the two States at issue (Minnesota and Nebraska) were narrowly tailored under the circumstances in each State. See *id.* at 973-974. Both the district court and the court of appeals here agreed with the Eighth Circuit's approach. Pet. App. 17a, 65a.

In *Western States Paving*, the Ninth Circuit reached the same conclusion. 407 F.3d at 997. The court explained that the Eighth Circuit in *Sherbrooke Turf* "did not require Minnesota and Nebraska to identify an independent compelling interest for their DBE programs," but that the Eighth Circuit "did inquire into whether the States' implementation of [the federal DBE program] was narrowly tailored to achieve Congress's remedial objective." *Id.* at 996. The Ninth Circuit

"agree[d] with the Eighth Circuit" on both counts, *id.* at 997, and it proceeded to analyze the Washington state agency's implementation of its program under the circumstances in that State, see *id.* at 997-1002. The circuits' consensus on the proper approach to as-applied challenges in this context confirms that this Court's review is unwarranted.

iii. In any event, this aspect of the court of appeals' analysis had no practical impact on the court's ultimate disposition of the suit. The court held that, in light of the broad discretion that States possess in implementing their own DBE programs, "[i]t makes sense * * * that a state, not [the Department], is the correct party to defend a challenge to its implementation of its program." Pet. App. 18a. As we explain more fully below, however, the court of appeals considered, and rejected on the merits, petitioner's equal-protection challenge to IDOT's implementation decisions. See pp. 17-20, *infra*. Petitioner's entitlement to relief therefore ultimately depends on whether that aspect of the court's analysis was correct, not on whether the court identified the right defendant or correctly treated petitioner's as-applied challenge as an attack on the IDOT program rather than on the DOT regulations.

2. Petitioner also contends (Pet. 20-32) that the court of appeals erred in rejecting its as-applied challenge to IDOT's implementation of its DBE program. That contention likewise does not warrant review.

a. Petitioner claims (Pet. 15-17, 20-21) that the decision below allows a state agency to satisfy narrow-tailoring requirements merely by "complying with the federal regulations," and that the court of appeals' holding compounds an existing lower-court conflict. That is incorrect. The Seventh Circuit expressly *disavowed*

such a holding, explaining that circuit precedent does not "allow[] the federal regulations to 'preempt' the Constitution" and does not "foreclose claims that a state or local government violates the Equal Protection Clause in the way that it implements th[e] flexible federal regulations." Pet. App. 45a n.3. The court further explained that, although the regulations give a state agency broad discretion, the agency "would exceed its federal authority * * * if it implemented federal law in a manner that violates the Equal Protection Clause." *Ibid.* (internal quotation marks and brackets omitted).

Petitioner dismisses this holding (Pet. 18) because it appears in a footnote and purportedly contradicts other parts of the opinion. But petitioner identifies no passage in the opinion that suggests, much less holds, that a state agency's compliance with the federal regulations simpliciter forecloses as-applied constitutional challenges. The portion of the opinion on which petitioner relies simply holds that the state agency rather than the federal government is the proper defendant in a challenge of this character, and that a particular State's unconstitutional implementation of the DOT regulations would not render the regulations themselves invalid. Pet. App. 17a-18a; see pp. 11, 14-16, *supra*. The court of appeals analyzed the narrow-tailoring issue at some length, see Pet. App. 44a-50a, and it did not suggest that IDOT's compliance with the federal regulations foreclosed petitioner's equal-protection claim. Petitioner also asserts (Pet. 18) that the court of appeals' footnote "does not reflect what the district court held," but it is the Seventh Circuit's express statement of its own holding, not that of the lower court whose judgment it affirmed, that controls.

Petitioner's claim (Pet. 21) that the decision below conflicts with decisions of the Eighth and Ninth Circuits fails for the same reason. Both of those courts rejected the view that a state agency's compliance with the federal regulations renders further narrow-tailoring analysis unnecessary. See *Western States Paving*, 407 F.3d at 997 & n.9; *Sherbrooke Turf*, 345 F.3d at 970-971. The Seventh Circuit reached the same conclusion here. Pet. App. 45a n.3.[2]

b. Petitioner also asserts (Pet. 16-17) that the decision below makes it "literally impossible to bring an as-applied challenge to" what petitioner labels the "[m]is-match" under the DBE program. That is incorrect. Petitioner argues (*ibid.*) that, because state agencies must calculate their overall goals for DBE participation as a percentage of total contract dollars but may apply contract goals only to contracts that have subcontracting possibilities, a disproportionate share of subcontract dollars will be directed to DBEs, and non-DBE subcontractors will be burdened. Nothing in the decision below, however, precludes review of such claims.

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[2] Petitioner contends (Pet. 21) that the Second and Tenth Circuits bar as-applied challenges if the state agency's DBE program complies with the federal regulations. That assertion provides no basis for further review in this case because the Seventh Circuit adopted the position that petitioner advocates. In any event, the decisions petitioner cites are distinguishable. Both *Harrison & Burrows Bridge Constructors, Inc.* v. *Cuomo*, 981 F.2d 50, 57 (2d Cir. 1992), and *Ellis* v. *Skinner*, 961 F.2d 912, 916 (10th Cir.), cert. denied, 506 U.S. 939 (1992), were decided in 1992, "when the ten percent federal set-aside was more mandatory and *Fullilove* [v. *Klutznik*, 448 U.S. 448 (1980)], not strict scrutiny, provided the governing constitutional principle." *Sherbrooke Turf*, 345 F.3d at 970. Petitioner cites no decision indicating that either circuit would reach the same conclusion today regarding the current framework.

To the contrary, the court of appeals squarely addressed petitioner's "mismatch" argument on the merits in adjudicating petitioner's as-applied challenge to the Illinois agency's DBE program. Pet. App. 47a; see *id.* at 49a. The court rejected the argument because, on the record here, it was speculative and unproved. *Id.* at 47a-49a. The court made clear that, "[i]f [petitioner] had presented evidence rather than theory on this point, the result might be different." *Id.* at 49a. Petitioner also ignores that the federal regulations require state agencies to address any undue burden placed on non-DBEs from an overconcentration of DBEs in a particular line of work—precisely the situation petitioner fears. 49 C.F.R. 26.33. If a state agency fails to do so, nothing in the regulations or the decision below would prevent a plaintiff from challenging that failure.

c. Petitioner's remaining arguments about the particular circumstances and evidence presented below—including the court of appeals' assessment of plaintiffs' expert evidence, Pet. 28-29—are highly factbound and do not warrant review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). In all events, as explained above, pp. 14-16, *supra*, the state respondents are the proper defendants in petitioner's as-applied challenge. They are best positioned to address the merits of those contentions, to the extent the Court concludes that any response is necessary.[3]

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[3] On February 7, 2017, the Illinois state-government respondents waived their right to respond to the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
T.E. WHEELER, II
Acting Assistant Attorney General
DIANA K. FLYNN
ROBERT A. KOCH
Attorneys

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