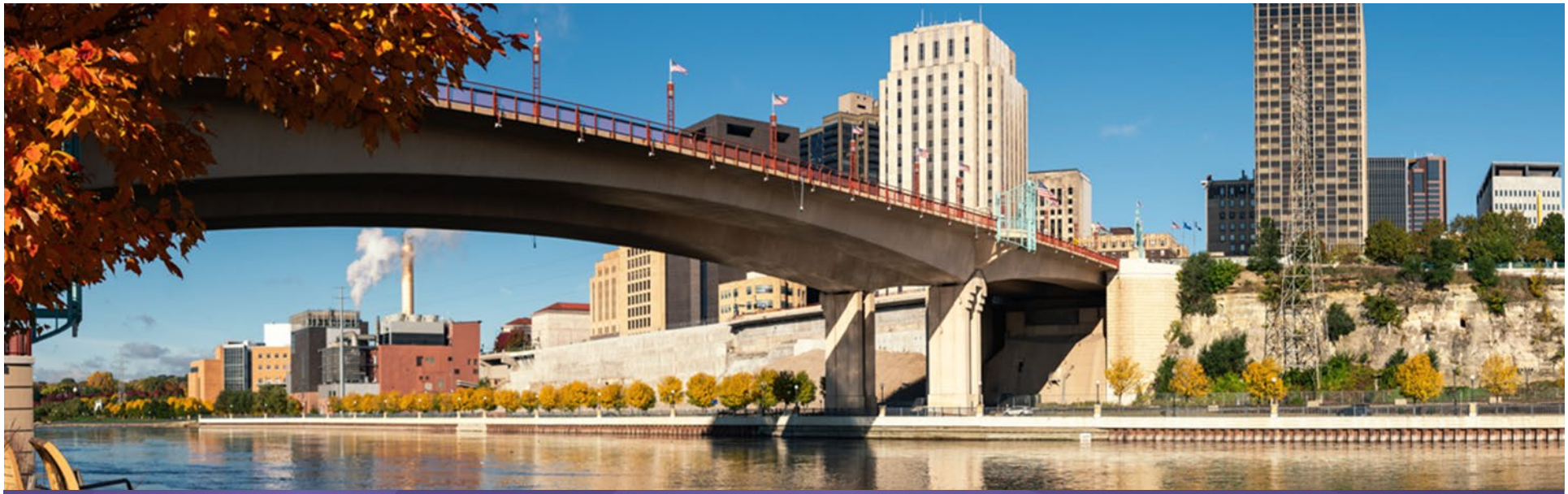

2025 MINNESOTA JOINT DISPARITY STUDY

Phase 1 Report

Prepared for:

Minnesota Department of Administration
50 Sherburne Ave
Saint Paul MN 55155

In association with
Minnesota Department of Transportation, Minnesota State Colleges and Universities, University of Minnesota, Metropolitan Airports Commission, Metropolitan Council, Mosquito Control District, Hennepin County, Ramsey County, City of Bloomington, City of Brooklyn Park, City of Minneapolis, City of Rochester, City of Saint Paul, Hennepin Healthcare System and Saint Paul Public Schools

Phase 1 Report
May 2024

Prepared by:

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KEEN INDEPENDENT RESEARCH

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2025 MINNESOTA JOINT DISPARITY STUDY PHASE 1 REPORT — Introduction

Sixteen state and local government entities have come together to analyze whether there is a level playing field for minority- and woman-owned firms and other diverse businesses in the Minnesota marketplace and their own contracts. The 2025 Minnesota Joint Disparity Study (2025 Study) examines opportunities for construction, professional services, goods and other services firms in the public and private sectors.

Each of the 16 public entities have taken steps to open more opportunities for diverse companies or are interested in doing so based on study results.

Figure 1 lists participating entities. The Minnesota Department of Administration (Admin) is leading this effort, as it did for the 2017 Minnesota Joint Disparity Study (2017 Study).

Keen Independent Research LLC (Keen Independent) is performing the 2025 Study. Keen Independent also prepared the 2017 Study. Subconsultants Holland & Knight LLP, Customer Research International and Donaldson Consulting, LLC are also participating in the study.

Background

The State and some of the participating entities currently operate programs that promote equity in procurement for minority- and woman-owned companies and other diverse businesses. The authorizing legislation for the programs operated by the State (and for many other participating entities) calls for periodic review of their continued need. This joint disparity study will provide information important to that review and consideration of whether these programs should continue.

Some participating entities do not currently have relevant programs to address equity when competing for entity contracts and subcontracts. This study will be instructive to these entities as well.

Government programs that provide preferences or requirements regarding use of minority- or woman-owned businesses can be challenged in court. The joint disparity study provides the types of information needed by entities to review any continued need for race- and gender-based programs as well as government agencies considering new programs.

The methodology for the 2025 Study is based on relevant case law, including legal decisions in the Eighth Circuit Court of Appeals.

1. Entities participating in the 2025 Minnesota Joint Disparity Study

> Minnesota Department of Administration
> Minnesota Department of Transportation
> Minnesota State Colleges and Universities
> University of Minnesota
> Metropolitan Airports Commission
> Metropolitan Council
> Mosquito Control District
> Hennepin County
> Ramsey County
> City of Bloomington
> City of Brooklyn Park
> City of Minneapolis
> City of Rochester
> City of Saint Paul
> Hennepin Healthcare System
> Saint Paul Public Schools

PHASE 1 REPORT — Phase 1 activities

The study includes three phases. This draft Phase 1 report documents work completed in the first three months of the study and outlines plans for completion of Phase 2 (data collection and analysis) and Phase 3 (reports, presentations and public forums). The study began on February 15, 2024, and will be complete in summer 2025.

Phase 1 Scope of Work

Phase 1 of the study provides the legal framework for the balance of the study that could be reviewed by participating entities before proceeding to the Phase 2 research and Phase 3 reports and presentations.

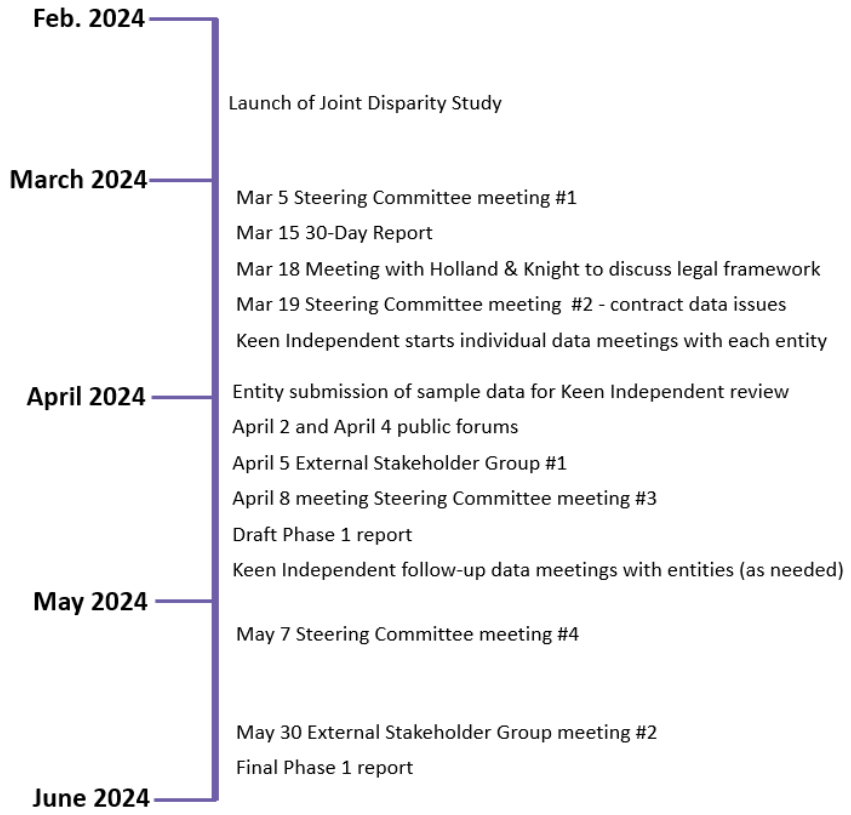
The information below explains progress and plans for completion of each of the six Phase 1 tasks through mid-May 2024 (also see Figure 2).

Task 1.1. Project kick-off meeting and administration. Keen Independent held a virtual kick-off meeting with Admin staff on February 15, 2024, and has had regular check-in meetings every two weeks. These meetings continued through Phase 1.

Keen Independent and Admin developed means for sharing large files (through ShareFile) and protocols for marking draft written documents and communications.

Keen Independent held a kick-off Steering Committee meeting with representatives from participating entities on March 5. This was the first of the regular monthly meetings that continued through Phase 1. There was also a meeting with legal representatives of participating entities and a data-focused meeting with staff of participating entities. Admin and Keen Independent held the first External Stakeholder Group meeting in April and the second one at the end of May 2024.

2. Phase 1 project schedule



PHASE 1 REPORT — Phase 1 activities

Task 1.2. Legal framework. Keith Wiener of Holland & Knight examined relevant case law and prepared the draft legal framework that forms an appendix to this report.

Task 1.3. Public forums and other communications. Keen Independent held a virtual public forum (April 2) and one hybrid public forum (April 4 at Rondo Community Library) as part of Phase 1.

Admin launched the 2025 Study website with content prepared by Keen Independent. Keen Independent developed methods for the public to forward comments and other input to the study by phone or email.

Task 1.4. Review of programs and procurement regulations. Keen Independent performed a preliminary review of entities' contract equity programs and their procurement policies. This assessment included review of documents as well as meetings with each entity.

Task 1.5. Preliminary research into Governmental Units contract data. Keen Independent reviewed participating entities' contract data and developed plans for compiling those data. The Keen Independent study team provided a draft general guide to collecting data, met with data-focused staff from each entity as a group and then met with each entity (sometimes multiple meetings). Admin and Keen Independent have coordinated with the Minnesota Department of Revenue to obtain subcontract data for entity construction projects.

Task 1.6. Start-up report. As a complement to the 30-Day Report, this Phase 1 Report comprises the "start-up report" required in Phase 1. Keen Independent has submitted draft written plans to collect information, analyze results, execute communications and perform study Quality Assurance/Quality Control (QA/QC). Phase 1 Report summarizes plans in the following pages. Figure 3 provides a list of appendices. (There is a skip in the lettering of appendices to allow easier use in the final Joint Disparity Study reports in 2025.

3. 2025 Minnesota Joint Disparity Study Phase 1 Report Appendices

A. Data Collection Guide
B. Data Collection Plan for Each Entity
C. Availability Data Collection Plan
D. Plan for Disparity Analysis for Entity Contracts
E. Plan for Quantitative Research for Marketplace Conditions
F. Plan for Qualitative Research
G. QA/QC Plan
H. Communications Plan
J. Analysis of Qualitative Information
L. Procurement and Contract Equity Programs
N. Legal Framework

Legal Framework

Phase 1 included preparation of the draft legal framework for the study, which is summarized here and provided as "Appendix N."

Across the country, state and local governments have enacted minority- and woman-owned business enterprise programs to:

a. Ensure that they are not engaged in discrimination in their contracting;
b. Remedy specific identified past discrimination or its present effects in their marketplace;
c. Remove and address barriers to participation in contracting by minority- and woman-owned business enterprises; and
d. Take affirmative steps to dismantle a system in which they were passive participants in private marketplace discrimination.

As summarized in the 30-Day Report and discussed in detail in Appendix N, different standards of legal review apply when a public entity defends programs with preferences for minority-owned business enterprises (MBEs), woman-owned business enterprises (WBEs) and types of businesses such as small businesses, veteran-owned businesses or businesses owned by persons with disabilities. The different standards of legal review are:

- Strict scrutiny (for MBE programs);
- Intermediate scrutiny (for WBE programs and LGBTQ programs); and
- Rational basis (for veteran-owned business programs and programs for business owners with a disability, for example).

Disparity studies are an accepted and recognized method to analyze information regarding participation of minority- and woman-owned businesses in government contracting and the marketplace. Disparity studies examine the types of evidence approved by the U.S. Supreme Court and lower courts that have reviewed public programs involving minority- and woman-owned businesses.

Contract Data Collection

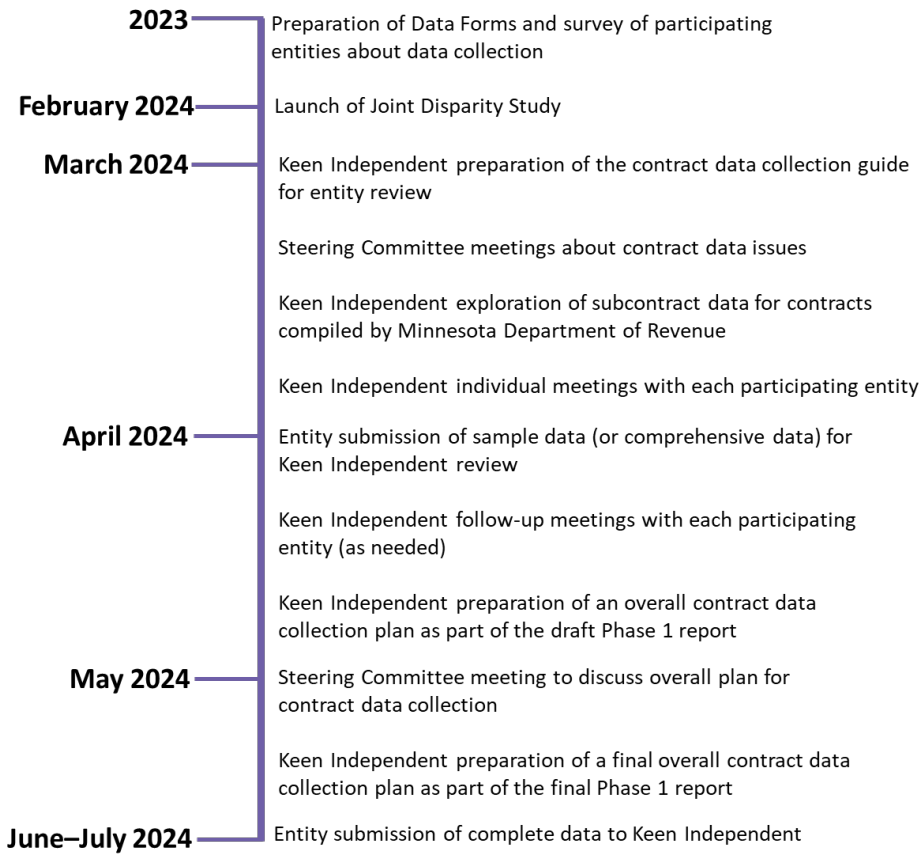
A disparity study compares the share of contract dollars going to minority- and woman-owned firms (and other diverse businesses) to availability benchmarks for those businesses. Compiling information on contract and subcontract dollars awarded or paid to firms, regardless of ownership, is the first step to producing estimates of the dollars going to MBE/WBEs as a share of total procurement dollars. The disparity study also uses information about individual procurements such as the date, size and type of work, whether it was a prime contract or subcontract, and whether an equity program applied (and its type).

There are many ways to prepare comprehensive procurement data for a disparity study. Keen Independent prepared a contract data collection guide as background to public entity staff participating in the study (see Appendix A).

As shown in Figure 4 to the right, Phase 1 of the study also includes considerable group and individual discussions about the procurement data collection from March through mid-May 2024. Data collection started in Phase 1 but, for many entities, will not be completed until summer 2024. Keen Independent is working with each entity individually to accomplish this task.

Appendix B summarizes the contract data collection plans for each participating entities as of May 30, 2024.

4. Steps to planning contract and payment data collection for each entity participating in the 2025 Minnesota Joint Disparity Study



PHASE 1 REPORT — Activities to be conducted in Phases 2 and 3

The following pages elaborate on the approach to Phases 2 and 3, consistent with the scope of work in the February 15, 2024, contract.

Overview of Study Communications

Keen Independent will lead certain study communications and support Admin in other communications. Appendix B of the Phase 1 report describes the target groups and the communications vehicles.

Internal groups. Keen Independent will communicate with a number of groups internal to the study process:

- Admin Project Management Group;
- Steering Committee, comprised of each of the 16 participating entities;
- Ad-hoc groups formed of staff from participating entities involved in specific components of the study (e.g., legal framework, data collection); and
- Individual participating entities.

The communications with participating entities will include:

- Regular virtual meetings with the lead representative(s) from the entity through completion of the study;
- Virtual meetings with key staff from the entity involved in contract, subcontract and payment data collection;
- Virtual meetings with appropriate entity staff to review preliminary data analyses or results as well as draft report sections;
- Virtual presentations to senior leadership once draft reports are complete and results and conclusions are available; and
- A virtual or in-person presentation to boards or elected officials of the entity in 2025 (as requested by the entity).

External groups. Much of the study communication will be with business owners and representatives as well as other interested members of the public. As discussed in Appendix B, these will include:

- External stakeholder group; and
- Trade associations and other business groups, business owners, and other interested individuals.

Communications will include:

- Briefings in newsletters;
- Press releases and email blasts;
- Disparity study website;
- Disparity study email address and telephone hotline;
- Introduction of the study through virtual in-depth interviews; and
- Public forums.

Timing. Key times for study communications include:

- Routine notices from study launch through early 2025;
- Launch of the availability survey in fall 2024;
- Explanation of study results in 2025; and
- Explanation of entity action in 2025 (from each entity).

Appendix B describes communications activities plan for each time period.

Summary of Quality Assurance/Quality Control Processes

Keen Independent incorporates four components in its QA/QC Plan:

- QA processes for evaluating, identifying and recommending adjustments to the activities or tasks (and associated resources) that must be performed in the project to provide confidence that the project will satisfy the relevant quality standards.
- QC process for validating consultant's deliverables for completeness and accuracy, as well as identifying and assessing issues and risks.
- QA/QC processes must consider consultant's internal activities and those activities performed by any subconsultants.
- Reporting to Admin on non-conformance assessments and proposed corrective actions.

Appendix G provides the Keen Independent Quality Assurance/Quality Control approach for the 2025 Minnesota Joint Disparity Study in order of the four components listed above. Also note that the QA/QC Plan supports the Data Collection Plans.

Figure 5 highlights some of the key components of the QA/QC Plan (see Appendix G for a full discussion).

5. Key components of QA/QC plan for 2025 Minnesota Joint Disparity Study

QA process for evaluating adjustments to activities or tasks

Adjustments related to study components

Pre-proposal exploration of issues

Preparation of a proposal or workscope for an assignment

Formal Project, Communications, Data Collection and QA/QC plans

Monthly reporting of study progress and any issues

Phase 1 report

Review of draft report materials

Adjustments related to changes in legal or regulatory environment

Adjustments related to entity data

Initial data collection discussions with Admin and the participating entities

Written data requests

Initial review of information received

Documentation of data or other information refinement

Preparation and review of preliminary analyses.

Adjustments related to resources

QC process for validating deliverables for completeness and accuracy

Internal team review and data-checking

Internal review of written documents

External review of data and other information

QC processes concerning subconsultant activities

Performance of subconsultants' own internal QC/QC processes

Keen Independent subconsultant training and supervision

Keen Independent review of subconsultant work product

Reporting issues and corrective action to Admin

Steps to Determine the Market Area, Industries and Groups in Phase 2

Before conducting the availability surveys and quantitative analyses of marketplace conditions, Keen Independent will determine the geographic market areas and subindustries that pertain to each individual entity's contracts in each industry.

Market area definitions. In Task 2.3 of the study, Keen Independent will determine the relevant geographic market area for contracts (by industry) for each participating entity. In the 2017 Study, that area was the Minneapolis-St. Paul Metropolitan Statistical Area for entities solely located in the Twin Cities. The area was Minnesota plus two counties in Wisconsin for State entities in the 2017 Study (Admin, MnDOT and Minnesota State Colleges and Universities).

Keen Independent will perform these analyses for each entity in the 2025 Study by reviewing the geographic distribution of contract and subcontract dollars to businesses in different locations. For example, Keen Independent will examine what share of City of Rochester contract dollars (by industry) go to firms with locations in the federally defined Rochester Metropolitan Statistical Area and determine whether the geographic area needs to be expanded to additional counties to capture at least 75 percent of the spending in each industry (after excluding purchases made primarily from national markets). The study team will conduct similar analyses for each of the other entities.

Definition of the subindustries for each participating entity. Each participating entity may have a different mix of work involved in its construction, professional services, goods and other services contracts and subcontracts. Keen Independent must identify those subindustries before conducting the availability survey and analyzing data about marketplace conditions in each industry.

Keen Independent will use six-digit North American Industry Classification System (NAICS) codes (and sometimes even more detailed codes) to code each Governmental Unit contract and subcontract into a subindustry under one of four general industries: construction, professional and technical services, goods and miscellaneous services.

Keen Independent will perform this coding for each prime contract and subcontract after excluding types of work or organizations that are out-of-scope (government agencies, national market purchases, etc.).

Definition of ownership groups. The 2025 Minnesota Joint Disparity Study Contract Exhibit C: Specifications, Duties, and Scope of Work defined the groups to be examined in the study:

- Determine whether there is underutilization of minority- and woman-owned businesses in participating entities' contracts; and
- Perform other analyses of veteran-owned businesses and businesses owned by persons with a substantial physical disability (but not full availability and disparity analyses for these two groups).

Definitions of racial and ethnic groups of minority-owned firms generally follow standard definitions under many contract equity programs: African Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Hispanic Americans and Native Americans.

Admin is adding a component to Task 2.7 in which Keen Independent will consider other groups for inclusion in the study research based on evidence indicating certain disadvantages for those groups. The new component will also consider refined definitions of groups. (See Appendix E for a detailed discussion of this issue and the workscope addition.)

Availability Survey

Keen Independent will collect information from firms about their availability for contracts with public sector entities through telephone surveys and other methods. Appendix C explains this process, including:

- Survey methods;
- Business listings;
- NAICS and Standard Industrial Classification (SIC) codes included in the survey;
- Development of the survey instrument;
- Establishments in the availability database; and
- Analysis of potential non-response bias and response reliability.

Appendix C also provides a first draft of the availability survey instrument (with some components still to be determined).

Availability survey methods. Keen Independent will offer multiple methods for survey participation, including:

- Online surveys;
- Telephone surveys; and
- Other avenues.

Business listings. Firms contacted in the availability surveys will come from data maintained by participating entities and from Dun & Bradstreet. These lists will be combined prior to the start of the survey.

NAICS and SIC codes included in the survey. The subindustries to be included in the list of firms purchased from Dun & Bradstreet will be determined after reviewing participating entities' prime contract and subcontract dollars for different types of work.

Development of the survey instrument. Areas of survey questions will include qualifications and interest in public entity work, bid capacity, regions of the state where the firm can work or provide goods, annual revenue, firm ownership and whether the firm experiences different types of marketplace barriers. The study team will likely not know the characteristics of the business owner when contacting a business. Obtaining that information is a key component of the survey.

Establishments in the availability database. Keen Independent will provide Customer Research International (CRI) a database likely exceeding 60,000 individual firms for the availability surveys (after removing duplicate listings from the data). Keen Independent will analyze the final disposition of each attempted survey. Some listings will be non-working or wrong numbers. After taking that into account, the study team will be able to report the success rate for reaching the listed businesses.

Response rates in similar surveys have dropped since the 2017 Study, especially after COVID-19. We expect it to still be high relative to other types of social science research.

Analysis of potential non-response bias and response reliability. The study team will consider the potential for non-response bias due to:

- Research sponsorship;
- Language barriers; and
- Industry differences in reaching respondents.

Businesses will be asked questions that may be difficult to answer, including questions about average annual revenue and employment. Keen Independent will explore the reliability of survey responses by comparing the consistency of responses from one question to another and with other sources of information about the company.

Disparity Analyses to be Performed

Keen Independent's disparity analyses for participating entity contracts will compare (a) the percentage of contract dollars going to a group with (b) benchmarks indicating the share of dollars that might be expected to go to that group given the relative availability of firms in that group given the types, sizes and locations of an entity's prime contracts and subcontracts. Appendix D provides additional information.

Industries. Based on preliminary assessments of relevant industries, Keen Independent anticipates preparing utilization, availability and disparity analyses for each of the following industries for each entity:

- Construction;
- Professional and technical services (which might include certain human services contracts);
- Goods; and
- Other services.

Disparity analysis will examine overall results within an industry as well as subsets of contracts, especially those for which no race- and gender-conscious programs apply. These industry groupings may be refined by the conclusion of Phase 1 of the study, or after completion of worktype coding of participating entity contracts in Phase 2.

Groups. Keen Independent will perform utilization, availability and disparity analyses, as possible, for groups for which any preference in state or local government contract equity programs could necessitate legal review under the strict scrutiny or intermediate scrutiny standards. For example, these full disparity analyses will be needed for firms owned by people of color (by racial and ethnic group) and for white woman-owned companies. Specific definitions of racial and ethnic groups are under consideration at this step in the study process.

Keen Independent might not need to perform disparity analyses regarding the participation of other types of firms in entity contracts. For example, preliminary legal analysis indicates that strict scrutiny and intermediate scrutiny do not apply to inclusion of firms owned by veterans or persons with disabilities in public sector contract equity programs. As appropriate and possible, Keen Independent will provide utilization analyses for these types of groups, but not produce full disparity analyses. Keen independent also plans to review marketplace conditions for such groups, as possible with existing data.

Special emphasis on contracts without race- or gender-conscious programs applied. Keen Independent's disparity analyses might reveal no underutilization of minority- and women-owned firms when a participating entity's race- or gender-conscious programs apply.

- Such a result might simply show that programs are effective.
- Analysis of contracts where no MBE/WBE-type programs apply will be most instructive as to the need for remedial measures.

Also, Keen Independent will not include entities' USDOT-funded contracts in the disparity analyses, as the Federal DBE Program applies to these contracts.

Analysis of trends. Keen Independent will examine the extent to which utilization, availability and disparity results for participants in the 2017 Study changed over time based on results from the 2025 Study. This will include whether any disparities found in the 2017 Study widened or narrowed and the effectiveness of any entity programs on that utilization over this time period. (Contractor will be able to perform these comparisons because results of the 2025 Study will be based on the same methodology and data sources as the 2017 Study.)

Quantitative Analysis of Marketplace Conditions

Keen Independent will prepare comprehensive quantitative analyses of marketplace conditions for different groups of businesses in Minnesota, in the Minneapolis-St. Paul-Bloomington metropolitan statistical area MSA and the Rochester MSA (or other geographic areas as appropriate). These analyses will help determine whether there is evidence that disparities exist for particular racial, ethnic and gender groups examined in the market area as well as for other groups as appropriate (for example, veterans and persons with disabilities). Keen Independent will analyze changes over time, including exploring any effects of the COVID-19 pandemic.

The discussion in this section summarizes the information under Task 2.7 of the Scope of Work that is part of Exhibit C: Specifications, Duties, and Scope of Work attached to the contract for this study (see that section of Exhibit C for further detail). At the end of Appendix E, Keen Independent offers one potential addition to Task 2.7 for Admin consideration.

Entry and advancement in study industries as employees. Keen Independent will examine U.S. Census Bureau data to determine whether there is underrepresentation of certain groups as employees in the study industries in the geographic market areas.

Business ownership. Also using Census data for the most recent time period, Keen Independent will determine whether there are disparities in the rates of business ownership for certain groups in the study industries.

Access to capital. Keen Independent will prepare a quantitative analysis of access to capital for different groups of individuals and firms.

Success of businesses. Keen Independent plans analysis of multiple data sources, including the availability survey results, to determine relative success of businesses by industry and group.

Analysis of Qualitative Information

Appendix F presents the plan for how the Keen Independent study team will collect and analyze qualitative information in the 2025 Study.

From April 2024 through summer 2025, the Keen Independent study team will compile qualitative information from the following:

- In-depth interviews;
- Business advisory group (BAG) meetings;
- Open-ended comments provided in the availability survey;
- Input received through the website, dedicated email address or telephone hotline;
- Comments from public forums; and
- Other means.

The steps to compile and analyze qualitative information in the 2025 Study closely follow those in the 2017 Study. Keen Independent expects to receive input from hundreds of businesses and other organizations and individuals through these efforts.

Appendix F presents the methodology for compiling, analyzing and presenting results for each component of the qualitative research.

PHASE 1 REPORT — Study schedule

The overall project schedule for Phases 1, 2 and 3 of the study has remained the same since the launch of the 2025 Minnesota Joint Disparity Study on February 15, 2024.

Figures 6, 7 and 8 on this and the following two pages provide the overall project schedule, by phase.

The only adjustment to the original schedule by task is for Task 2.7 on the following page.

Phase 1

Keen Independent conducted Phase 1 from February 15, 2024, through much of May 2024.

6. Phase 1 project schedule

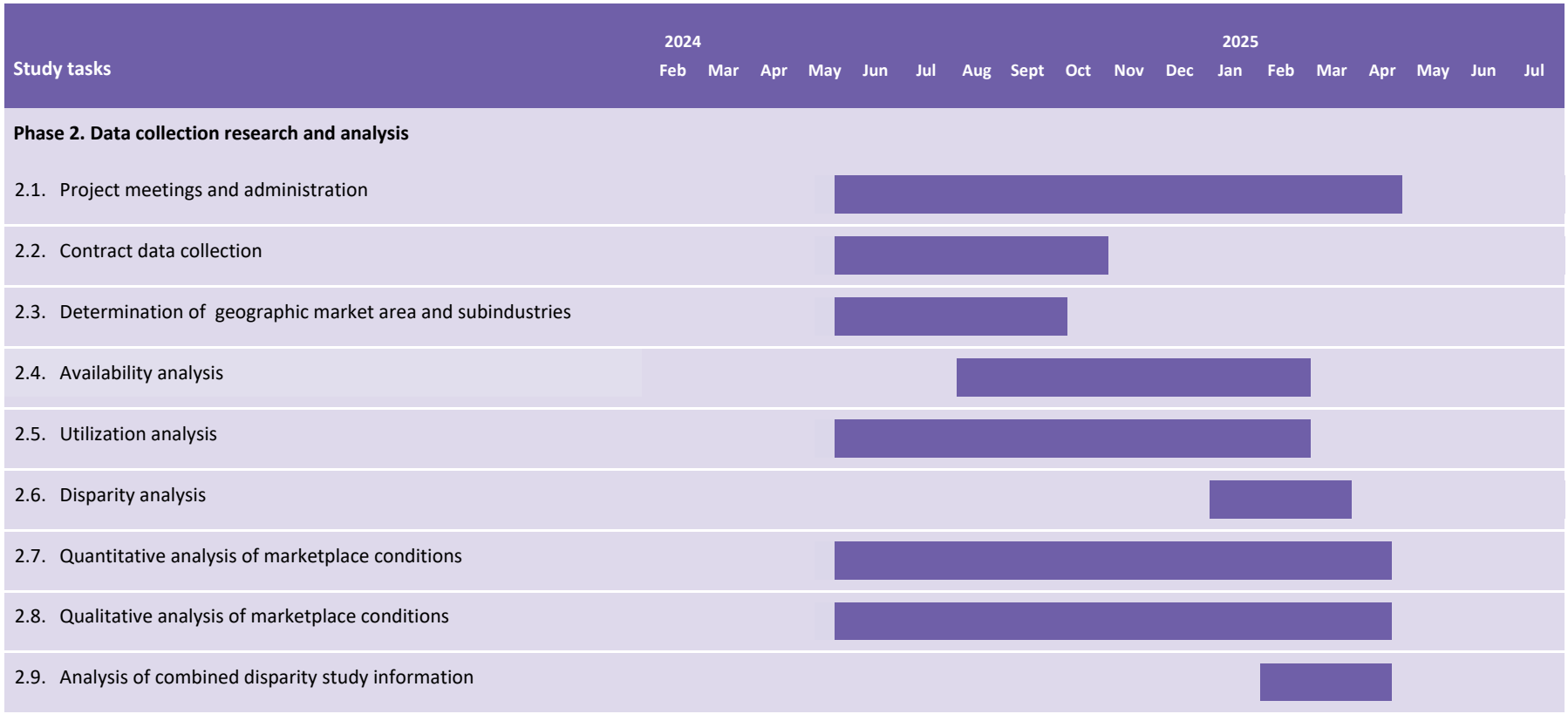
Study tasks	2024 Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec	2025 Jan	Feb	Mar	Apr	May	Jun	Jul
Phase 1. Project initiation and planning																		
1.1. Project kick-off meeting and administration		■	■	■														
1.2. Legal framework		■	■	■														
1.3. Public forums and other communications		■	■	■														
1.4. Review of programs and procurement regulations		■	■	■														
1.5. Prelim. research into Governmental Units contract data		■	■	■														
1.6. Start-up report		■		■	■													

Phase 2

Figure 7 shows the overall schedule for Phase 2 of the study. Preliminary results will be provided to participating entities as it becomes available (e.g., draft report appendices will be submitted for review as Keen Independent prepares them).

With the expansion of Task 2.7 to review potential inclusion of groups and potential refinement of group definitions, additional work will begin at the start of Phase 2. No adjustment to the overall project schedule was needed.

7. Phase 2 project schedule



Phase 3

Figure 8 shows anticipated timing of full draft reports, final reports and presentations to each entity in Phase 3 of the study. The 2025 Study has a completion date of July 30, 2025 (unchanged since the launch of the project).

8. Phase 3 project schedule

Study tasks	2024 Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec	2025 Jan	Feb	Mar	Apr	May	Jun	Jul
Phase 3. Disparity study reports, presentations and public meetings																		
3.1. Project meetings and administration																■	■	■
3.2. Preparation of common elements of draft reports														■	■	■		
3.3. Preparation of draft reports																■		
3.4. Presentation to each Governmental Unit																	■	
3.5. Public forums and request for comments																		■
3.6. Submission of final disparity study reports																		■
3.7. Study documentation																		■

APPENDIX A. Contract Data Collection — Introduction

Keen Independent Research (Keen Independent) prepared this contract data collection guide in February 2024 as background to public entity staff participating in the 2025 Minnesota Joint Disparity Study.

Keen Independent designed the guide after reviewing the information about contract and payment data systems that each governmental unit submitted to the Minnesota Department of Administration in planning for the study. Keen Independent also reviewed the results of a survey of staff from each entity about their level of knowledge and concerns about contract data for their organizations.

The guide builds on this information to help each governmental unit explore options and identify steps to assemble needed data. It provides the "why" behind each step and "tips" from other studies to give staff from each entity a sound foundation for discussing the particular opportunities and constraints regarding their data collection with Keen Independent staff. (It is general and not specific to an entity.) Although it does not anticipate every possible scenario concerning data collection, the guide does capture common issues.

As shown in Figure A-1 to the right, Phase 1 of the study includes considerable group and individual discussions about the procurement data collection from March through mid-May 2024. Data collection can start in Phase 1 but, for most entities, will not be completed until summer 2024. Keen Independent will work with each entity individually.

The comprehensive procurement databases to be provided by each participating entity **do not need to include ownership data** for each contractor and vendor (e.g., whether they are minority- or woman-owned). Any data on ownership will be useful, but it is typical in a disparity study for Keen Independent to research ownership of individual companies. We perform this additional research even when an entity provides some information about firm ownership.

A-1. Steps to planning contract and payment data collection for each entity participating in the 2025 Minnesota Joint Disparity Study

A. Contract Data Collection — Overview of data collection planning

A disparity study compares the share of contract dollars going to minority- and woman-owned firms (and other diverse businesses) to availability benchmarks for those businesses. Compiling information on contract and subcontract dollars awarded or paid to firms, regardless of ownership, is the first step to producing estimates of the dollars going to MBE/WBEs as a share of total procurement dollars. The disparity study also uses information about individual procurements such as the date, size and type of work, whether it was a prime contract or subcontract, and whether an equity program applied (and its type).

Why Preparing Data for a Disparity Study is Not Straightforward

In Keen Independent's experience, public agency procurement and financial data management systems are rarely designed to easily compile the information about each individual procurement that is needed in a disparity study.

Data needed for individual procurements. Because information about individual procurements is useful, it is best not to rely on data limited to total payments to a company for the study period. (However, if total payments are the only data available for an entity, Keen Independent has ways to accommodate this situation.)

Data for a specific time frame. The disparity study reviews utilization of firms within a specific time period, which presents an additional challenge. Ideally, only new procurements made and older procurements that were renewed or extended during that time period would be included in the procurement data. The fact that making a procurement and paying a company for its work occur at different times adds complexity to the data collection. (This disparity study seeks to examine procurements made from July 1, 2016, through July 2023.) There are ways to handle information that does not fit within exact dates.

Prime contracts and subcontracts. A firm can receive entity contract dollars through both a direct purchase (e.g., a prime contract) and through a subcontract, so the study includes both prime contracts and subcontracts. Further, the utilization analysis examines subcontracts for firms in addition to those that might be certified and meeting a contract goal. It will be important to obtain information for non-certified subcontractors on a contract. (Keen Independent is also exploring a statewide database that might provide subcontract data for each entity's contracts.)

Data for prime contracts and subcontracts at the time of prime contract award are useful, as is information about how much each subcontractor was actually paid. Again, these data may not be readily available, or the government entity might have no data for payments to subcontractors.

Not all payments are included. A disparity study typically does not examine all purchases by a public entity. There are certain types of purchases, such as for land or rent payments for buildings, that are not included. Further, the study does not include payments to government entities, not-for-profit organizations or membership organizations, as they do not have "ownership."

A disparity study often focuses on locally funded contracts and excludes analysis of contracts that are federally funded, especially those subject to federal contract equity programs such as the Federal Disadvantaged Business Enterprise (DBE) Program.

The Road to Success Will Differ for Each Entity

Each of these complexities is discussed in this guide. Because of all the reasons discussed above and many more, there many ways to prepare comprehensive procurement data for a disparity study. The balance of the guide discusses options, workarounds and other tips to consider when creating a workable plan for each entity.

A. Contract Data Collection – An example of data submitted by an entity

Figure A-2 below shows a hypothetical example of a procurement database (e.g., an Excel spreadsheet) that might be prepared by a public entity. Each record (row) is a different procurement, subcontract or other procurement action. Each column (field) presents a certain type of information for that procurement. It would be ready for further Keen Independent analysis such as assigning a code for the type of work involved. (Additional fields of data for each procurement are shown on the following page.)

This hypothetical example includes both procurement and payment information. It might be more likely that procurement information is prepared in one spreadsheet and payment data are provided in a different spreadsheet. Keen Independent would then merge data from the two sources.

A-2. Hypothetical example of a procurement spreadsheet

Contract ID	PO number	Contract name	Vendor ID	Vendor name	Vendor role	Type of procurement	ID of 1st tier sub (if vendor is 2nd tier)	…
Contract_0001	PO_202201	Lift station maintenance	Vendor_0001	Vendor 1 name	Prime	Contract		…
Contract_0001	PO_202201	Lift station maintenance	Vendor_0002	Vendor 2 name	Sub			…
Contract_0001	PO_202201	Lift station maintenance	Vendor_0003	Vendor 3 name	Sub			…
Contract_0001	PO_202202	Lift station maintenance	Vendor_0001	Vendor 1 name	Prime	Modification		…
Contract_0002	PO_202203	Building rehabilitation	Vendor_0004	Vendor 4 name	Prime	Contract		…
Contract_0002	PO_202203	Building rehabilitation	Vendor_0005	Vendor 5 name	Sub			…
Contract_0002	PO_202203	Building rehabilitation	Vendor_0006	Vendor 6 name	Sub			…
Contract_0002	PO_202203	Building rehabilitation	Vendor_0007	Vendor 7 name	2nd tier sub		Vendor_0005	…
Contract_0003	PO_201901	Computer replacement	Vendor_0008	Vendor 8 name	Prime	Cooperative purchase		…

Source: Keen Independent Research.

A. Contract Data Collection – An example of data submitted by an entity

A-2. Hypothetical example of a procurement spreadsheet (continued)

Contract ID	…	Award amount	Payment amount	Work code	Work description	Award/ execute date	Funding source	Program applied	Contract goal	Certification(s) (DBE, MBE)
Contract_0001	…	$150,000	$150,000	237110	Lift station repair	1/1/2020	State	SBE	15%	
Contract_0001	…	$20,000	$21,800	238910	Site prep	1/1/2020	State	SBE		SBE, MBE
Contract_0001	…	$10,000	$9,877	237110	Lift station inspection	1/1/2020	State	SBE		SBE, WBE
Contract_0001	…	$45,000	$43,500	237110	Lift station repair	5/12/2020	State	SBE		SBE
Contract_0002	…	$2,000,000	$2,020,318	236100	Residential building construction	2/15/2022	Local			SBE
Contract_0002	…	$120,000	$118,820	238160	Roofing contractors	2/15/2022	Local			SBE
Contract_0002	…	$75,000	$76,230	238220	HVAC	2/15/2022	Local			SBE, VBE
Contract_0002	…	$15,000	$0	238910	Site cleanup	2/15/2022	Local			SBE
Contract_0003	…	$300,000	$300,000	423430	Computer equipment	4/5/2019	Local			

A. Contract Data Collection – Topics in the guide

The following pages provide general information about how to prepare procurement data that meet the needs for a typical disparity study. The discussion does not include every avenue or tip for developing these data, nor every potential challenge. Keen Independent will work with each governmental unit to explore additional challenges and how they can be addressed.

The first seven topics focus on assembling procurement and payment data. The final topics discuss two related items: providing a vendor table and preparing a list of firms that have indicated interest in a public entity's contracts (if such a list exists). In order, topics are:

- Data from Finance and data from Purchasing;
- What purchases or payments to include or exclude;
- A focus on unique procurements, including all purchasing methods;
- Determining whether a procurement was made in the study period;
- Determining the value of a contract or subcontract;
- Other data fields requested for procurement and payment records;
- Notes on subcontract data;
- Providing a vendor table; and
- Providing an interested firms list.

A. Contract Data Collection – Data from finance and data from purchasing

Figure A-3 describes potential sources of contract data.

Payments Data and Purchases Data

Unless an entity has a procurement system that is linked to payment data and other information that typically comes from financial systems, it will often need to provide data from both a financial and a purchasing information system. For some entities, certain purchases may still be done using hard copy forms (especially when purchasing functions are decentralized) and only payment data are available in electronic form.

Data Systems that Track Utilization of Targeted Businesses

To report utilization of targeted businesses and/or to monitor prime contractor compliance with any targeted business programs, some public entities establish specialized data systems that track diverse spending on their procurements. These systems are always useful in preparing comprehensive contract data. However, they are often just one input to the contract database as they may be missing some information for the contracts included in the data or some types of procurements (small purchases, for example). They also might be missing needed subcontract information for non-certified firms.

Tax-Incentivized Projects

Across the country, some municipal development commissions and similar organizations apply equity programs to projects receiving tax incentives from that entity. Contracts for these projects are handled by developers or other groups but may still involve public tax dollars.

Keen Independent will discuss this issue with individual entities to identify whether any are operating equity programs in this way. Contract data collection for tax-incentivized projects is similar to contracts directly awarded by a public entity.

Tips

Throughout the guide, Keen Independent provides some tips based on our experience with past disparity studies (more than 200 of them). For this topic:

- Be prepared to collect both finance (payment) and purchasing (procurement) data as necessary.
- Having a system that tracks diverse spending is helpful but might not have all the information needed.
- In some instances, there might be no electronic data for a key aspect of a procurement. Sometimes PDFs of contracts or other documents can provide the needed information. (If we receive the PDFs or scans of hard copy documents, Keen Independent can incorporate the information into the contract database).

A-3. Potential sources of data

- ✓ Purchasing information systems
- ✓ Financial information systems
- ✓ Data systems specifically designed to track spending with targeted businesses
- ✓ Other data systems _____
- ✓ PDFs or hard copy records

A. Contract Data Collection – What purchases or payments to include or exclude

There are certain types of payments or purchases that are ideally excluded prior to providing the data. Other types of exclusions can be made by Keen Independent after reviewing the data.

Purchases from Businesses, not All Payments to Individuals or Organizations

The disparity study will examine purchases of construction, professional services, goods and other services. This will be a subset of all payments made by a government entity.

Purchases, not reimbursements or other payments. Payments related to employee reimbursement, purchases of real property, transfers to other government entities or government grants are not included in disparity study (see Figure A-4). These will need to be excluded from any payments data submitted to Keen Independent.

Purchases from businesses (including sole proprietors), not payments to governments or not-for-profit entities. The procurement data should be for purchases from businesses. If the entity cannot exclude all non-businesses, Keen Independent can.

Other Types of Exclusions from the Analysis

There are unique types of purchases, including purchases from regulated utilities, that are also excluded from a disparity study. These are shown below "employee reimbursements" in Figure A-4.

National Market Exclusions

Keen Independent will review the procurement data and exclude additional types of "national market" purchases. Those purchases are typically for specialized goods and commodities available from a small number of national sources (such as mosquito control chemicals). They are typically not available for purchase from Minnesota vendors.

Tips

- Financial data will usually have account codes that identify different types of payments (employee salaries, employee reimbursements, etc.). This makes it relatively easy to exclude payments that are not related to purchases.
- The above is true for purchases or rents of land or buildings.
- An entity may have information in its vendor file that indicates whether an organization being paid is a business, a government agency or a not-for-profit organization. These distinctions are important when annually preparing 1099s that go to businesses that receive income from the public.
- Keen Independent will identify national market purchases in the procurement data provided by a participating entity.

A-4. Types of purchases or payments *excluded* from the data

- ✓ Purchases from government entities (as they have no ownership)
- ✓ Purchases from or payments to not-for-profit entities or membership organizations (as they have no ownership)
- ✓ Purchases, rentals or leases of land, buildings or other property
- ✓ Payments related to settlements of lawsuits
- ✓ Employee reimbursements
- ✓ Purchases from regulated utilities or other unique purchases (utilities; telecommunications services; finance and insurance, including payments of bank fees or interest on bonds or loans; newspapers and other subscriptions; membership dues; travel; arts, entertainment, recreation
- ✓ Any other non-purchases

A. Contract Data Collection – Focus on unique procurements, including all purchasing methods

Procurements, Contracts, POs and Other Purchases

The disparity study will examine purchases of construction, professional services, goods and other services through any contractual means or any purchasing methods (with certain exceptions discussed below).

All types of purchases. Each participating entity might make purchases through master agreements, contracts, purchase orders (POs), contract renewals and other mechanisms. All such procurements should be included in the data. Keen Independent is interested in any procurement action which led to the award of work (or purchase of goods) within the study period. (See Figure A-5.)

Some entities may award contracts and then issue task orders or other actions for the specific goods or services required under the contract. For example, entities might establish a contract or blanket purchase for certain goods contracts that indicate pricing, but do not guarantee a volume of purchases. It will be important to distinguish between these procurement actions and avoid double-counting individual procurements. (Keen Independent will discuss this with each entity.)

Disparity studies typically do not capture procurements made through P-cards or made by individual employees on their own credit cards, which are then reimbursed.

Methods of procurement. Some purchases might be made through publicly advertised competitive processes, while others might be informal purchases that are not publicly advertised and some could be through sole source purchases, emergency procurements or cooperative purchases. Each type of procurement should be included to the extent that the data are available. Entities do not need to consider how a purchase is made when determining whether to include a procurement in the data.

Very small procurements. The threshold for including a purchase in this disparity study is when it is for $5,000 or more (or $5,000 in payments in a year). We can exclude small purchases, or the entity can.

Tips

- For ease of reading, Keen Independent uses the terms "contracts," "purchases" and "procurements" somewhat interchangeably in the study reports unless otherwise noted.
- How a procurement is made is not a factor in deciding whether to include it in the data. For example, include procurements resulting from cooperative purchases.
- Disparity studies typically do not include procurements made through P-cards or made by individual employees on their own credit cards, which are then reimbursed.
- An entity may have information in its vendor file that indicates whether an organization being paid is a business, a public agency or a not-for-profit organization (perhaps used when preparing 1099s). These data are useful.
- Keen Independent will identify national market purchases in the procurement data provided by a participating entity.

A-5. Include in the data

- ✓ Purchases made by the participating entity, regardless of how made (except for P-card purchases or reimbursement of individuals' credit card purchases)
- ✓ Procurements initially made prior to the July 1, 2016, start date for the study period that had procurement actions such as task orders, extensions or renewals during the study period (but see next pages for further information details)
- ✓ Procurements for which another entity handled the procurement process

A. Contract Data Collection – Determining whether a procurement was made in the study period

Whether to Include or Exclude a Procurement Event

Keen Independent is examining purchases made between July 1, 2016, and June 30, 2023. When possible, Keen Independent seeks purchases made within this time period based on the date of contract award (or other official action such the day a PO was issued), even if that was on the last day of the study period (i.e., June 30, 2023, for this study).

- The award date helps Keen Independent know whether a contract equity program applied to the contract.
- When an entity conducts repeat disparity studies, there should be a way to focus on new activity since the end of the study period for the previous study.

Some Data for Some Older Procurements

Other decision rules for certain older procurements.

Activity on contracts awarded before the start of the study period. Sometimes a public entity has a contract in place for many years. As shown in Figure A-6, we request that public entities go beyond contract award date to determine whether an old contract had a "procurement action" within the study period, such as:

- Contract extensions or renewals;
- POs, task orders or work orders issued within the study period on a contract awarded before the start of the study period;
- Other types of procurement actions on old contracts that occurred in the study period and led to study period work.

For older contracts that have recent procurement actions, Keen Independent will seek data on the value of work performed or goods supplied related to that procurement action (not including what occurred before that action).

When there is no information on procurement actions for a lengthy contract. When public entities have indefinite quantity contracts awarded prior to the study period and no information on renewals, extensions or other actions in the study period, Keen Independent sometimes will include the payments for that procurement made in the study period.

Tips

- For prime contracts awarded in the study period, it is helpful to have information about new subcontracts or adjustments to the value of existing subcontracts made after the end of the study period.
- If a new contract equity program was introduced in the middle of the study period, additional information about whether the new program applied to a procurement is helpful.
- The discussion on this page applies to entities that have comprehensive, sophisticated procurement data. Other approaches apply when this is not the case. For example:
  - Sometimes the entity only has data on payments. If so, Keen Independent may examine all payments made to a business during the study period.
  - If an entity changed its purchasing information system in the middle of the study period, that can also create challenges in applying these decision rules.

A-6. Rules for including procurements based on dates

- ✓ Procurements awarded July 1, 2016–June 30, 2023
- ✓ Procurements initially made prior to July 1, 2016, that had procurement actions such as task orders, extensions or renewals during the study period (but see next pages for other details)

A. Contract Data Collection – Determining the value of a contract or subcontract

Keen Independent seeks information about individual procurements or discrete procurement actions. Each individual procurement (or new action during the study period on an old contract) would have a value.

Award Amounts for each Procurement

Award amount data requested. Keen Independent will request:

- ✓ The award amount for each procurement action (if an amount is identified by the entity);
- ✓ The dollar value for each subcontract; and
- ✓ As possible, the value associated with other procurement actions on a blanket purchase order or indefinite quantity contract.

Issues that complicate the use of award amounts as the true value of the contract to a business. Award amounts would provide the correct value for procurements for this type of analysis, except for issues including:

- Sometimes a contract is for an indefinite quantity of purchases (for example, purchases of a specific supply item). If the entity enters "$1,000,000" as the dollar value of this contract, but does not purchase anything off the contract, the actual utilization of the vendor is "$0."
- An on-call engineering contract is another example of a procurement action that might have a maximum value attached to the contract for which no work is guaranteed.

For these reasons, Keen Independent often requests contract and subcontract award amounts as well as payment amounts for contracts and subcontracts, if available.

Payments for each Procurement

Keen Independent will often request payment data for:

- ✓ Totals for each contract during the study period (aggregation of payments made for each procurement action, or if not known, totals for each calendar or fiscal year).
- ✓ Payments made to date for each contract awarded (or procurement action made) during the study period (including payments made after the end date of the study period).
- ✓ The payments made to date for each subcontract on a contract that was awarded during the study period (or procurement action during the study period).

Tips

- Both procurement data and payment data should identify the contract, PO or other procurement action to which they pertain. (Data sources should use the same numbering system so data from multiple sources can be linked.)
- Payment data should identify the company name of the firm being paid, ideally applying the vendor ID number used in procurement data.
- Sometimes an entity may readily have data for only the full value of a contract, which may have increased or decreased since the time of award. Those data are still useful.
- It might be difficult for certain entities to provide payments totaled by contract or fiscal year. In these cases, the entity can provide individual payments.
- Sometimes an entity does not maintain electronic data on individual procurements and only has payment data. Keen Independent can usually complete utilization analyses based on payment data alone.

A. Contract Data Collection – Other data fields requested for procurement and payment records

Figure A-7 provides a list of data fields that ideally will be included with each procurement or payment record.

Identifying Numbers and Names

Keen Independent seeks to identify individual procurements (or actions such as renewals or task orders). Keen Independent will often need to merge different data sources (such as procurement and payment data) or bring in information from another table based on identifiers such as a vendor number.

- ✓ Keen Independent requests that the procurement and the payment data have consistent identification numbers that tie the data to an individual procurement (if possible).
- ✓ A field with the name associated with the procurement is also helpful (e.g., "New Library Project").
- ✓ For task orders, work orders, subcontracts or other actions under an agreement, we will request that the entity provide the number for the individual action ("Task order #1") and the contract or other agreement number to which it is tied.

Procurement Action and Method

To the extent data are available:

- ✓ Keen Independent requests information indicating whether an entry pertains to a regular procurement action or whether it was an action pertaining to a larger agreement (specify "task order," etc.).
- ✓ Keen Independent will request information about how the procurement was made (especially noting whether it was sole source, emergency, cooperative purchase or another type of non-competitive purchase).

Type of Work Involved

Keen Independent codes the type of work involved in each procurement (including subcontracts). If available, we request:

- ✓ General information indicating whether the procurement is for construction, professional services, goods or other services (or other type of work).
- ✓ A numeric code designating the specific type of work (e.g., asphalt road paving). This might be a NAICS, SIC, NIGP, UNSPSC or other coding system (in which case, we request a codebook).
- ✓ A field providing a description of work or goods received under the procurement (including subcontracts, as possible).

A-7. Other fields to be included in the procurement and/or payment data

- ✓ Procurement identification such as contract number and name, PO number, task order or work order number, project number, etc.
- ✓ Date of award or procurement action
- ✓ Type of procurement action (contract, task order/work order, modification, renewal, etc.)
- ✓ Method of procurement (e.g., IFB, small purchase, RFP, sole source, emergency, coop, etc.)
- ✓ If data were not excluded based on federal funding, fields indicating whether federally funded (Yes/No) and, if possible, federal agency that is the source of funding (e.g., USDOT, EPA, HUD, etc.)
- ✓ Codes indicating type of work (e.g., accounting codes in payment data)
- ✓ Description of the type of work performed or goods received
- ✓ If equity program applied to the purchase (goals, preferences, other)
- ✓ Descriptive field about type of work (e.g., asphalt road paving)

A. Contract Data Collection – Notes on subcontract data

Keen Independent seeks the same types of information for subcontracts as it does for prime contracts and other procurements.

Data for all Subcontracts, not just Certified Firms

Keen Independent uses data about all subcontracts on a contract, not just those going to certified firms, so we request the same types of data for any subcontract. (This helps to ensure apples-to-apples analysis of subcontracts going to certified firms and non-certified companies.)

- ✓ Keen Independent requests that an entity provide as much information as possible on all subcontracts.
- ✓ Because of the type of work involved or contract value, many contracts typically do not involve subcontracts. Keen Independent will discuss those types of contracts with each entity.
- ✓ The Minnesota Department of Revenue collects data on subcontracts, which were used in the previous disparity study. Keen Independent is researching whether these data can be obtained for the 2025 Joint Disparity Study, and if so, the types of information available. This may augment the subcontract data available from each entity.

Data for Subcontracts Awarded to Date

- ✓ There may be subcontracts awarded after June 30, 2023, for contracts awarded during the study period. Keen Independent seeks information about these subcontracts.
- ✓ Keen Independent requests the full subcontract value (current) and data on all payments on a subcontract made to date.

Tips

- Sometimes public entity Procurement Departments do not collect or maintain any data about subcontractors on their projects. However, contract or project managers in end-user departments sometimes have this information, even if informally gathered.
- Sometimes labor hour reporting on construction contracts will identify the subcontractors involved. Entity staff receiving and monitoring these reports may be able to identify subcontractors for each project of a certain size.
- Large construction projects might have subcontractors that further subcontract work to other firms (second-tier subcontractors). There can be multiple tiers of subcontractors on very large construction projects. Keen Independent is interested in the same types of information on second-tier and other lower-tier subcontracts as it is on first-tier subcontracts. Keen Independent is also interested in any available data on large supply agreements or other work that are not formal subcontracts but provide goods or services to a prime contractor in a similar way as a subcontractor.
- Sometimes a public entity's vendor table will not have information for firms that only bid on or perform work as subcontractors. Information about subcontractors (such as address) might come from bid documents or other sources.
- Prime consultants' invoices can sometimes be a source of information on the subconsultants involved in a professional services contract. (Sometimes invoices are available as PDFs.)
- One reason for data that ties a subcontract to a prime contract is that Keen Independent subtracts subcontract values from the prime contract value to determine a "retained amount" for the value of work performed by the prime.

A. Contract Data Collection – Providing a vendor table

The study team seeks the name, address(es) and other information of firms in any vendor table, whether or not they received work during the study period.

What is a Vendor Table?

A "vendor table" is a database that has data such as vendor address when making a purchase or a payment. Procurement and payment databases sometimes just have a vendor ID and/or name in their records. The entity can pull in data such as a firm's address from the vendor table when making a payment, for example. (The vendor table is usually separate from the procurement or payment databases to allow it to be updated with new vendors or new vendor information.)
See Figure A-8 for the vendor table fields of interest.

Keen Independent will use information the entity has for each vendor to locate a company website, information in directories and other sources. Even somewhat dated information about a firm can be useful when matching the firm with these sources (such as former company name).

Tips

- All addresses and phone numbers available for a vendor can be useful to Keen Independent. Please provide all of them, even if it is not clear whether they are current.
- Sometimes entities recycle or reuse vendor ID numbers, associating multiple firms with a single identification number. The entity should alert Keen Independent if this is a possibility.
- Public entities periodically purge records for vendors that have not bid on or received contracts for many years. This is not an issue if vendor records remain for the procurements made during the study period. Sometimes Keen Independent will request an old backup version of a vendor table, however.

A-8. Fields for vendors in an entity's vendor data

- ✓ Vendor ID number
- ✓ Vendor name
- ✓ Address, city, state and zip code (sales, billing, headquarters and other registered addresses)
- ✓ Phone number(s)
- ✓ Email
- ✓ Website
- ✓ Types of work performed by the company and/or firm primary industry or other descriptor of work performed (if known)
- ✓ Contact name first and last name
- ✓ Vendor owner first and last name (if known)
- ✓ Certification status (if maintained in the vendor table)
- ✓ Vendor race/ethnicity (if maintained in the vendor table)

A. Contract Data Collection – Providing an interested firms list

Information about Firms Interested in an Entity's Procurement Opportunities

Some public entities provide a mechanism for companies to register to receive information about their procurements or other outreach. An entity might also maintain a list of companies that have downloaded bid opportunities. Either list is somewhat broader than a "bidders list" that pertains to companies that have bid on past opportunities.

We are interested in the broader list of "interested firms" that includes those that have not bid on a contract. Keen Independent seeks lists that are open to firms regardless of ownership or certification. A list limited to certified firms is less useful.

Keen Independent will combine the participating governmental units' lists when building a master database of firms to be contacted in the availability survey for the Joint Disparity Study.

If a public entity maintains such a list, Keen Independent asks that it be provided. We are especially interested in the information identified in Figure A-9.

Tips

- All addresses, phone numbers and emails available for an interested firm can be useful to Keen Independent. Please provide them all, even if it is not clear whether they are currently valid.
- A current list can be retrieved. The list can include firms added since June 30, 2023.
- Any information might be helpful, even if a public entity does not collect everything listed in Figure A-9.
- As with other data, Keen Independent requests these data in electronic form.

A-9. Fields for vendors in an entity's interested firms list

- ✓ Vendor ID number
- ✓ Vendor name
- ✓ Address, city, state and zip code (sales, billing, headquarters and other registered addresses)
- ✓ Phone number(s)
- ✓ Email
- ✓ Website
- ✓ Types of work performed by the company and/or firm primary industry or other descriptor of work performed (if known)
- ✓ Contact name first and last name
- ✓ Vendor owner first and last name (if known)
- ✓ Certification status (if known)
- ✓ Vendor race/ethnicity (if known)
- ✓ Vendor gender (if known))

Appendix B. Contract Data

Appendix B summarizes the contract data collection plans for each of the 16 participating entities for the 2025 Minnesota Joint Disparity Study as of May 2024.

Appendix B reviews data collection plans for the 16 participating entities in the following order:

- Minnesota Department of Administration (Admin);
- Minnesota Department of Transportation (MnDOT);
- Minnesota State Colleges and Universities;
- University of Minnesota;
- Metropolitan Airports Commission (MAC);
- Metropolitan Council (Met Council);
- Mosquito Control District;
- Hennepin County;
- Ramsey County;
- City of Bloomington;
- City of Brooklyn Park;
- City of Minneapolis;
- City of Rochester;
- City of Saint Paul;
- Hennepin Healthcare System; and
- Saint Paul Public Schools.

Topics discussed for each entity's contract data plans are:

- Procurement data;
- Vendor information;
- Interested vendor list; and
- Next steps, if applicable.

As the Keen Independent study team works with each entity, data plans will continue to evolve.

B. Contract Data Collection — Minnesota Department of Administration

The Minnesota Department of Administration (Admin) is in the process of providing needed contract data for the disparity study.

Contract Data

Admin uses StateWide Integrated Financial Tools (SWIFT) to track contract and payment data. Contracts may have multiple purchase orders (POs), and it may be the case that POs are not linked to a specific contract number.

Admin provided the following SWIFT data:

- Paid amount;
- Reporting business unit;
- Supplier;
- Fund;
- PO id;
- PO date;
- Category description;
- Commodity long description;
- Category ID;
- PO line description;
- Ship to description;
- Contract ID (field is blank);
- Supplier contract ID;
- PO documents; and
- Statement of purpose.

Admin will provide additional information:

- Vendor ID number;
- Contract max amount; and
- Contract beginning date.

Admin will also provide a description of the "Fund" field.

Construction Contract Data (Access database)

Admin provided an Excel file that tracks Mn Department of Administration construction projects.
The file may have the following information:

- Project number;
- Project description;
- Prime name;
- Project amount;
- If the contract has a contract goal, part of a sheltered market, or was a set-aside project.
- Vendor ID number;
- Contract max amount; and
- Contract beginning date.

Subcontract Data

Admin will provide the following information:

Viva STARS. Prime contractors use the Viva Stars platform to report payments to certified subcontractors on construction contracts above $500,000.

B. Contract Data Collection — Minnesota Department of Administration

Admin explained that for construction projects, prime contractors must submit a "Subcontractor Plan" with their bid, including the subcontractor's name and type of work. Admin will confirm if the dollar amount is included, too. However, these forms can be hardcopies and are not centralized.

Vendor Information

Admin will provide a list of firms that have received payment from the state. This information includes a unique vendor ID number, name, and address. A vendor may have multiple addresses.

Interested Vendors Lists

Admin will provide the following information.

SWIFT list. Firms registered in SWIFT "Supplier Portal" to receive bid notifications.

QuestCDN. Admin staff member Doug Heeschen obtained QCDN data for Admin, MAC, Met Council and MnDOT maintenance. Data include:

- Firm name;
- Firm address; and
- Firm email address.

Admin will provide a new file with phone number.

Next Steps

Admin will provide Keen Independent:

- Updated SWIFT data;
- Star VIVA data;
- SWIFT vendor file; and
- QCDN data with phone number.

B. Contract Data Collection — Minnesota Department of Transportation

The Minnesota Department of Transportation (MnDOT) is in the process of providing needed contract data for the disparity study.

Contract Data

MnDOT uses Contract Agreements Auditing Tracking System (CAATS) and American Association of State Highway and Transportation Officials (AASHTOWare) system for contract management. Both systems are linked to the Minnesota Statewide Integrated Financial Tools (SWIFT) system for payment data.

In addition, MnDOT uses SWIFT to track payments on all purchases, including construction and professional/ technical services contracts. CAATS and AASHTOWare draw on SWIFT data for information about construction and professional/technical services contracts.

CAATS. MnDOT implemented CAATS in 2016 to manage all contracts except highway construction contracts. Data include information about both prime contracts and subcontracts. MnDOT provided the following data for contracts in CAATS:

- Contract number (seven-digit contract numbers);
- Contract/amendment type;
- District (for work location);
- SP number (contract identifier);
- Vendor ID;
- Vendor name;
- Vendor role (prime, sub, interested (bidders));
- Award amount;
- Awarded date;
- Executed date;
- Subcontractor amount;
- Contract work code;
- Contract work description;
- Funding source;
- Contract type;
- TGB and/or VET goals; and
- Vendor certification.

MnDOT provided payments to prime contractors in a separate table. For this study, MnDOT is reviewing CAATS data for consistency regarding award and executed dates and payments.

Certain enhancement to CAATS were made in 2019. TGB and/or VET goal data might not be consistently available in CAATS before 2019.

B. Contract Data Collection — Minnesota Department of Transportation

AASHTOWare. MnDOT uses AASHTOWare to manage horizontal construction and some small vertical construction contracts such as rest-stops. Large building projects are managed by the Minnesota Department of Administration (Admin).

MnDOT explained that AASHTOWare data may include:

- Contract number (six-digit contract numbers);
- Prime vendor number;
- Prime vendor name;
- Subcontractor number;
- Paid amount;
- District;
- Contract type;
- TGB and VET goals;
- Fund type;
- Award date;
- Contract execution date;
- Prime contract awarded type; and
- Prime contract awarded amount.

MnDOT is reviewing AASHTOWare data to determine whether this system consistently identifies subcontractors and payments to subcontractors.

Note that all professional technical services contracts over $5,000 should have included the TGB/VET preference in the bid package.

SWIFT. MnDOT purchases of goods and other services are tracked in SWIFT. SWIFT payments do not need to be related to a contract. MnDOT provided the following SWIFT data:

- Accounting date;
- District (project location);
- Project SP number;
- Vendor ID;
- Vendor name;
- Voucher;
- Invoice number;
- Voucher amount;
- Voucher description;
- SWIFT contract number;
- MnDOT contract number;
- Contractor type description;
- Contract max amount;
- Contract description;
- PO ID;
- PO description; and
- Vendor certification.

The contracts in SWIFT may also be included in CAATS and AASHTOWare data. Contracts can be identified by project SP number, MnDOT contract number and vendor name.

B. Contract Data Collection — Minnesota Department of Transportation

Vendor Information

MnDOT provided a vendor table with the following information:

- Vendor ID;
- Vendor name;
- Vendor address, city, state, zip code; and
- Vendor certification.

Interested Vendors Lists

Possible sources of interested vendors lists for MnDOT include the following:

- **SWIFT vendor registration.** Firms interested in bidding on a construction contract should be in the SWIFT system managed by the Minnesota Department of Administration.
- **Bid Express.** Firms interested in bidding on a construction contract can register with Bid Express. MnDOT will ask the Contracting Team for this list.

At the time Keen Independent prepared this data assessment, MnDOT had not provided this information.

Next Steps

MnDOT will submit updated CAATS and AASHTOWare data.

Keen Independent will confirm that all vendors in CAATS, AASHTOWare and SWIFT are in the vendor data provided.

MnDOT will submit a list of interested vendors for SWIFT and AASHTOWare/Construction.

B. Contract Data Collection — Minnesota State Colleges and Universities

Minnesota State Colleges and Universities (Minnesota State) is providing needed contract data for the disparity study.

Contract Data

Minnesota State uses the JAGGAER system to track goods and services payments and eBuilder to track construction contracts.

JAGGAER system. In 2016, Minnesota State implemented the JAGGAER system ("marketplace") to track payments for construction contracts $250,000 and below, some professional services, goods and other services.

Minnesota State provided purchase order data from April 2016 through February 2024. Data include:

- PO number;
- Institution;
- Vendor name;
- Remit to address, City, State;
- Transaction description;
- Data shipping;
- Vendor ID;
- Date transaction;
- Data contract number (contract number feature introduced in 2018);
- Data total spend; and
- Data invoice spend.

eBuilder. Minnesota State Design and Construction uses e-Builder system to track prime construction and design projects.

Minnesota State provided construction and professional services contracts and purchase orders unrelated to a contract data from July 2016 through June 2023. Data include:

- Institution;
- Commitment number;
- PO number;
- Vendor ID;
- Vendor name
- Vendor address, city, state and zip code;
- Contract type;
- Commitment description;
- Date created;
- Commitment value;
- Actuals paid;
- Remaining to be paid;
- Financial type; and
- Vendor TGB certification.

B. Contract Data Collection — Minnesota State Colleges and Universities

Vendor Information

Minnesota State will provide a vendor list from SWIFT. Vendors should register with SWIFT before receiving a Minnesota State contract.

Interested Vendors List

JAGGAER and QUESTCDN can serve as sources of interested vendors.

JAGGAER list. Firms can register in JAGGAER to receive notifications for contract opportunities. Minnesota State submitted the following data:

- JAGGAER Indirect Vendor ID;
- Vendor name;
- Vendor number;
- Vendor email address.

Minnesota State will add vendor address, city and state and phone number, as available.

QUESTCDN. Vendors pay a fee to download construction bid documents. QUESTCDN administers bid documents.

Minnesota State can provide this information.

Next Steps

Vendor information. Minnesota State will provide a vendor list from SWIFT. Vendors should register with SWIFT before receiving a Minnesota State contract.

QUESTCDN. Minnesota State will provide a list of vendors that paid a fee to download construction bid documents.

Minnesota State Facilities will provide a list of federally funded projects.

Additional subcontract information for construction contracts will be obtained via IC134 data and subcontract data for professional services contracts will be obtained from primes and subconsultants directly, as needed.

B. Contract Data Collection — University of Minnesota

The University of Minnesota (UMN) is in the process of providing needed contract data for the disparity study.

Contract Data

UMN uses multiple procurement and payment systems to track purchases and payments.

eSourcing. UMN uses an eSourcing tool called MBid to track bids, requests for proposals and purchases of services.

Jaggaer. UMN uses Jaggaer to track contracts in PeopleSoft. Purchasing contract data includes:

- Contract number;
- Renewal;
- Contract name;
- Supplier number;
- Supplier name;
- Start date;
- End date;
- End date/renewals;
- Contract type;
- Estimated annual value of contract (this is different from total contract amount and it is not always populated); and
- Version type (original, renewal).

Contract data do not consistently match with contract codes in PeopleSoft payment data.

PeopleSoft. PeopleSoft is a financial system used to process payments. PeopleSoft is not linked to eSourcing or Jaggaer. Therefore, it is not possible to link contract numbers with payments.

UMN provided the following PeopleSoft data files.

"UofM PO Detail" and "U Market PO Detail" files. Files contain payments to purchase orders during the study period (July 1, 2016, through June 30, 2023). Multiple purchase orders may be related to a contract number. However, contract information (contract code or contract type) may not always be included in the dataset.

The file may include contracts awarded before 2016, but with payments during the study period. Data include:

- Supplier code;
- Supplier name;
- Invoice line amount;
- Invoice date;
- Fiscal year;
- Invoice number;
- Invoice due date;
- Payment date;
- Voucher number;
- PO description;
- PO number;
- PO line amount,
- Contract type;
- Contract code (supplier number, contract type, contract number, start date and end date);

- RRC (location of wok);
- Department (location of work);
- Fund classification;
- Supplier certification; and
- Supplier address.

"UofM AP NonPO Detail" files. Files contain payments to invoices not related to a contract or purchase order. Data include:

- Supplier code;
- Supplier name;
- Invoice line amount;
- Invoice date;
- Fiscal year;
- Invoice number;
- Invoice due date;
- Payment date;
- Voucher number;
- RRC (location of wok);
- Department (location of work);
- Fund classification;
- Supplier certification; and
- Supplier address.

UMN explained that NonPO Details can be aggregated at the voucher level. Note that expenditures in TRIRIGA will be included in this dataset.

UofM Card Detail. This file presents purchase card transactions over $5,000. These P-card expenditures represent just 3.1 percent of total UMN expenditures, so they will not be included in the analysis.

Exclusions from PeopleSoft data. UMN excluded from PeopleSoft:

- Federally funded procurements;
- Students (as suppliers);
- Revenues;
- Legal settlements, travel and insurance;
- Taxes;
- Accounts receivable; and
- Utilities: electricity, water and sewage.

TRIRIGA. In 2020, UMN started using TRIRIGA to track facilities and capital project-related contracts. Prior to TRIRIGA, UMN used a combination of Unifier, MAPS and COMPASS to track these contracts.

TRIRIGA standard contracts. These are contracts awarded by UMN and tracked in TRIRIGA. Data include:

- Project number;
- Contract number (a project number may include multiple contracts);
- Vendor ID;
- Vendor number;
- Purchase type (construction, A&E, goods, services);
- Contract date;
- Original contract amount;
- Current contract amount;
- Construction start date;
- Substantial completion date;
- PeopleSoft voucher number; and
- Amount invoiced to date.

B. Contract Data Collection — University of Minnesota

TRIRIGA Purchase Orders. Data show purchase orders not related to a standard contract.

- Vendor ID;
- Vendor name;
- PO number;
- PO description;
- PO date;
- PO total amount;
- PO order type;
- PO voucher number; and
- PO voucher amount.

UMN will provide TRIRIGA data at the voucher level. Voucher numbers can be matched with UofM NonPO data file.

Project number can provide location of work (campus).

UMN will research how to identify federally funded projects.

SmartComp. UMN Office of Supplier Diversity uses SmartComp to track payments to certified firms in contracts with a TGB goal. The SmartComp system was implemented in 2018 and may have some contracts that were awarded in 2016.

SmartComp data include:

- Project type;
- Project name;
- Project number (may match with TRIRIGA);
- Prime contractor;
- Start date;
- Contract amount;
- Overall commitment;
- Subcontractors name;
- Subcontractor zip code;
- Subcontractor phone, email;
- Subcontractor paid amount;
- Subcontractor certification; and
- Work performed by subcontractor.

B. Contract Data Collection — University of Minnesota

Vendor Information

UMN provided vendors in PeopleSoft. Data include:

- Supplier code;
- Supplier name;
- Supplier address, city, state, zip code;
- Ownership (corporation, sole proprietor); and
- Certification as obtained from Supplier i.o.

Interested Vendors List

UMN provided a list of firms registered in MBid to receive bid opportunities notifications (interested suppliers). Data include:

- Supplier name;
- Ownership (corporation, sole proprietor);
- Supplier address, city, state and zip code;
- Supplier phone number and email; and
- Supplier race/gender as reported.

Next Steps

- **PeopleSoft purchase orders related to a contract.** When this information is available, Keen Independent may aggregate data by contract code.

  In instances that contract code is not available, data may be aggregated by vendor and by year.

- **PeopleSoft payments unrelated to a contract.** Keen Independent may aggregate data by voucher number.

  Keen Independent will identify contracts in TRIRIGA and PeopleSoft payments unrelated to a contract.

- Keen Independent will also identify facilities and equipment contracts awarded before 2021 in PeopleSoft (since TRIRIGA was implemented in 2021).

- Other construction subcontract data will be obtained from IC134 and subcontract data for professional services contracts will be obtained from prime consultants and subconsultants directly, as needed.

B. Contract Data Collection — Metropolitan Airports Commission

The Metropolitan Airports Commission (MAC) is in the process of providing needed contract data for the disparity study.

Contract Data

MAC uses different procurement systems, such as its E1 System, to store contract data and related information.

Data system and structure. MAC uses a combination of contracts, blanket orders and POs to track procurement actions.

A procurement will typically be associated with a contract and POs issued for it. However, there are cases of a contract without any POs and POs without any contract.

MAC procurement data are anticipated to include the following fields:

- Payment amount;
- Award amount;
- Vendor name; and
- TGB race/gender, etc.

Information related to the types of work performed for a procurement are not readily available within MAC's systems.

Targeted Group Business (TGB) Program project data. MAC will also be able to provide data related to projects that had TGB requirements applied. Data related to these procurements will include the same fields previously mentioned.

Subcontract Data

MAC does not actively maintain subcontract information. However, data may be available related to its TGB subcontractors.

Vendor Information

MAC does not have an active vendor list. MAC does have a list of companies that have submitted a W9 form to the MAC.

Interested Vendor List

MAC does not actively maintain an interested vendor's list. However, its Airport Development Department may have a list of firms that have previously signed up for procurement notifications on their website (these data may include contact name and email address).

Next Steps

MAC will submit data relevant to the study.

B. Contract Data Collection — Metropolitan Council

Metropolitan Council (Met Council) is in the process of providing needed contract data for the disparity study.

Contract Data

Met Council uses PeopleSoft to track procurement and payment data and the Contract Management System to track payments to subcontractors on Met Council contracts with a Metropolitan Council Underutilized Business Program (MCUB goal).

PeopleSoft includes contracts and purchase orders. Some purchase orders may not be related to a contract number.

PeopleSoft contract data. Met Council provided a file with contracts awarded from July 1, 2016, through June 30, 2023. The file includes:

- Date executed;
- Contract number;
- Contract title;
- Contract status;
- Division;
- Unit;
- Contract type;
- Contract value (original contract value);
- CIM (estimated value from contract initiation memo);
- Contract end date;
- Funding;
- Amendment end date; and
- Contractor (vendor name).

The contract value pertains to the original value. It does not include amendments or change orders.

Met Council provided a file with contract amendments and will provide a file showing change orders from the e-Builder system.

Keen Independent will obtain vendor information from purchasing orders and payment reports.

PeopleSoft purchase orders. The file contains purchase orders during the study period. It may include purchase orders related to a contract. Purchase order data include:

- Purchase order;
- Supplier ID;
- Supplier;
- PO amount;
- PO date;
- PO status;
- PO line description; and
- Fund code.

B. Contract Data Collection — Metropolitan Council

PeopleSoft payments. The file includes payments made from January 2016 through May 2024 on purchase orders and contracts. Payment data include:

- Vendor ID;
- Vendor name;
- Voucher ID;
- Invoice number;
- Contract ID;
- Monetary amount;
- PO ID;
- Account;
- Fund;
- Project ID;
- PO amount total;
- Description; and
- To charge date.

PeopleSoft MCUB payments. The file includes payments to MCUB firms on contracts with an MCUB goal during the study period. MCUB payment data include:

- Contract ID;
- Reports to (prime contractor);
- Contract title;
- DBE name;
- Contract value;
- Pay requested;
- Pay requested final;
- Pay made final date;
- MCUB goal; and
- Funding.

B. Contract Data Collection — Metropolitan Council

Vendor Information

Met Council provided a list of active, inactive and unapproved vendors (unapproved are new vendors or that will be inactivated). Data include:

- Supplier ID;
- Supplier name;
- Supplier address, city, state, zip code;
- Supplier email address;
- Supplier phone number; and
- Supplier certifications.

Interested Vendors Lists

Vendors pay a fee to download construction bid documents. QUESTCDN administers bid documents. Minnesota Department of Administration will provide this information for Met Council.

Next Steps

- Keen Independent will also discuss the total contract value of contracts in the MCUB database.
- Additional subcontract information for construction contracts will be obtained via IC134 forms and subcontractor information for professional services contracts from primes and subconsultants directly, as needed.
- Met Council will also provide construction change order reports from its e-Builder construction management system back to the system implementation (approximately 2019). Data will include contract number, change order amount and funding source or differentiator.

B. Contract Data Collection — Metropolitan Mosquito Control District

The Metropolitan Mosquito Control District (MMCD) is in the process of providing needed contract data for the disparity study.

Contract Data

In 2018, MMCD adopted a new financial system to track payments to vendors. Data may not be readily available before 2018.

Data system and structure. MMCD procurement data include:

- Payment amount;
- Payment date;
- Vendor name; and
- Vendor ID.

Subcontract Data

Mosquito Control rarely has a contract that would involve subcontractors and does not maintain information for any subcontracts.

Vendor Information

MMCD has a vendor list used for annual audit.

Interested Vendor List

MMCD does not have an interested bidder list.

Next Steps

MMCD will provide Keen Independent complete data relevant to the study.

B. Contract Data Collection — Hennepin County

Hennepin County in the process of providing needed contract data for the disparity study.

Contract Data

Hennepin County uses PeopleSoft to track procurement and payment data. PeopleSoft includes contracts and purchase orders, some of which may not be related to a contract number.

In 2018, the County transitioned from BizTrak to B2Gnow to track payments to subcontractors on contracts with a targeted inclusion practice.[1] The County tracks all subcontractors (CERT and non-CERT certified).[2]

PeopleSoft (APEX) data. The County provided prime and payment sample data for contracts with expiration dates after June 30, 2016.

Contract sample data include:

- Contract number;
- Supplier ID;
- Supplied name;
- Description;
- Industry classification (NAICS and NIGP);
- Approval date;
- Max amount; and
- Remaining contract balance.

Payment sample data include:

- Vendor name
- Contract number;
- Invoice date;
- Voucher ID;
- Purchase order number;
- PO description;
- Contract expended amount;
- Fund code;
- Department code;
- Account code; and
- Contract not to exceed amount.

BizTrak. BizTrak data include:

- Bid number;
- Job number;
- Business name;
- AA classification code;
- Contract title;
- Award amount;
- Start date;

[1] Setting goals for Small Business Enterprises (SBE), Small Minority Business Enterprises (SMBEs), Small Women Business Enterprises (SWBE)) and incentivized inclusion of ESBE and SBE subcontractors.

[2] The County recognizes firms certified as SBE, SMBE, SWBE and ESBE through the Central (CERT) Program.

- Subcontractor name;
- Subcontractor tier (first or second tier);
- Subcontractor award amount; and
- Subcontractor payment amount.

B2Gnow. B2Gnow sample data include:

- Contract number;
- B2Gnow contract ID;
- Contract title;
- Contract value;
- Diversity goal;
- Vendor name;
- Vendor type;
- Vendor ID;
- Vendor address, city, state and zip code;
- Vendor phone and email;
- Vendor original contract value; and
- Payments to subcontractor.

Vendor Information

The County provided a list of vendors. The file includes:

- Supplier ID;
- Supplier name;
- Address;
- City;
- State;
- Zip code;
- Email; and
- Phone number.

The supplier ID number can be matched with PeopleSoft supplier vendor files.

Interested Vendor List

The County provided a list of firms registered in the Supplier Portal to receive bid notifications (bidders list). The file includes:

- Company ID;
- Company name;
- Phone number;
- Email address;
- Address;
- City;
- State; and
- Zip code.

B. Contract Data Collection — Hennepin County

Next Steps

- The County is currently reviewing PeopleSoft files for additional contract and purchase order information. The County will provide following files:
  - **Contracts awarded during the study period.** The file will include contract number, vendor, contract description, contract amount, industry classification (NAICS and NIGP), current contract amount and payments to date (from inception to date).
  - **Purchase orders unrelated to a contract during the study period.** The file will include purchase order number, vendor, purchase order description, industry classification (NAICS and NIGP), purchase order amount and payments to date (from inception to date).
- The County is also reviewing BizTrak and B2GNow data. The county will send contracts with payments during the study period.
- The County will exclude delegation of authority agreements with the Minnesota Department of Administration and contracts with non-profits.
- The County will also identify procurements that use federal funds.
- Additional subcontract information for construction contracts will be obtained via Minnesota Department of Revenue IC134 data and subcontract data for professional services contracts will be obtained from primes and subcontractors directly, as needed.

B. Contract Data Collection — Ramsey County

Ramsey County is providing needed procurement data for the disparity study.

Procurement Data

The County uses PeopleSoft to track payment data. The County's open data portal retrieves data from the PeopleSoft system.[1] The study team accessed a sample of data. The data include purchase orders, some of which may not be related to a contract number.

Fields in the sample data include:

- Transaction and voucher numbers;
- Supplier ID;
- Supplier name;
- Description;
- Payment date;
- Payment amount;
- Account code and name;
- Department and division codes and names; and
- Supplier classification (e.g., "government" or "non-profit").

Vendor Information

Keen Independent retrieved sample supplier data from the County open data portal and compiled additional vendor data from the PeopleSoft procurement data. These data include the following fields:

- Supplier ID;
- Supplier name;
- CERT certification; and
- Supplier classification.

Supplier ID can be matched with PeopleSoft supplier vendor files.

Interested Vendor List

The County maintains a list of interested bidders using DemandStar. Keen Independent requested a database with all users that had registered for County procurement opportunity notifications through DemandStar.

Next Steps

- The County is reviewing PeopleSoft for information related to funding source, contract or purchase order ID and award date.
- The County is investigating additional sources of descriptions for the types of goods or services procured.
- Subcontract information for County construction contracts will be obtained via IC134 data.

[1] https://opendata.ramseycounty.us/County-Administration/Expenditures-Data/4htu-nawa/data_preview

B. Contract Data Collection — City of Bloomington

The City of Bloomington ("City") is in the process of providing needed procurement data for the disparity study.

Procurement Data

The City uses an ERP system to track payment data. The City also uses Laserfiche to store contract information. The City is in the process of consolidating these two sources of City procurement information.

ERP software. The City's ERP system includes all payments to vendors and non-businesses. These data include the following fields:

- Unique payment identification;
- Unique vendor identification;
- Payment amount;
- Payment date;
- Category of work;
- Department making the purchase; and
- A project indicator.

Laserfiche system. The City maintains a list of contracts and contract amendments in its Laserfiche system. Fields relevant to the study (such as contract award date, award amount, funding source and type of procurement) may be retrieved from these PDF files.

Data consolidation sample. The City shared a sample of payment data from the ERP system consolidated with procurement information from the Laserfiche system. These consolidated data include the following fields:

- Unique contract and purchase order identification;
- Contract number;
- Funding source;
- Award date;
- Award amount;
- Payment amount;
- Vendor identification;
- Vendor name;
- Description of good or service procured; and
- Type of procurement (e.g., contract or cooperative purchase).

B. Contract Data Collection — City of Bloomington

Vendor Information

The City maintains a database of vendors that performed work for the City during the study period. These data include the following fields:

- Vendor name;
- Address;
- Telephone number;
- Number of employees;
- Contact person; and
- Type of vendor (e.g., business or government).

Interested Vendor List

The City maintains a list of vendors that have expressed interest in learning about City procurement opportunities through the Bids and Tenders platform. These data include:

- Business name;
- Contact person;
- Email address;
- City;
- Most recent login; and
- Certification status and classification.

B. Contract Data Collection — City of Brooklyn Park

The City of Brooklyn Park is in the process of providing necessary contract data for the 2025 Minnesota Joint Disparity Study.

Contract Data

The City of Brooklyn Park uses a decentralized procurement process. Departments lead individual purchasing efforts to supply their needs. Purchase orders (POs) are not required for every purchase and there is no final approval from the Finance Department on those procurements.

Procurement data features. The City is providing data on payments made during the study period for its procurements. There are:

- PO numbers for some items (there are no contract ID numbers in the data); and
- CIP numbers for capital improvement projects and capital equipment purchases (and may also have a project number).

Capital improvement projects. The City has some data on what was approved for capital improvement projects (CIPs) and capital equipment plans (CEPs) and each CIP/CEP will include a summary of the total dollar amount to be spent.

Subcontract information. The City does not actively maintain subcontract information. Very few City construction projects involve subcontracts. (Keen Independent may be able to obtain IC134 data for City construction contracts during the study period.)

Vendor Information

The City of Brooklyn Park maintains an active vendor list that includes unique vendor identification numbers as well as contact information. Keen Independent will receive this information.

Interested Vendor List

The City of Brooklyn Park does not maintain a list of interested vendors.

Next Steps

The City of Brooklyn Park will provide Keen Independent with a refined version of the procurement data.

B. Contract Data Collection — City of Minneapolis

The City of Minneapolis (City) is in the process of providing needed contract data for the disparity study.

Contract Data

The City of Minneapolis uses PeopleSoft to track procurement and payment data and B2GNow to track payments to subcontractors on City contracts with a Small and Underutilized Business Program (SUBP).

PeopleSoft includes contracts and purchase orders. Some purchase orders may not be related to a contract number. The City started using B2GNow in 2019 to track subcontracts (SUBP and non-SUBP certified).

Purchase orders with contract data. City data include contracts over $5,000 and related purchase orders with an expended amount during the study period. Therefore, the data may include POs paid during the study period for contracts awarded before 2016). The data exclude contracts that use money provided by MnDOT. Data fields include:

- Contract number;
- Contract begin date;
- Purchase order number;
- Purchase order date;
- Fund number (can identify federally funded contracts);
- Supplier number;
- Supplier name;
- Category;
- Contract description;
- Original contract amount;
- Current contract amount;
- Purchase order amount and; and
- Expended amount.

The data can be aggregated at contract number level and can be matched with B2GNow data using contract number.

B2GNow data can be used to identify procurements with SUBP goals.

Purchase orders with no contract. This data file includes purchase orders not related to a contract. Data include:

- Purchase order number;
- Purchase order date;
- Fund number (can identify federally funded contracts);
- Supplier number;
- Supplier name;
- Category;
- Description; and
- Merchandise amount.

Data in this file can be aggregated at the purchase order number level.

B. Contract Data Collection — City of Minneapolis

B2Gnow data. The B2Gnow data file contains prime contract and subcontract information for City contracts with a SUBP goal. The City started using B2Gnow in 2019. These data may include some but all contracts with an equity goal during the portion of the study period prior to 2019.

B2GNow tracks Community Planning and Economic Development (CEPD) construction contracts. These contracts are not included in PeopleSoft and have a different contract ID number. PeopleSoft data include CEPD developer expenditures (e.g. real state or title companies). Data fields include:

- Contract number;
- Contract title;
- Vendor ID;
- Business name;
- Vendor type (prime/sub);
- Original contract value;
- Start date;
- End date;
- Goal type;
- Subcontract amount; and
- Payments total.

P-cards expenditures. City P-card expenditures total about $2.1 million per year and represent less than 1 percent of total City expenditures. P-card expenditures will not be included in the analysis.

Vendor Information

The City provided a list of vendors that have received a payment from the City (supplier list). The file includes:

- Supplier ID;
- Supplier name;
- Address;
- City;
- State; and
- Zip code.

The supplier ID number can be matched with PeopleSoft supplier vendor files.

Interested Vendor List

The City provided a list of firms registered in eSupplier to receive bid notifications (bidders list). The file includes:

- Supplier ID;
- Supplier name;
- Address;
- City;
- State; and
- Zip code.

Next Steps

- The City is working with PeopleSoft files to provide additional contract and purchase order information (confirming expenditure amounts and other fields related to matching contract files with the B2GNow file).

- For B2GNow data, the City will include subcontractor addresses.

- For B2GNow data before 2019, the City is collecting paper versions or LCPTracker data to obtain subcontract information for contracts with SUBP goals that are not in the B2Gnow database.

  Additional subcontract information for construction contracts will be obtained via IC134 data (from the Minnesota DOR) and subcontract data for professional service contracts will be obtained from primes and subconsultants directly, as needed.

- The City will also provide phone number and/or email addresses for firms in eSupplier (interested vendors).

B. Contract Data Collection — City of Rochester

At the time of this report, City of Rochester ("City") is providing needed procurement data for the disparity study.

Procurement Data

The City uses Oracle to track payments on all City procurements. The City also uses Laserfiche to manage and store contract PDFs, which contain additional contract information relevant to the study. Rochester manually maintains two spreadsheets: a City Bid Projects spreadsheet with contracts awarded during the study period and a Projects with Targeted Bidders 2020-2024 spreadsheet.

Oracle. Keen Independent retrieved data on all City payments since January 2015 from the City's OpenGov data portal.[1] The retrieved Oracle data include the following fields:

- Unique invoice identification number;
- Payment amount;
- Payment date;
- Vendor identification; and
- Description of the procured good or service.

Laserfiche system. The City maintains a list of contracts and contract amendments in its Laserfiche system. Fields relevant to the study (such as contract title, work description, award date, award amount, funding source and type of procurement) may be retrieved from these PDF files. Keen Independent requested a sample of contract PDFs for review.

City Bid Projects spreadsheet. The City maintains a list of public works contracts awarded between 2017 and 2023. These data include the following fields:

- Bid date and award date;
- Project or contract number;
- Project title;
- Project description; and
- Award amount and City engineer's estimate.

Projects with Targeted Bidders 2020-2024. Rochester manually tracks a list of contracts with Targeted Business Goals program elements. Rochester is providing this list to the study team.

1 https://rochestermn.opengov.com/data/#/11308/query=CFAF88D18FC8FD27AC825BE103C8994D&embed=n

B. Contract Data Collection — City of Rochester

Vendor Information

Rochester delivered a database of all vendors active with the City since January 2015. These data contain the following fields:

- Vendor identification number;
- Vendor name;
- Vendor address;
- Total amount paid;
- Contact;
- Vendor telephone number.

Next Steps

- The City is in the process of addressing Keen Independent requests for clarification and additional information.
- The City will provide a sample of contract PDFs from the Laserfiche system for Keen Independent review.
- Subcontract information for construction contracts will be obtained via IC134 data and subcontract data for professional services contracts will be obtained from primes and subconsultants directly, as needed.

B. Contract Data Collection — City of Saint Paul

The City of Saint Paul (City) is in the process of providing needed contract data for the disparity study.

Contract Data

The City of Saint Paul uses Infor Enterprise Resource Planning (Infor) for procurement data and B2Gnow to track payments to subcontractors on certain City contracts with a Vendor Outreach Program (VOP) goal.

Purchase orders issued. The City provided a file including all purchase orders from January 2014 through May 2024. Data include:

- Company (City division);
- Purchase order number (purchase order number can be the same for different City divisions);
- Purchase order date;
- Vendor number,
- Calculate total amount (purchase order amount); and
- Purchase order status.

The City of St. Paul will provide contract data. Contracts are related to purchase orders, but not all purchase orders are related to a contract.

The City will provide procurement data at the contract level since it is not possible to export a contract number to a purchase order file.

Payment to purchase orders. The City provided a file with payments to purchase orders from July 2016 through April 2024. Data include:

- Company (City division);
- Vendor number;
- Vendor name;
- Invoice number;
- Invoice amount;
- Invoice date;
- Due date;
- Transient payment date;
- Transient payment number;
- Transient payment amount; and
- External purchase order number.

Contract file. The City provided a contract file with effective dates from November 2009 through September 2024. Data include:

- Contract number;
- Vendor name;
- Status;
- Effective date;
- Expiration date;
- Supplier number and name;
- Buyer name; and
- Proposed total contract amount.

B. Contract Data Collection — City of Saint Paul

B2Gnow. The City of Saint Paul Department of Human Rights and Equal Opportunity uses B2Gnow to track payments to subcontractors on contracts over $175,000 that have a VOP business inclusion goal. The City includes all subcontractors, CERT- and non-CERT certified, in those data.

B2Gnow includes information on housing and economic development projects with business inclusion goals.

Vendor Information

The City provided a list of vendors that have received a payment from the City. The file includes:

- Vendor name;
- Vendor City;
- Vendor State;
- Vendor zip code; and
- Vendor email address.

Interested Vendors Lists

The City provided a list of firms registered in the City's supplier portal to submit bids. The file includes:

- Supplier ID;
- Supplier name;
- Supplier City;
- State;
- Supplier email address; and
- Supplier phone number.

Next Steps

City will provide additional information on contract data including identifying federally funded contracts and payments to contracts.

B. Contract Data Collection — Hennepin Healthcare System

Hennepin Healthcare System ("Hennepin Health" or "System") is in the process of providing needed contract data for the disparity study.

Contract Data

Hennepin Health uses PeopleSoft and Supplier.io data tracking software systems for procurement tracking. They also used B2Gnow for a portion of the study period to track its diverse spend.

PeopleSoft data. Hennepin Health provided sample payment data for procurements in Fiscal Year 2024, aggregated per vendor. The study team requested that Hennepin Health provide data with amounts aggregated by purchase order (PO) number. The PeopleSoft data include the following fields:

- Unique payment identification;
- Unique vendor identification;
- Payment amount;
- Payment date (we can request the earliest payment date per PO);
- Category of work performed (using UNSPSC, but we will need to check on whether for the whole PO or for the payment/voucher);
- Department making the purchase; and
- Account code.

Supplier.io. This system tracks total payments made to Hennepin Health vendors. This system includes vendor identification and contact information (address, phone, email, etc.) as well as an internal business classification (including minority-owned, woman-owned, small business, and others). The supplier.io data also include the total payments made to the vendor for the study period.

B2Gnow. Hennepin Health recently began using B2Gnow to track subcontractor participation on its large construction projects. Some of these projects may have been awarded during the study period.

Vendor Information

Hennepin Health provided a database of vendors that did business for the System during the study period. The file includes:

- Vendor identification;
- Vendor name;
- Address; and
- Email.

The vendor identification number can be matched with PeopleSoft supplier vendor files. Hennepin Health does not maintain a list of firms that have expressed interest in doing business with the System.

Next Steps

- Hennepin Health is currently reviewing PeopleSoft and Supplier.io files for additional procurement and vendor information.
- The System will provide a funding source key to identify procurements with federal funds using account codes and other codes in the PeopleSoft data.
- Hennepin Health will provide B2Gnow data for any contracts that were awarded during the study period.
- Additional subcontract information for construction contracts will be obtained via IC134 data and subcontract data for professional services contracts will be obtained from primes and subconsultants directly, as needed.

B. Contract Data Collection — Saint Paul Public Schools

Saint Paul Public Schools ("SPPS" or "District") is providing needed contract data for the disparity study.

Contract Data

SPPS uses PeopleSoft and Procore data tracking software systems for procurement and contract payment tracking.

PeopleSoft data. SPPS provided sample payment data for purchase orders in Fiscal Year 2023. The PeopleSoft data include the following fields:

- Unique payment identification;
- Voucher identification;
- Invoice identification;
- Unique vendor identification;
- Vendor name;
- Payment date;
- Payment amount;
- Product code;
- Description of good or service procured; and
- Funding source.

Procore data. SPPS provided sample payment data for large ($5 million or higher value) construction contracts in Fiscal Year 2023. These Procore data include the following fields:

- Unique purchase order;
- Contract number;
- Unique vendor identification;
- Vendor name;
- Payment amount;
- Payment date;
- Description of good or service procured; and
- Funding source.

Vendor Information

SPPS provided a database of vendors that did business for the District during the study period. The file includes:

- Vendor identification;
- Vendor name;
- Address;
- Telephone number; and
- Contact person.

The vendor identification number can be matched with PeopleSoft and Procore data files.

B. Contract Data Collection — Saint Paul Public Schools

Interested Vendors Lists

SPPS tracks interested firms through the online platform, Getall. This system tracks all firms that have submitted bids or proposals online. These data include firm name and contact information (including phone and email address).

Next Steps

- SPPS will provide PeopleSoft and Procore data for the remainder of the years in the study period.
- SPPS will deliver the list of interested vendors from the Getall system for study records.
- Additional subcontract information will be obtained via IC134 and/or from primes and subcontractors directly, as needed.

APPENDIX C. Availability Data Collection Plan — Survey methods

Keen Independent will collect information from firms about their availability for contracts with public sector entities through telephone surveys and other methods. Appendix C further explains this process, including:

- Survey methods;
- Business listings;
- NAICS and SIC codes included in the survey;
- Development of the survey instrument;
- Establishments successfully contacted;
- Establishments in the availability database;
- Analysis of potential non-response bias;
- Response reliability;
- Analysis of potential limitations; and
- Survey instrument.

Availability Survey Methods

Keen Independent will offer multiple methods for survey participation.

Online surveys. For firms on the interested firms list that have email addresses, the State of Minnesota Department of Administration ("Admin") will distribute a request to complete the online availability survey through the eGovDelivery list service. Keen Independent retained Customer Research International (CRI) to conduct telephone surveys with listed businesses and manage the online component of the survey.

In the 2017 Minnesota Joint Disparity Study ("2017 Study"), the online survey successfully obtained completed surveys from some firms but not the majority of the contact list. Some firms did not respond to the online survey, but the primary reason was that Keen Independent did not have an email address for them.

Telephone surveys. After completing the online phase of the survey, CRI will conduct telephone surveys with listed businesses.

- Firms will be contacted by telephone. CRI will attempt to contact each firm with a phone number at different times of day and different days of the week to maximize the opportunity to successfully reach the company. In the 2017 Study, CRI made at least four attempts to reach a business. Keen Independent expects the number of attempts will be four or more in the 2025 Study.

- Survey sponsorship. CRI will begin by saying that the call is made on behalf of Minnesota state agencies, colleges and universities as well as cities, counties, the Airport, Met Council and other public entities in the Twin Cities and Rochester. Keen Independent will state that the purpose of the survey is to add to state and local governments' lists of firms interested in working with public entities in Minnesota.

- Survey period. The surveys will begin in fall 2024 and be completed by the end of the year.

Other Avenues to Complete a Survey

If a company is not able to complete a survey on the telephone, business owners can complete the survey online. Any interested firm that is not reached by email or telephone can also complete an online survey.

C. Availability Data Collection — Business listings

Firms contacted in the availability surveys will come from data maintained by participating entities and from Dun & Bradstreet.

Data on Interested Firms from Participating Entities

At this point in time, Keen Independent is identifying lists of firms potentially interested in participating entity contracts. These lists will be combined before launching the survey. Current examples include the following.

- The SWIFT system. Admin will provide Keen Independent with the database of vendors registered on the StateWide Integrated Financial Tools (SWIFT) system.
- Lists of firms that have received bid documents. In the 2017 Study, Admin provided a list of firms that had registered and/or downloaded bid documentation via Franz Reprographics. QUESTCDN now administers bid documents for Admin and some of the other participating entities. We have requested these data.
- Other interested firms lists from individual entities. Keen Independent has requested that each participating entity provide any other lists they maintain concerning firms that have expressed an interest in their contracts.

Dun & Bradstreet

The study team will purchase a list of firms from Dun & Bradstreet (D&B) Hoovers' database within relevant types of work that have a location in Minnesota (and perhaps certain counties in surrounding states, depending on the analysis of the geographic distribution of entity spending for each industry). D&B will provide phone numbers for most of these businesses. Keen Independent will search online data for any missing phone numbers.

D&B maintains the largest commercially available database of U.S. businesses. The study team used D&B listings to augment the survey list in the 2017 Study. Keen Independent will attempt to exclude any listings that are government agencies or not-for-profit organizations.

The subindustries to be included in the survey will be determined after reviewing participating entities' prime contract and subcontract dollars for different types of work. D&B classifies types of work by North American Industry Classification System (NAICS) and Standard Industrial Classification (SIC) codes.

Combining Lists Prior to Survey

Keen Independent will attempt to consolidate information when a firm has multiple listings across these data sources. The combined list will likely exceed 60,000 businesses after removing companies outside the relevant geographic market area for the study.

Keen Independent will not draw a sample of those firms for the availability analysis; rather, the study team will attempt to contact each business identified through the online and telephone surveys and other methods. Some courts have referred to similar approaches to gathering availability data as a "custom census."

C. Availability Data Collection — Business listings

The study team will likely not know the race, ethnicity or gender of the business owner when contacting a business establishment. Obtaining that information is a key component of the survey. Areas of survey questions will include:

- Identification of purpose. CRI will acknowledge the State and other participating entities (in general) as the survey sponsors and describe its purpose as identifying companies interested in a wide range of public entity contracts.
- Verification of correct business name. CRI will confirm that the business reached is the business sought out.
- Contact information. CRI will compile contact information for the establishment and the individual who completes the survey.
- Identification of main lines of business. CRI will ask businesses to describe their main line of business. For construction and professional services firms, respondents will then select from a list of the multiple types of work that their firm performed.
- Sole location or multiple locations. CRI will ask respondents if their companies have other locations and whether their establishments are affiliates or subsidiaries of other firms. (Keen Independent will merge responses from the same firm from multiple locations.)
- Qualifications and interest in public sector work. CRI will ask about businesses' qualifications and interest in work with public agencies in Minnesota, and for construction and professional services firms, will ask whether they are interested in prime contracts and/or subcontracts.
- Geographic areas. Businesses will be asked whether they can do work in six different geographic areas in Minnesota:
  - Twin Cities metropolitan area;
  - Central Minnesota (such as St. Cloud or Willmar);
  - Northeast (such as Duluth);
  - Northwest (such as Brainerd or Moorhead);
  - Southeast (such as Rochester); and
  - Southwest (such as Mankato or Worthington).
- Largest contracts. CRI will ask businesses to identify the dollar range of the largest contract or subcontract on which they had bid or had been awarded in Minnesota during the past eight years.
- Ownership. Businesses will be asked if 51 percent or more of the firm is owned and controlled by certain groups (e.g., women and/or minorities, by group).
- Business background, revenue and employee size. CRI will ask about the year the firm started, average annual revenue over the past two years, and number of employees. (This will allow identification of "small businesses.")
- Potential barriers in the marketplace. CRI will ask questions about potential barriers to starting and expanding a business or achieving success in their industry in Minnesota (in the last eight years).

  CRI will then ask whether respondents would be willing to participate in an in-depth interview.

C. Availability Data Collection — Establishments in the availability database

Analysis of Survey Response Rates

Keen Independent will provide CRI a database likely exceeding 60,000 individual firms for availability surveys (after removing duplicate listings from the data).

Keen Independent will analyze the final disposition of each of the attempted surveys.

Some listings will be non-working or wrong numbers. After taking that into account, the study team will be able to report the success rate for reaching the listed businesses.

Response rates in similar surveys have dropped since the 2017 Study, especially after COVID-19. We expect it to still be high relative to other types of social science research.

Analysis of Categories of Responses

Keen Independent will also examine the disposition of the businesses CRI successfully contacts, and which firms are included in the availability database.

- Establishments not interested in discussing availability for public sector work. Of the businesses that the study team successfully contacts, Keen Independent expects that many will indicate that they are not interested in discussing their availability for public sector work, or report they were not qualified or interested in public sector work.

  In Keen Independent's experience, those types of responses are often firms that do not perform relevant types of work. Some respondents reported that they had already completed a survey but had not.

- No longer in business or don't do related work. Some respondents will likely indicate that their companies are no longer in business or are found to not perform work related to participating entity contracts.

- Non-businesses. Some responses might not be included in the final availability database because the organizations indicated that they were not a for-profit business. Examples of non-businesses included nonprofits, government agencies and private residences with no associated business.

C. Availability Data Collection — Analysis of potential non-response bias

Analysis of non-response bias considers whether businesses that were not successfully surveyed are systematically different from those that were successfully surveyed and included in the final data set. There are opportunities for non-response bias in any survey effort.

The study team will consider the potential for non-response bias due to:

- Research sponsorship;
- Language barriers; and
- Industry differences in reaching respondents.

Keen Independent will also compare response rates for firms identified in D&B records as MBE/WBEs versus other firms.

C. Availability Data Collection — Analysis of response reliability

Business owners and managers will be asked questions that may be difficult to answer, including questions about average annual revenue and employment.

Keen Independent will explore the reliability of survey responses in several ways. For example:

- Keen Independent will review data from the availability surveys in light of information from other sources. This includes data on the race/ethnicity and gender of the owners of TGB-, DBE-, WBE-, MBE-certified businesses that will be compared with survey responses concerning business ownership.
- Keen Independent will compare survey responses about the largest contracts that businesses won during the past eight years with actual contract data.
- For firms indicating a high number of types of work performed, the study team will review responses.
- Keen Independent will review responses of all firms indicating a relatively large bid capacity (contracts bid or awarded of more than $5 million).

C. Availability Data Collection — Analysis of other potential limitations

There are limitations to this approach to collecting availability data. Keen Independent will analyze and discuss these potential issues.

Using D&B Lists

Keen Independent will purchase D&B business listings for Minnesota as one source of firms to be reached in the availability surveys. D&B provides the most comprehensive private database of business listings in the United States. D&B does not require firms to pay a fee to be included — it is completely free (and is separate from its credit rating services). Even so, the database will not include all establishments:

- There may be a lag between formation of a new business and inclusion in D&B listings.
- One way for D&B to identify firms is legal filings concerning an entity (such as registering with a Secretary of State or obtaining a business license), therefore any businesses operating without being legally registered might not be in D&B's lists.
- Some businesses providing work related to participating entity projects might not be classified in those industries in the D&B data and might not be included in the survey list. Keen Independent will investigate, for example, why some firms receiving work from participating entities are not included in the survey list and whether the firms are out of business or are no longer interested in public sector work.

Selection of Specific Subindustries

Keen Independent will identify subindustries primarily using federally defined 6-digit NAICS codes as well as SIC codes to build a business list from D&B. These codes can be imprecise, which potentially leaves some related businesses off the contact list.

Also, Keen Independent focused on the subindustries that represented the largest area of State and participating entities' spending. Firms in NAICS codes that represent little spending will not be included in the D&B list.

Companies Reporting that They Do Not Perform Related Work or Were Not Interested in Discussing Work with the State or other Public Entities

Many firms contacted in the availability survey may indicate that they do not perform types of work related to public entity procurements or are otherwise not interested in performing public sector work. This is to be expected as Keen Independent will be very broad when preparing the initial list of firms to survey.

C. Availability Data Collection — Analysis of other potential limitations

Not a Count of All Businesses Available for Public Entity Contracts

The purpose of the availability surveys is to provide precise, unbiased estimates of the percentage of firms available for public contracts that are owned by certain groups. Keen Independent does not attempt to develop a list of *every* firm potentially available for *every* type of procurement. The research will appropriately focus on firms in the geographic market area in subindustries most relevant to participating entity procurement.

- Firms in subindustries that comprise a small portion of total dollars of participating entity procurement will not be included in the survey. Because Keen Independent calculates availability benchmarks on a dollar-weighted basis, inclusion of these firms is not important in developing overall availability results.
- The study team will only purchase D&B data for firms in the Minnesota market area as the study focuses on types of purchases primarily made from within the market area. This method is consistent with court decisions that have considered this issue.
- Not all firms on the list of businesses will complete surveys, even after repeated attempts to contact them.

Therefore, the availability analysis will not provide a comprehensive listing of every business that could be available for all types of participating entity procurement and should not be used in that way.

NAICS codes sometimes represent broad definitions of the types of work vendors can perform. Therefore, Keen Independent's compiled list of available firms should not be used as a single source of firms available for highly specialized contracts.

Federal courts have approved similar approaches to measuring availability that Keen Independent uses in this study (see Appendix N).

The United States Department of Transportation's (USDOT's) "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program" also recommends a similar approach to measuring availability for agencies implementing the Federal DBE Program.[1]

[1] Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program. Retrieved from https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise

C. Availability Data Collection — Survey instrument (email construction version)

Minnesota Joint Disparity Study
Fax/Email Survey

The State of Minnesota and cities, counties and other public entities in the state are reaching out to companies interested in working on a wide range of construction, professional services, goods and other services contracts. The information developed in these surveys will add to their lists of companies interested in working with public entities across Minnesota.

Survey Instructions

When you have finished the survey, please:

1) **Scan completed survey and email to surveys@cri-research.com; or**
2) **Fax completed survey to 512-353-3696.**

If you have any questions, please contact:

Keen Independent Study Team
Email: JointMNDisparityStudy2025@keenindependent.com
602-704-0125

Z5. What is the name of your business?

_____

X5. What would you say is the main line of business of your company?

_____

A1. During the past eight years, has your company bid on work with public entities in Minnesota?

☐ 1=Yes

☐ 2=No

☐ 98=Don't know

A2. During the past eight years, has your company been awarded work with public entities in Minnesota?

☐ 1=Yes

☐ 2=No

☐ 98=Don't know

A3. Is your company qualified and interested in working with public agencies in Minnesota?

☐ 1=Yes

☐ 2=No

☐ 98=Don't know

A4. Is your company qualified and interested in working as a prime, as a subcontractor or both?

☐ 1=Prime only

☐ 2=Sub only

☐ 3=Both

☐ 98=Don't know

C. Availability Data Collection — Survey instrument (email construction version)

C1. Which of the following types of work does your firm perform related to construction? Select all that apply.

INSERT TYPES OF WORK [TO BE COMPLETED]

E1. In rough dollar terms, in the past eight years, what was the largest contract or subcontract your company was awarded, bid on, or submitted quotes for? **TO BE REFINED**

- ☐ 1=$100,000 or less
- ☐ 2=More than $100,000 up to $500,000
- ☐ 3=More than $500,000 up to $1 million
- ☐ 4=More than $1 million up to $5 million
- ☐ 5=More than $5 million up to $10 million
- ☐ 6=More than $10 million
- ☐ 97=Not applicable
- ☐ 98=Don’t know

C. Availability Data Collection — Survey instrument (email construction version)

The next questions are about the ownership of the business.

F1. A business is defined as woman-owned if more than half — that is, 51 percent or more — of the ownership and control is by women. By this definition, is your firm a woman-owned business?

☐ 1=Yes

☐ 2=No

☐ 98=Don't know

F2. A business is defined as minority-owned if more than half — that is, 51 percent or more — of the ownership and control is African American, Asian American, Hispanic American, Native American or another minority group. By this definition, is your firm a minority-owned business? **DRAFT, TO BE REFINED**

☐ 1=Yes

☐ 2=No **[SKIP TO G1]**

☐ 98=Don't know **[SKIP TO G1]**

F3. Would you say that the minority group ownership is mostly African American, Asian American, Hispanic American or Native American? **DRAFT, TO BE REFINED**

☐ 1=African American
(This includes persons having origins in any of the Black racial groups of Africa.)

☐ 2= Asian American
(This includes persons who have origins in any of the original peoples of the Far East, Southeast Asian, or the Indian subcontinent or the Pacific Islands.)

☐ 3=Hispanic American
(This includes persons of Mexico, Puerto Rico, Cuba, Central or South American, regardless of race.)

☐ 4=Native American
(This includes persons which maintain cultural identification through tribal affiliation or community recognition of the original peoples of the North American continent; or those who demonstrate at least one-quarter decent from such groups.)

☐ 5=Other group (Please specify): _____

☐ 98=Don't know

C. Availability Data Collection — Survey instrument (email construction version)

The next questions are about the background of the business.

G1. About what year was your firm established?

_____

☐ 98=Don't know

G2. Is this the sole location for your business, or do you have offices in other locations?

☐ 1=Sole location

☐ 2=Have other locations

☐ 98=Don't know

G3. Is your company a subsidiary or affiliate of another firm?

☐ 1=Independent **[SKIP TO G5]**

☐ 2=Subsidiary or affiliate of another firm

☐ 98=Don't know **[SKIP TO G5]**

G4. What is the name of your parent company?

_____

☐ 98=Don't know

G5. About how many employees did you have working out of just your location, on average, over the past three years? (This includes employees who work at your location and those who work from your location.)

_____

☐ 98=Don't know

G6 Think about the annual gross revenue of your company, considering just your location. Please estimate the annual average for the past three years.

☐ 1=Up to $0.5 million

☐ 2=More than $1 million up to $2.25 million

☐ 3= More than $2.25 million up to $5 million

☐ 4= More than $5 million up to $9.5 million

☐ 5= More than $9.5 million up to $19 million

☐ 6= More than $19 million up to $24 million

☐ 7= More than $24 million up to $34 million

☐ 8= More than $34 million up to $45 million

☐ 9= More than $45 million

☐ 98=Don't know

G7. **[SKIP IF YOUR FIRM DOES NOT HAVE OTHER LOCATIONS]**

About how many employees did you have, on average, for all of your locations over the past two years?

(Number of employees at all locations should not be fewer than at just your location.)

_____

☐ 98=Don't know

G8. **[SKIP IF YOUR FIRM DOES NOT HAVE OTHER LOCATIONS]**

Think about the annual gross revenue of your company, for all your locations. Please estimate the annual average for the past five years.

(Revenue at all locations should not be less than at just your location.)

☐ 1=Up to $0.5 million

☐ 2=More than $1 million up to $2.25 million

☐ 3= More than $2.25 million up to $5 million

☐ 4= More than $5 million up to $9.5 million

☐ 5= More than $9.5 million up to $19 million

☐ 6= More than $19 million up to $24 million

☐ 7= More than $24 million up to $34 million

☐ 8= More than $34 million up to $45 million

☐ 9= More than $45 million

☐ 98=Don't know

Finally, we're interested in whether your company has experienced barriers or difficulties associated with business start-up or expansion, or with obtaining work. Think about your experiences in the past eight years in Minnesota as you answer these questions.

H1a. Has your company experienced any difficulties in obtaining lines of credit or loans?

☐ 1=Yes

☐ 2=No

☐ 97=Does not apply

☐ 98=Don't know

H1b. Has your company obtained or tried to obtain a bond for a project or contract?

☐ 1=Yes

☐ 2=No **[SKIP TO H1d]**

☐ 97=Does not apply **[SKIP TO H1d]**

☐ 98=Don't know **[SKIP TO H1d]**

H1c. Has your company had any **difficulties** obtaining bonds needed for a project or contract?

☐ 1=Yes

☐ 2=No

☐ 97=Does not apply

☐ 98=Don't know

H1d. Have you had any difficulty in being prequalified for work?

☐ 1=Yes

☐ 2=No

☐ 97=Does not apply

☐ 98=Don't know

H1e. Have any insurance requirements on contracts presented a barrier to bidding?

☐ 1=Yes

☐ 2=No

☐ 97=Does not apply

☐ 98=Don't know

H1f. Has the large size of projects presented a barrier to bidding?

☐ 1=Yes

☐ 2=No

☐ 97=Does not apply

☐ 98=Don't know

H1g. Has your company experienced any difficulties learning about bid opportunities with public entities in Minnesota?

☐ 1=Yes

☐ 2=No

☐ 97=Does not apply

☐ 98=Don't know

H1h. Has your company experienced any difficulties learning about bid opportunities in the private sector?

☐ 1=Yes

☐ 2=No

☐ 97=Does not apply

☐ 98=Don't know

H1i. Has your company experienced any difficulties learning about subcontracting opportunities with prime contractors?

☐ 1=Yes

☐ 2=No

☐ 97=Does not apply

☐ 98=Don't know

H1j. Has your company experienced any difficulties obtaining final approval on your work from inspectors or prime contractors?

☐ 1=Yes

☐ 2=No

☐ 97=Does not apply

☐ 98=Don't know

H1k. Has your company experienced any difficulties receiving payment from public entities in a timely manner?

☐ 1=Yes

☐ 2=No

☐ 97=Does not apply

☐ 98=Don't know

H1l. Has your company experienced any difficulties receiving payment from prime contractors in a timely manner?

☐ 1=Yes

☐ 2=No

☐ 97=Does not apply

☐ 98=Don't know

H1m. Has your company experienced any difficulties receiving payment from other customers in a timely manner?

☐ 1=Yes

☐ 2=No

☐ 97=Does not apply

☐ 98=Don't know

H1n. Has your company experienced any difficulties with brand name specifications or other restrictions on bidding?

☐ 1=Yes

☐ 2=No

☐ 97=Does not apply

☐ 98=Don't know

H1o. Has your company experienced any difficulties obtaining supply or distributorship relationships?

☐ 1=Yes

☐ 2=No

☐ 97=Does not apply

☐ 98=Don't know

H1p. Has your company experienced any competitive disadvantages due to the pricing you get from your suppliers?

☐ 1=Yes

☐ 2=No

☐ 97=Does not apply

☐ 98=Don't know

H2. This is an opportunity for the State of Minnesota and other participating state and local governments to hear directly from members of the business community, like you. What other comments would you like them to hear?

☐ 1=Yes [Please provide your thoughts in the box below.]

☐ 97=Nothing/None/No comments

☐ 98=Don't know

H3. We would like to hear more from you about conditions in the local marketplace or doing business with public entities. Can we mark you as interested in a follow-up interview?

☐ 1=Yes

☐ 2=No

☐ 97=Does not apply

☐ 98=Don't know

C. Availability Data Collection — Survey instrument (email construction version)

Just a few last questions.

I1. What is your full name?

_____

I2. What is your position at the firm?

☐ 1=President

☐ 2=Owner

☐ 3=Manager

☐ 4=CFO

☐ 5=CEO

☐ 6=Assistant to Owner/CEO

☐ 7=Sales manager

☐ 8=Office manager

☐ 9=Receptionist

☐ 88=Other (Please specify): _____

I3. What mailing address could the State of Minnesota or other public entities use to contact you?

Street address: _____

City: _____

State: _____

ZIP: _____

I4. What phone number could they use to contact you?

_____

I5. What e-mail address could the State of Minnesota or other public entities use to contact you?

_____

Survey Instructions

When you have finished the survey, please:

1) **Scan completed survey and email to surveys@cri-research.com; or**
2) **Fax completed survey to 512-353-3696.**

Thank you for your time. This is very helpful.

APPENDIX D. Plan for Disparity Analysis for Entity Contracts — Introduction

As discussed in the preliminary legal framework for this study (see Appendix N), an inference of discrimination may be made if there is evidence of a disparity between a public entity's actual utilization of a group of firms and the level of utilization that might be expected given the availability of that group of firms to perform those contracts. The disparity analyses for each entity will follow what has been reviewed and approved in past court decisions.

Utilization Analyses

Keen Independent will prepare utilization analyses that estimate the number and dollars of contracts and subcontracts going to different groups of businesses, by major industry.

Methodology for Developing Dollar-Weighted Availability Benchmarks

As described in the Minnesota Joint Disparity Study Contract Exhibit C: Specifications, Duties, and Scope of Work, Keen Independent will conduct a contract-by-contract availability analysis based on the specific types and sizes of participating entity contracts and subcontracts for July 1, 2016–June 30, 2023, and dollar-weight those results.

- The study team will use the availability database developed in this study (see Appendix C of this report), including information about the types of work a firm performs, the size of contracts or subcontracts it bids, where it is able to perform work, and the corresponding ownership group.
- To determine availability for a contract or subcontract, Keen Independent first identifies and counts the firms indicating that they perform contracts and subcontracts of that type of work of that size in that location.
- The study team will then calculate the share of firms available for that contract (by race/ethnic/gender group).
- Once availability has been determined for every entity contract and subcontract, Keen Independent will weight the availability results based on the share of total entity contract dollars that each contract represents.

Figure D-1 provides an example of this dollar-weighted analysis.

D-1. Example of an availability calculation for a contract

A hypothetical example is for a subcontract for highway, street and bridge construction ($108,939) on a FY2020 contract. To determine the number of MBE/WBEs and majority-owned firms available for that subcontract, the study team would identify businesses in the availability database that:

a. Were in business at that time;
b. Indicated that they performed highway, street and bridge construction;
c. Indicated qualifications and interest in such subcontracts for public entities;
d. Reported bidding on work of similar or greater size in the past eight years; and
e. Reported being able to perform work in that region.

Assume there were 21 businesses in the availability database that met those criteria, and of those businesses, 10 were MBE/WBEs. Therefore, MBE/WBE availability for the subcontract would be 48 percent (10/21 = 47.6%).

In this example, the contract weight might be $108,939 ÷ $52 million = 0.2% (equal to its share of total procurement dollars). Keen Independent would make this calculation for each prime contract and subcontract, weight results, and sum results to calculate the benchmark.

APPENDIX D. Plan for Disparity Analysis for Entity Contracts — Introduction

Disparity Analyses to be Performed

Keen Independent's disparity analyses for participating entity contracts will compare (a) the percentage of contract dollars going to a group with (b) benchmarks indicating the share of dollars that might be expected to go to that group given the relative availability of firms in that group given the types, sizes and locations of an entity's prime contracts and subcontracts.

Industries. Based on preliminary assessments of relevant industries, Keen Independent anticipates preparing utilization, availability and disparity analyses for each of the following industries for each participating entity:

- Construction;
- Professional services;
- Goods; and
- Other services.

Disparity analysis will examine overall results within an industry as well as subsets of contracts, especially those for which no race- and gender-conscious programs apply. These industry groupings may be refined by the conclusion of Phase 1 of the study, or after completion of worktype coding of participating entity contracts in Phase 2.

Groups. Keen Independent will perform utilization, availability and disparity analyses, as possible, for groups for which any preference in state or local government contract equity programs could necessitate legal review under the strict scrutiny or intermediate scrutiny standards. For example, these full disparity analyses will be needed for firms owned by people of color (by racial and ethnic group) and for white woman-owned companies. Definitions of racial and ethnic groups are under consideration at this step in the study process.

Keen Independent may not need to perform disparity analyses regarding the participation of other types of firms in entity contracts. For example, preliminary legal analysis indicates that strict scrutiny and intermediate scrutiny do not apply to inclusion of firms owned by veterans or persons with disabilities in public sector contract equity programs. As appropriate and possible, Keen Independent will provide utilization analyses for these types of groups, but not produce full disparity analyses. Keen independent also plans to review marketplace conditions for such groups, as possible with existing data.

Special emphasis on contracts without race- or gender-conscious programs applied. Keen Independent's disparity analyses might reveal no underutilization of minority- and women-owned firms when a participating entity's race- or gender-conscious programs apply.

- Such a result might simply show that programs are effective.
- Analysis of contracts where no MBE/WBE-type programs apply will be most instructive as to the need for remedial measures.

Also, Keen Independent will not include entities' USDOT-funded contracts in the disparity analyses, as the Federal DBE Program applies to these contracts.

Analysis of trends. Keen Independent will examine the extent to which utilization, availability and disparity results for participants in the 2017 Minnesota Joint Disparity Study changed over time based on results from the 2025 Minnesota Joint Disparity Study. This will include whether any disparities found in the 2017 Study widened or narrowed and the effectiveness of any entity programs on that utilization over this time period. (Contractor will be able to perform these comparisons because results of the 2025 Study will be based on the same methodology and data sources as the 2017 Study.)

D. Plan for Disparity Analysis for Entity Contracts — Disparity indices

To conduct the disparity analysis, Keen Independent will compare the actual utilization of businesses owned by a group (for example, Hispanic American-owned firms) with the percentage of contract dollars that businesses in that group might be expected to receive based on their availability for that work.

To make utilization and availability directly comparable, results are expressed as percentages of the total dollars associated with a particular set of contracts. Keen Independent will then calculate a "disparity index" to easily compare utilization and availability results among groups and across different sets of contracts.

- A disparity index of "100" indicates an exact match between actual utilization and what might be expected based on availability of businesses for that group for a specific set of contracts (often referred to as "parity").
- A disparity index of less than 100 may indicate a disparity between utilization and availability, and disparities of less than 80 in this report are described as "substantial."[1]

Figure D-2 describes how disparity indices are calculated.

D-2. Calculation of disparity indices

The disparity index provides a straightforward way of assessing how closely actual utilization of an MBE/WBE group matches what might be expected based on its availability for a specific set of contracts. With the disparity index, one can directly compare results for one group to that of another group, and across different sets of contracts. Disparity indices are calculated using the following formula:

$$\frac{\text{\% actual utilization} \times 100}{\text{\% availability}}$$

For example, if actual utilization of white woman-owned firms (WBEs) on a set of procurements was 1 percent and the availability of WBEs for those procurements was 2 percent, then the disparity index would be 1 percent divided by 2 percent, which would then be multiplied by 100 to equal 50. In this example, WBEs would have received 50 cents of every dollar that they might be expected to receive based on their availability for the work.

[1] Some courts deem a disparity index below 80 as being "substantial" and have accepted it as evidence of adverse impacts against MBE/WBEs. For example, see *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F. 3d 1187, 2013 WL 1607239 (9th Cir. April 16, 2013).; *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Eng'g Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994). Also see Appendix B for additional discussion.

D. Disparity Analysis for City Contracts — Sampling

Testing for statistical significance relates to testing the degree to which a researcher can reject "random chance" as an explanation for any observed differences. Random chance in data sampling is the factor that researchers consider most in determining the statistical significance of results.

The study team attempts to reach each firm in the relevant geographic market area identified as possibly doing business within relevant subindustries, mitigating many of the concerns associated with random chance in data sampling as they may relate to Keen Independent's availability analysis.

The utilization analysis attempts to represent a complete "population" of contracts. (The study team attempts to obtain data for every relevant entity contract above a minimum size, not just a sample of those contracts.)

Therefore, one might consider any disparity identified when comparing overall utilization with availability to be "statistically significant."

Figure D-3 explains how Keen Independent calculates the level of statistical confidence in the utilization and availability results. As outlined on the next page, the study team also uses a sophisticated statistical simulation tool to further examine statistical significance of disparity results.

D-3. Confidence intervals for availability and utilization measures

Keen Independent expects to successfully reach tens of thousands of business establishments in the availability telephone survey — a number of completed surveys that might be considered large enough to be treated as a "population," not a sample.

However, if the results are treated as a sample, the representation of availability for a particular group of firms is typically accurate within 1 to 3 percentage points (overall availability before dollar-weighting). By comparison, many survey results for proportions reported in the popular press are accurate within +/- 5 percentage points. (Note that Keen Independent applies a 95 percent confidence level and the finite population correction factor when determining these confidence intervals.)

Because Keen Independent will attempt to collect data for all participating entity procurements during the study period, no confidence interval calculation is expected to apply for the utilization results. (In other words, sampling of utilization data will not be an explanation for any observed disparity.)

D. Disparity Analysis for City Contracts — Monte Carlo analysis

There were many opportunities in the sets of prime contracts and subcontracts for firms with ownership by different groups to be awarded work. Some contract elements involved large dollar amounts and others involved only a few thousand dollars.

Approach

Monte Carlo analysis is a useful tool for the study team to use for statistical significance testing in the disparity study because there are many individual chances at winning an entity's prime contracts and subcontracts during the study period, each with a different payoff.

Keen Independent will use Monte Carlo simulation to determine whether chance in contract and subcontract awards could explain the disparities observed for minority- and woman-owned firms, overall, when examining each participating entity's procurements.

Figure D-4 describes Keen Independent's use of Monte Carlo analysis.

D-4. Monte Carlo analysis

The study team conducts the Monte Carlo analysis by examining individual contract elements. For each element, Keen Independent's availability database provides information about businesses available to perform that contract element, based on type of work, contractor role and contract size.

The study team assumes that each available firm has an equal chance of "receiving" that contract element. The Monte Carlo simulation then randomly chooses a business from the pool of available businesses to "receive" that contract element.

The Monte Carlo simulation repeats the above process for all other elements in a particular set of contracts. The output of a single Monte Carlo simulation for all contract elements in the set represents simulated utilization of MBEs or WBEs for that set of contract elements.

The entire Monte Carlo simulation is then repeated 10,000 times. The combined output from all 10,000 simulations represents a probability distribution of the overall utilization of MBEs and utilization of WBEs if contracts were awarded randomly based on the availability of businesses in local study industries.

The output of the Monte Carlo simulations represents the number of runs out of 10,000 that produces a simulated utilization result that is equal or below the observed utilization in the actual data for MBE/WBEs and for each set of contracts. If that number was less than or equal to 250 out of the 1,000 simulation runs (i.e., 2.5% of the total number of runs), then the disparity index is considered statistically significant at the 95 percent confidence level (using a two-tailed test).

APPENDIX E. Plan for Quantitative Analysis of Marketplace Conditions — Overview

Keen Independent will prepare comprehensive quantitative analyses of marketplace conditions for different groups of businesses in Minnesota, the Minneapolis-St. Paul-Bloomington metropolitan statistical area (MSA) and Rochester MSA (or other geographic areas as appropriate). These analyses will help determine whether there is evidence that disparities exist for particular racial, ethnic and gender groups in the market area as well as for other groups as appropriate (for example, veterans and persons with disabilities).

Keen Independent will analyze changes over time, including exploring any effects of the COVID-19 pandemic.

The discussion in this section summarizes the information under Task 2.7 of the Scope of Work that is part of 2025 Minnesota Joint Disparity Study ("2025 Study") Exhibit C: Specifications, Duties, and Scope of Work attached to the contract for this study (see that section of Exhibit C for further detail).

Entry and Advancement in Study Industries as Employees

Keen Independent will examine U.S. Census Bureau data to determine whether there is underrepresentation of certain groups as employees in the study industries in Minnesota, the Twin Cities metro area, and other geographic areas as appropriate.

Business Ownership

Also using Census data for the most recent time period, Keen Independent will determine whether there are disparities in the rates of business ownership for certain groups in the study industries. Regression analyses will be able to statistically control for other personal characteristics to determine any effect of factors such as race, ethnicity, gender, veteran status and physical disability. Analyses will be prepared for multiple market area definitions.

Access to Capital

Keen Independent will prepare a quantitative analysis of access to capital and credit for different groups of individuals and firms. Keen Independent will analyze home ownership and mortgage lending, as home equity is often an important source of capital to start and expand businesses.

Data sources will include:

- Keen Independent's availability survey of business owners in the relevant geographic area;
- U.S. Census data for home ownership;
- Federal Financial Institutions Examination Council's Home Mortgage Disclosure Act data; and
- Existing published research concerning access to capital, employment, advancement and business ownership.

Success of Businesses

Some of the analyses of business success planned for the study are also outlined in Scope of Work that is part of the 2025 Study Exhibit C: Specifications, Duties, and Scope of Work. For example, Keen Independent will analyze whether the success of firms since the 2017 Minnesota Joint Disparity Study ("2017 Study") differs by race, ethnicity or gender of the business owner.

The research will include regression analyses for business earnings using the most recent U.S. Census Bureau data for business owners in different groups. Keen Independent will also examine data on business closures for different time periods.

E. Plan for Quantitative Analysis of Marketplace Conditions — Potential new subtask about groups

Keen Independent outlines a potential new subtask for Task 2.7-Quantitative analysis of marketplace conditions. This task would consider which groups to include in the study research and how they are defined (including whether disaggregation of groups is possible).

Groups Included in the RFP for the Disparity Study

The Minnesota Department of Administration ("Admin") issued a Request for Proposals for the study in fall 2023 that specified certain groups as the focus of the study. For example, the Summary of the Scope of Work in the RFP indicated that the study should determine whether there is underutilization of minority- and woman-owned businesses in participating entities' contracts. It also requests analyses of the utilization of veteran-owned businesses and businesses owned by persons with a substantial physical disability.

Keen Independent's workplan followed these requirements and definitions of racial and ethnic groups of minority-owned firms generally followed standard definitions under many contract equity programs: African Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Hispanic Americans and Native Americans.

Potential Expansion of Study Tasks to Consider Evidence Supporting Inclusion of a Group in Study Analyses

Admin could add a component to Task 2.7 in which Keen Independent would recommend groups for inclusion in the study research based on evidence indicating certain disadvantages for those groups. The new component would also consider definitions of groups.

A group's inclusion would need to be determined as part of Phase 1, prior to starting Phase 2 tasks. Inclusion of a group would not predetermine study results for that group, only that marketplace conditions for that group would be studied. The research about potential inclusion would take place in June–July 2024.

Determining whether a group might be included in further research. The following criteria are offered as a starting point for discussion. A group could be a candidate for inclusion in the research if there was preliminary evidence that each of the four conditions applied:

a. The group may have been affected by discrimination in Minnesota in the past and/or currently;

b. Any such discrimination may have demonstrated, lasting effects today in Minnesota;

c. Any such discrimination could affect opportunities for starting and successfully operating a business in one or more of the study industries; and

d. There are sufficient data for that group for appropriate analyses to be conducted in the study (considering the standard of judicial review applied if there were a challenge to inclusion of the group in a contract equity program).

For example, in the April 2, 2024, public forum, some members of the public urged Admin to include LGBTQ-owned firms in the study.

Determining how to define or potentially disaggregate groups based on race or ethnicity. This additional subtask would also consider whether a group such as Asian Americans (and Asian American-owned businesses) is best defined for the 2025 Study using standard federal language or if alternate definitions or further disaggregation are more appropriate and more supportable given the unique history and current conditions in Minnesota.

One example is whether some of the study analyses could consider Southeast Asian Americans, including members of the Hmong community, separate from the broader category of Asian Americans. The same criteria as outlined above might be applied when making such a decision. It is also possible that a racial/ethnic group could be expanded or added to certain analyses.

APPENDIX F. Plan for Qualitative Research — Introduction

Appendix F presents the plan for how the Keen Independent study team will collect and analyze qualitative information in the 2025 Minnesota Joint Disparity Study.

From April 2024 through summer 2025, the Keen Independent study team will compile qualitative information from the following:

- In-depth interviews;
- Business advisory group (BAG) meetings;
- Open-ended comments provided in the availability survey;
- Input received through the website, dedicated email address or telephone hotline;
- Comments from public forums; and
- Other means.

The steps to compile and analyze qualitative information in the 2025 Study closely follow those in the 2017 Minnesota Joint Disparity Study ("2017 Study"). Keen Independent expects to receive input from hundreds of businesses and other organizations and individuals through these efforts.

The following pages discuss the methodology for compiling, analyzing and presenting results for each component of the qualitative research. The end of this appendix provides a first draft of the interview guide for the in-depth interviews in the study.

F. Plan for Qualitative Research — Methodology

In-depth Interviews and Business Advisory Group Meetings

The study team will gather input from business owners and representatives, trade organization representatives and other individuals through virtual in-depth interviews and business advisory group (BAG) meetings. Examples of topics are shown to the right.

In-depth interviews are typically from 30 to 60 minutes in length and will be scheduled and conducted by Donaldson Consulting LLC or Keen Independent. Some business owners prefer to participate in a group setting. These Business Advisory Groups will cover the types of topics as an in-depth interview, but in a small group discussion. They will be led by Keen Independent.

Up to 140 individuals will be included in the in-depth interviews and BAGs (about the same as the 110 in-depth interviews and 27 participants in focus groups in the 2017 Study). They will represent a cross-section of Minnesota businesses, including diverse business owners and white male-owned firms.

Keen Independent will synthesize and provide examples of quotes in a single-combined appendix to the disparity study reports for each entity. For anonymity, Keen Independent will analyze and code comments without identifying any of the participants by name.

Draft interview guides are provided at the end of this appendix.

Topics discussed and analyzed in in-depth interviews and Business Advisory Groups may include:

- Starting a business;
- Dynamic firm size, types of work and markets served;
- Current conditions in the Minnesota (or other regional) marketplace;
- Keys to business success;
- Working with public entities;
- Whether there is a level playing field;
- Whether there are challenges for certain businesses not faced by other businesses;
- Access to capital;
- Bonding and insurance;
- Issues with prompt payment;
- Unfair treatment in bidding;
- Any stereotyping or double standards;
- Whether there are “good ol’ boy” or other closed networks;
- Contractor-subcontractor relationships;
- Business assistance programs and certifications;
- Future firm challenges; and
- Other insights and recommendations.

A rough draft of the interview guide is provided at the end of this appendix.

F. Plan for Qualitative Research — Methodology

Open-ended Comments in the Availability Survey

Keen Independent will conduct online and telephone surveys with business owners and managers as part of the availability analysis. The surveys will include questions concerning general marketplace conditions, including potential barriers associated with obtaining financing and bonding and receiving payment (see Task 2.4). There will be open-ended questions as well to identify other types of barriers.

Keen Independent will analyze the results of those questions as part of the qualitative and quantitative analyses of local marketplace conditions. The study team anticipates receiving comments from thousands of firms through this process (more than 2,200 firms provided comments through this method during the 2017 Study).

An example of an open-ended question in the availability survey is as follows:

> This is an opportunity for the State of Minnesota and other participating state and local governments to hear directly from members of the business community, like you. What other comments would you like them to hear?

Input through Website, Dedicated Email Address, Telephone Hotline or other Means

The State of Minnesota Department of Administration ("Admin") has established a study website and distributed information about the study through various means. Keen Independent will provide periodic website updates.

Any business owner or other individual wishing to provide input to the study can do so through the website, by email using the study email address or by phone using the dedicated telephone hotline.[1] (Individuals can leave phone messages or can be called for a live discussion.) Anyone interested in providing a comment can also mail it to Keen Independent.

Keen Independent will examine this input in the same way as from other sources.

[1] Website: https://mn.gov/admin/disparity-study/; email: JointMNDisparityStudy2025@keenindependent.com; hotline: 602-704-0125.

F. Plan for Qualitative Research — Methodology

Public Forums

Public forums will provide an opportunity for any interested individual to learn about the disparity study and provide input to the study. For the public forums, Keen Independent will work with Admin as the lead agency in consultation with other participating entities.

Once the study is complete, individual participating entities might decide to hold additional public forums (separate from Keen Independent and the study process).

Phase 1 public forums. Keen Independent held two public forums at part of Phase 1 of the study:

- April 2 virtual public forum; and
- April 4 hybrid virtual and in-person public forum held at Rondo Community Library in Saint Paul.[2]

Results are synthesized in Appendix J of the Phase 1 report and will be included in the final disparity study reports in Phase 3.

Phase 2 and 3 public forums. Keen Independent will hold up to five virtual public forums in 2025. These public forums will collect additional information and, if held after release of draft disparity study reports, provide an opportunity for any input concerning those reports. Keen Independent and Admin will work together to plan those public forums, with input from participating entities. Keen Independent's budget assumes that all of them will be virtual.

[2] Although Keen Independent's budget accounted for all public meetings being virtual, the study team accommodated a hybrid approach for one, Phase 1 public meeting.

F. Plan for Qualitative Research — Methodology

Review of Other Qualitative Information Sources

Keen Independent will review qualitative information from other sources as well. They may include public hearings, judicial findings, informal or form complaints related to discrimination or contracting practices that went to participating entities, and other sources.

The study team typically include results from other disparity studies conducted in the region. We are not aware of any since the 2017 Study but will review any that might be identified after further research.

KEEN INDEPENDENT. Draft Business Interview Guide
2025 Minnesota Joint Disparity Study

Draft, Confidential, Trade Secrets, Not for Public Distribution

Read to Interviewee

Thank you for agreeing to participate in the 2025 Minnesota Joint Disparity Study in-depth interview. Participating entities have come together to analyze whether there is a level playing field for small, minority-, women-, veteran-owned firms as well as businesses owned by persons with disabilities in contracts with the State of Minnesota State and Local Governmental Units (Governmental Units). We are examining procurement of construction, professional services, goods, and other services in the public and private sectors.

The participating entities include:

- Minnesota Dept. of Administration;
- Minnesota Department of Transportation;
- Minnesota State Colleges and Universities;
- University of Minnesota;
- Metropolitan Airports Commission;
- Metropolitan Council;
- Mosquito Control District;
- Hennepin County;
- Ramsey County;
- City of Bloomington;
- City of Brooklyn Park;
- City of Minneapolis;
- City of Rochester;
- City of Saint Paul;
- Hennepin Healthcare System; and
- Saint Paul Public Schools.

F. Plan for Qualitative Research — First draft interview guides for in-depth interviews

We will be recording our interview via Zoom so that we do not need to take detailed notes. Are you okay with our recording this interview?
[If yes, inform the interviewee that you will initiate recording. Then ask again to confirm the interviewee's approval at the start of the recording.]

Interviews are reported in aggregate for purposes of anonymity.

Note to interviewer: When possible, please ask the interviewee to distinguish answers that are specific to the participating entities listed above.

Interviewer: Please fill out the form on following page, as possible, in advance of the interview, then augment with interviewee responses.

F. Plan for Qualitative Research — First draft interview guides for in-depth interviews

Information [possibly to be expanded]	**Fill all boxes** [Complete as much as possible prior to interview.]
Interviewer name Date and location of interview	
Interviewee name, title and responsibilities	
Length of time interviewee has been with company	
Gender of firm owner(s)	(include % ownership if multiple owners)
Owner(s) race/ethnicity/group: African American, Hispanic American, Native American, Asian American, white woman or other	(include % ownership if multiple owners)
Is the interviewee a veteran?	
Gender of interviewee(s)	
Is the interviewee a member of the disabled community?	
Interviewee (s) race/ethnicity/group: African American, Hispanic American, Native American, Asian-Pacific American, Subcontinent Asian American, white woman or other	(list one or more)

Certifications: MBE, ESBE, SDVBE, WBE or other	(list one or more)
Type of Business?	
Number of years in business?	
Approx. number of employees (including owner(s))	
Whether a subsidiary or affiliate of another firm (or is a publicly traded company)	

F. Plan for Qualitative Research — First draft interview guides for in-depth interviews

A. Background on the Firms and Industries Represented

I would like to ask you about the history/background of your firm.

- Tell me about how the business got started (e.g., did you start it, purchase it, or did you get involved later ... how has ownership changed over time, etc.?).

  [If not mentioned] Did you or someone else in the business have background or experience in this field before you started? [Describe]

- What were your sources of capital used to start or purchase the business?

- What were the challenges you faced [if any] in starting the business? Are these types of challenges typical in your industry? [Why?/Why not? Probe]

- Please describe your business now, what types of work the firm conducts and if (and why) that has changed over time. For example, have you gotten into new fields or markets, and why?

- In what regions of Minnesota do you typically work? [Probe for reasons for working locally, statewide or other] Are there barriers to expanding your firm's territory?

- What types and sizes of contracts and subcontracts is your firm involved in?

- What determines the types and sizes of projects or contracts for your firm? [e.g., what limits how big a project/contract?]

- Does your firm work on both public sector and private sector work? [Why/why not? Has this changed over time?]

F. Plan for Qualitative Research — First draft interview guides for in-depth interviews

- What types of public sector organizations do you work for (including as a sub)? [Why?]
- Does your firm generally work as a prime or subcontractor/subconsultant, or both? [Why?] Has this changed over time? [Why?]
- Have you conducted work for any of the participating entities? [Probe for differences in prime/sub, contract type and size, other. Re-read list provided on page 1]
- Any changes in the size of the firm over time? What is this based upon?
- Probe: Does the company expand and contract depending on work opportunities, season or market conditions?
- What are the current economic conditions for companies in your field in the State of Minnesota marketplace? Are these conditions affecting your ability to be successful?
- Were there times when it wasn't clear that your firm would be successful?
- [If so] Tell me about them? How did you overcome any challenges?
- Did you get any help along the way? From whom?
- Do you get outside expert assistance for your business from firms such as accountants or attorneys? [What types? …. Why/why not use?] [if used] At what point in the development of the business did you start getting assistance from outside experts?

- Are there any barriers to getting outside expert assistance?

- What are the key factors that contribute to your firm's growth and success?
  [Probe for comments about how the following items contribute to the firm's success (or if any of these present any challenges)]:

1. Relationships with customers and others.
2. Employees/hiring.
3. Project labor agreement/union.
4. Equipment.
5. Access to favorable pricing and credit regarding materials or products.
6. Financing/access to capital (e.g., business loans, refinancing a home mortgage or using personal resources for business use, other sources of capital).
7. Bonding [if necessary].
8. Insurance.
9. Distributorships [if applies].
10. Pricing on materials and equipment.
11. Other.

F. Plan for Qualitative Research — First draft interview guides for in-depth interviews

B. Working on projects with the participating entities or other public or private sector entities as prime or sub

Note to interviewer: Probe for differences between the participating entities.

- Describe your experience working with each of the participating agencies. [Probe for: How do you decide to pursue opportunities with any of the entities? Other public or private entities?]

- Do you face any challenges in learning about opportunities with the participating Governmental Units? [Why/why not?] Other public or private entities? [Why/why not?]

- Is it difficult to win prime contracts with any of the entities? [Why/why not?]Is it more difficult to get prime contracts with one entity over another? [Why/why not?]

- Describe your experiences working with the participating entities. [Re-read list of participating entities if necessary]

- Are there other difficulties trying to get work with any of the entities?

- Do you know of barriers that might affect minority- and woman-owned businesses, veteran-owned businesses, persons with a disability-owned and small businesses in learning about or participating in contracts with the participating entities? Other public agencies?

- Are there any barriers for small firms in general?

- What suggestions would you have for the State of Minnesota and participating entities or other public agencies to improve how they contract for work and administer those contracts?

- Describe how you generally perceive contractor-subcontractor relationships public or private sector contracts [if applies].

- Can any of the entities learn from one another?
- Does your firm pursue or perform work for any other public agencies in the State of Minnesota?
- Do you hire subcontractors/subconsultants?
- [If so] How do you hire firms as subcontractors/subconsultants? How are they selected? Are there any requirements for subcontractors/subconsultants?
- Do you make any efforts to include MBEs, WBEs, SDVBEs, ESBEs or other diverse businesses in public or private sector contracts? If so, why? How?
- [If does make efforts] Without your and others' efforts, would small or certified firms be successful in obtaining work on public or private sector contracts? Why/why not?
- Describe challenges or barriers that you might have faced when hiring and/or working with minority- and woman-owned businesses, veteran-owned and persons with a disability-owned or other small businesses?
- How do subs generally find out about public and private sector work, and specifically work with the participating agencies?
- [If work as a sub] Are there any difficulties getting primes to consider your firm for subcontracts? Are there any difficulties successfully working with primes?

F. Plan for Qualitative Research — First draft interview guides for in-depth interviews

C. Conditions in the Marketplace

We now turn to conditions in the public or private sector in the State of Minnesota marketplace. When providing examples, we are focusing on recent events or those in the past that may have a lasting effect. [Probe for more than yes/no.]

Please answer for minority- and woman-owned businesses, veteran-owned businesses, persons with a disability-owned and other small companies doing business in the marketplace.

- What gives one firm in your industry an advantage over another?

- Are there instances in which firms such as yours are treated unfairly when pursuing opportunities or when performing work in your field in the marketplace?

- Do you know of any unfair treatment or disadvantages for small businesses, veteran-owned and persons with a disability-owned businesses in your field in the marketplace?

- Are there any unfair treatment or disadvantages for minority- or woman-owned businesses or other diverse businesses in your field in the marketplace?

- Can you sum up what a level playing field would look like in your industry working with the participating agencies? [Depending on answer] What makes it not a level playing field? [Or why is there a level playing field?]

- In the marketplace, are there additional difficulties for minorities, women, veterans, persons with disabilities, residents or other diverse individuals starting businesses in your line of work? [If not mentioned, probe for any stereotypical attitudes]

- Do “good ol’ boy” networks, closed networks or other information networks exist that affect firms in your industry in the marketplace? If so, does this have a negative effect on minority- and woman-owned firms, veteran-owned, persons with a disability-owned firms or small firms?

- Effects of COVID-19 on the marketplace?

- Please explain if you have or your firm has ever witnessed or experienced any of the following (as a prime or sub), probe for examples for each:

1. Issues regarding access to capital.
2. Issues regarding bonding.
3. Issues with prompt payment.
4. Denial of opportunity to bid.
5. Unfair rejection of bid.
6. Bid shopping.
7. Bid manipulation.
8. Double standards for minority- or woman-owned firms or other diverse businesses when performing work.
9. Unfair treatment regarding approval of work for minority- and woman-owned firms or other diverse firms.
10. Unfavorable work environment for minorities, women, veterans or other diverse individuals (e.g., harassment based on race, gender, LGBTQIA+, disability or other personal attributes on jobsites).
11. Any “fronts” or false reporting of good faith efforts.
12. [If not mentioned] Are there any barriers to working with one or all the participating agencies or unfair policies or treatment? [Probe for prequalification, restrictive contract specifications, insurance, bonding, prevailing wage, timely payment, etc.}
13. Other.

- If there are any barriers or disadvantages in the marketplace specifically for minority- and woman-owned firms, veteran-owned firms, small businesses, persons with disabilities-owned or other diverse businesses, do you have suggestions for steps to address them?

- Is there anything else about the marketplace that is important for us to know?

F. Plan for Qualitative Research — First draft interview guides for in-depth interviews

D. Insights Regarding Business Assistance Programs and Certification

Next, I'd like to discuss business assistance programs, certification and other programs.

- Have you taken advantage of or have any knowledge of any contract goals programs or any business assistance programs from the participating entities? [Probe for specific -sponsored programs, barriers to participation, benefits from participation]

1. Contract goals
2. Prompt payment requirements.
3. Business assistance (including classes, financing or bonding assistance, others).
4. Other programs and business assistance.

- Please tell us about your knowledge of or experiences with certification, certification process or certifying agencies.
  [If has had experience] Have you had any differences in experiences when certifying with more than one certification agency in Minnesota? If so, please explain.

- Are there types of assistance that were not particularly useful to your firm?

- Going forward, what are the biggest challenges for your firm to be successful?

- [If the firm is MBE, WBE, SDVBE, ESBE or has other certifications] Does your firm pursue subcontracts with the participating entities or local government projects that do not have goals? Are you successful in obtaining subcontracts without contract goals? [Why/why not?]

F. Plan for Qualitative Research — First draft interview guides for in-depth interviews

- [If minority- or woman-owned, veteran-owned or a small business and certified] Please tell us about MBE, WBE, SDVBE, ESBE or other certification. Is it easy or difficult to become certified? Are there any advantages or disadvantages to certification? [Probe for type of certification]

- [If minority- or woman-owned, veteran-owned or a small business and NOT certified] Why is your company not certified? [Probe for whether tried in the past, etc.]

E. Any Other Insights and Recommendations

- What, if anything, do you think the participating entities are doing well to level the playing field for minority- and woman-owned businesses or other diverse businesses in general? Are there any programs or practices you would like to see improved or changed?

- Any additional comments regarding programs for persons with disabilities-owned businesses, veteran-owned businesses?

- Do you have any other suggestions for how the participating entities can improve, or for any other insights, feedback or recommendations?

KEEN INDEPENDENT. Draft Industry Association Interview Guide
2025 Minnesota Joint Disparity Study

Draft, Confidential, Trade Secrets, Not for Public Distribution 03282024

Read to Interviewee

Thank you for agreeing to participate in the 2025 Minnesota Joint Disparity Study in-depth interview. Participating entities have come together to analyze whether there is a level playing field for small, minority-, women-, veteran-owned firms as well as businesses owned by persons with disabilities in contracts with the State of Minnesota State and Local Governmental Units (Governmental Units). We are examining procurement of construction, professional services, goods, and other services in the public and private sectors.

The participating entities include:

- Minnesota Dept. of Administration;
- Minnesota Department of Transportation;
- Minnesota State Colleges and Universities;
- University of Minnesota;
- Metropolitan Airports Commission;
- Metropolitan Council;
- Mosquito Control District;
- Hennepin County;
- Ramsey County;
- City of Bloomington;
- City of Brooklyn Park;
- City of Minneapolis;
- City of Rochester;
- City of Saint Paul;
- Hennepin Healthcare System; and
- Saint Paul Public Schools.

F. Plan for Qualitative Research — First draft interview guides for in-depth interviews

We will be recording our interview via Zoom so that we do not need to take detailed notes. Are you okay with our recording this interview? [If yes, inform the interviewee that you will initiate recording. Then ask again to confirm the interviewee's approval at the start of the recording.]

Interviews are reported in aggregate for purposes of anonymity.

Note to interviewer: When possible, please ask the interviewee to distinguish answers that are specific to the participating entities.

Interviewer: Please fill out the form on following page, as possible, in advance of the interview, then augment with interviewee responses.

F. Plan for Qualitative Research — First draft interview guides for in-depth interviews

Information [possibly to be expanded]	**Fill all boxes** [Complete as much as possible prior to interview.]
Interviewer name Date and location of interview	
Interviewee(s) name(s), title(s) and responsibilities with the industry association or business assistance organization	
Length of time interviewee(s) with industry association	
Race/ethnicities/groups the industry association represents: African American, Hispanic American, Native American, Asian American, white woman or other	(list one or more)
Gender of interviewee(s)	
Does the interviewee's association represent members of the disabled community?	

F. Plan for Qualitative Research — First draft interview guides for in-depth interviews

Race/ethnicity/group of interviewee(s): African American, Hispanic American, Native American, Asian-Pacific American, Subcontinent Asian American, white woman other	(list one or more)
Does the interviewee's association represent veterans?	
Type of industries represented	
Association affiliations if any	

F. Plan for Qualitative Research — First draft interview guides for in-depth interviews

A. Background on the Firm and Industry

I would like to ask you about the history/background of the groups or businesses you represent.

- Please tell me about your [industry association/business assistance organization] and what kinds of firms you represent or serve.
- What are the challenges that firms you represent face in starting their businesses in the industry (in general and for specific businesses)?
- For the businesses you represent, have you observed any barriers to entry into the industry you represent?
- In what regions of Minnesota do the firms you represent typically work? [Probe for reasons for working locally, statewide or other].
- Are there barriers to expanding the firm's territory?
- Have you observed any changes over time in the types of work companies in your industry perform?
- Any changes in the size of the firms over time? [Probe: Do the companies generally expand and contract depending on work opportunities, season or market conditions?]
- How do firms you represent typically get into the work they perform?
- What types and sizes of contracts and subcontracts are the companies you represent involved in?

F. Plan for Qualitative Research — First draft interview guides for in-depth interviews

- What determines the types and sizes of projects or contracts for firms in the industry you represent? [e.g., what limits how big a project/contract]

- Do the firms you represent work on both public sector and private sector work? [Why/why not? Has this changed over time?]

- Do the firms you represent generally work as primes or subcontractors/subconsultants, or both? [if applies to industry]

- Have the firms you represent conducted work for any of the participating entities? [Probe for whether prime/sub, contract types and sizes, other. Re-read list of entities provided on page 1 if necessary]

- What are the current economic conditions for companies in your field in the Minnesota marketplace? Do these conditions affect the ability of firms in your industry to get work?

- What are some of the reasons for a company not to be successful?

- How do/did companies in your industry overcome any challenges?

- Do/did they get any help along the way? From whom?

- What are the key factors that contribute to the success of the firms you represent? [Probe for comments about how the following items contribute to a firm's success (or if any of these present any challenges)]:

1. Relationships with customers and others.
2. Employees/hiring.
3. Project labor agreement/union.
4. Equipment.
5. Access to favorable pricing and credit regarding materials or products.
6. Financing/access to capital (e.g., business loans, refinancing a home mortgage or using personal resources for business use, other sources of capital).
7. Bonding [if necessary].
8. Insurance.
9. Distributorships [if applies].
10. Pricing on materials and equipment.
11. Other.

- Do smaller companies in your industry get outside expert assistance from firms such as accountants or attorneys? [What types? …. Why/why not use?] [if used] At what point in the development of the business would they start getting assistance from outside experts? [if at all]

- Are there any barriers to getting outside expert assistance?

F. Plan for Qualitative Research — First draft interview guides for in-depth interviews

B. Working on projects with one or more of the participating entities and other public or private sector entities as prime or sub

Note to interviewer: Probe for differences between the participating entities.

- How do firms generally find out about opportunities to bid on the participating entities' contracts? Other agencies?
- Do they face any challenges learning about opportunities with the participating entities? Other public agencies?
- Are there any barriers to obtaining prime contracts or subcontracts with the participating entities? Is it more difficult to get prime contracts with one agency over another? [Probe for prequalification, restrictive contract specifications, insurance, bonding, prevailing wage, timely payment, etc.]
- Are there other difficulties trying to get work with other public entities or private firms?
- Describe their experiences working on contracts of the participating entities. Other public entities or private firms.
- Do you know of barriers that might affect minority-, woman-owned businesses or other diverse businesses in learning about or participating in contracts with the participating agencies? Other public entities or private firms?
- Do any of the firms you represent pursue or perform work for any other public agencies in Minnesota? [Refer to list of entities on page 1 if necessary]
- Are there any barriers for small firms in general?

- What suggestions would you have for the State of Minnesota and participating entities or other public agencies to improve how they contract for work and administer those contracts?
- Can any of the agencies learn from one another?
- Describe how you generally perceive contractor-subcontractor relationships on public or private sector contracts [if applies].
- Do prime contractors typically have subcontractors or subconsultants that participate in the work? How are they selected? Are there any requirements for subcontractors/subconsultants?
- Do the firms you represent make any effort to include MBEs, WBEs, SDVBEs, ESBEs or other certified firms in public contracts?
- How are prime contractors/consultants encouraged to include subcontractors/subconsultants, MBEs, WBEs, SDVBEs, ESBEs?
- [If does make efforts] Without your industry and others' effort, would small or certified firms be successful in obtaining work on public or private sector contracts? Why or why not?
- What about veteran-owned and/or persons with disabilities-owned businesses?
- How do subs generally find out about public and private sector work, and specifically work with one or more of the participating entities?

- [If work as a sub] Are there any difficulties getting primes to consider certain firms for subcontracts or supplies?

- Are there any difficulties subs have when they have subcontracts with primes?

F. Plan for Qualitative Research — First draft interview guides for in-depth interviews

C. Conditions in the Marketplace

We now turn to conditions in the public or private sector in the State of Minnesota marketplace. When providing examples, we are focusing on recent events or those in the past that may have a lasting effect. [Probe for more than yes/no.] Please answer for minority-, woman-, veteran- and persons with a disability-owned firms and other small companies doing business in the marketplace.

- What gives one firm in your industry an advantage over another?

- Are there instances in which certain types of firms are treated unfairly when pursuing opportunities or when performing work in your industry? [Explain]

- Do you know of any unfair treatment or disadvantages for small businesses in your industry? Veteran-owned and/or persons with a disability-owned businesses?

- Are there any unfair treatment or disadvantages for minority- or woman-owned firms or other diverse firms in your industry?

- Is there a level playing field? Why or why not?

- Can you sum up what a level playing field would look like in your industry in the marketplace? [Depending on answer] What makes it not a level playing field? [Or why is there a level playing field?]

- Are there additional difficulties for minorities, veterans, women or other diverse individuals starting businesses in your line of work? [If not mentioned, probe for any stereotypical attitudes]

- Do "good ol' boy" networks, closed networks or other information networks exist that affect firms in your industry in the marketplace? If so, does this have a negative effect on minority- and woman-owned businesses, veteran-owned businesses and other small businesses?

F. Plan for Qualitative Research — First draft interview guides for in-depth interviews

- Please explain if you have or the firms you represent have ever witnessed or experienced any of the following (as a prime or sub), probe for examples for each:

1. Issues regarding access to capital.
2. Issues regarding bonding.
3. Issues with prompt payment.
4. Denial of opportunity to bid.
5. Unfair rejection of bid.
6. Bid shopping.
7. Bid manipulation.
8. Double standards for minority- or woman-owned firms or other diverse businesses when performing work.
9. Unfair treatment regarding approval of work for minority- and woman-owned firms or other diverse firms.
10. Unfavorable work environment for minorities, women or other diverse individuals (e.g., harassment based on race, gender, LGBTQIA+, disability or other personal attributes on jobsites).
11. Any “fronts” or false reporting of good faith efforts.
12. [If not mentioned] Are there any barriers to working with one or any of the participating entities? Any unfair policies or treatment? [Probe for prequalification, restrictive contract specifications, insurance, bonding, prevailing wage, timely payment, etc.}
13. Other.

F. Plan for Qualitative Research — First draft interview guides for in-depth interviews

- If there are any barriers or disadvantages in the marketplace specifically for minority- and woman-owned firms, or other diverse firms, do you have suggestions for steps to address them?

- Effects of COVID-19 on the marketplace?

- Is there anything else about the marketplace that is important for us to know?

F. Plan for Qualitative Research — First draft interview guides for in-depth interviews

D. Insights Regarding Business Assistance Programs and Certification

Next, I'd like to discuss business assistance programs and certification.

- Have the groups or businesses you represent taken advantage of or have any knowledge of any contract goals programs or any business assistance programs from the participating entities? [Probe for specific -sponsored programs, barriers to participation, benefits from participation]

1. Contract goals.
2. Prompt payment requirements
3. Business assistance (including classes, financing or bonding assistance, others).
4. Other programs and business assistance.

- Please tell us about your knowledge of or experiences with the certification process or certification agencies.

- Have you had any differences in experiences when certifying with more than one certification agency in Minnesota?

- Are there types of assistance that are not particularly useful to firms?

- What do you see as the biggest challenges for firms in your industry/chamber to be successful?

- Do certified MBEs, WBEs, SDVBEs, ESBEs or other certified firms pursue subcontracts for local government projects that do not have goals? Are they successful obtaining contracts without goals?

F. Plan for Qualitative Research — First draft interview guides for in-depth interviews

- Please tell us about MBE, WBE, SDVBE, ESBEs or other certification. Have the firms you represent found it easy or difficult to become certified? Are there any advantages or disadvantages to certification?

- Why are some disadvantaged, minority- and woman-owned firms or other diverse firms not certified?

E. Any other Insights and Recommendations

- What, if anything, do you think the participating entities are doing well in encouraging minority- and woman-owned business, veteran-owned business and other small business participation in Minnesota? Are there any programs or practices you would like to see improved or changed?

- Do you have any other suggestions for how the participating entities can improve, or for any other insights, feedback or recommendations?

APPENDIX G. Quality Assurance/Quality Control Plan — Introduction

Keen Independent incorporates four components in its Quality Assurance/Quality Control (QA/QC) Plan:

- QA processes for evaluating, identifying and recommending adjustments to the activities or tasks (and associated resources) that must be performed in the project to provide confidence that the project will satisfy the relevant quality standards.
- QC process for validating consultant's deliverables for completeness and accuracy, as well as identifying and assessing issues and risks.
- QA/QC processes must consider consultant's internal activities and those activities performed by any subconsultants.
- Reporting to Admin on non-conformance assessments and proposed corrective actions.

This document provides the Keen Independent Quality Assurance/Quality Control approach for the 2025 Minnesota Joint Disparity Study ("2025 Study") in order of the four components listed above. Also note that the QA/QC Plan supports the Data Collection Plans.

G. QA/QC Plan — QA process for evaluating adjustments to activities or tasks

Keen Independent employs flexibility to adapt activities and tasks to what is learned in the initial stages of a project, and sometimes at later stages. The following list of processes is not exhaustive, but illustrates processes for:

- Identifying issues;
- Determining which issues are critical; and
- Deciding whether to make recommendations to adjust activities and processes.

Adjustments Related to Study Components

The processes described below pertain to a typical Keen Independent assignment, including disparity studies. For each step, the study team describes the process typically employed for identifying issues, how they are evaluated, when this step is performed and who performs the step. We also identify whether and how the step is incorporated in the 2025 Study.

Pre-proposal exploration of issues. Before commencing a project, Keen Independent explores the background, environment and objectives for the assignment. The client has often identified issues in meetings or other communications at this point in the process.

If there are any concerns, Keen Independent often will meet with or submit communications to the client to address them. The study team recommends changes when the objectives of the assignment cannot be met without adjustment.

Keen Independent went through this process before starting on the proposal for the 2025 Study.

Preparation of a proposal or scope of work for an assignment. Keen Independent thoroughly explores client needs before preparing a proposal or contract for the assignment. Our proposal or scope of work identifies study background, objectives, tasks, information sources, schedule, needed study resources and reporting relationships.

Once retained to complete the work, Keen Independent schedules meetings and other initial discussions with the client to refine our understanding of background, issues, desired schedule and deliverables, and other aspects of the study.

In the contract negotiations in January and February 2024 and the project kick-off meeting with State of Minnesota Department of Administration ("Admin") on February 15, 2024, Admin staff and Keen Independent were able to make refinements to the scope of work in the original proposal.

Our meetings in Phase 1 with Admin, the Steering Committee, External Stakeholder Group, and others, as well as the two public forums, also resulted in refinements to study approach. This process is fully documented, including meeting minutes, monthly progress reports and written plans for study components.

Admin has a record of the contract negotiations, kick-off meeting and other meetings, draft and revised plans, monthly progress reports and other Phase 1 deliverables starting in January 2024.

Formal Project, Communications, Data Collection and QA/QC plans. Keen Independent has prepared formal Communication and Data Collection plans shared with Admin and the participating entities as part of this study (as well as this QA/QC plan).

Admin and the participating entities will review draft plans submitted by Keen Independent.

G. QA/QC Plan — QA process for evaluating adjustments to activities or tasks

Monthly reporting of study progress and any issues.
Keen Independent keeps clients apprised of study progress as well as any difficulties or need to redirect specific tasks or project timing. We do so through:

- Frequent verbal and/or email communications;
- Formal monthly progress reports that can also identify any study issues; and
- Regular meetings with the client.

For the 2025 Study, Keen Independent will have frequent informal discussions, submit monthly progress reports to Admin, and hold regular Admin and Steering Committee meetings.

Keen Independent is following this process in the 2025 Study.

Phase 1 report. Keen Independent has prepared a draft report at the end of Phase 1 for Admin and Steering Committee review. This provides another opportunity to ensure that the analytical steps will meet project objectives and schedule.

Keen Independent will document any recommendations for adjustments in study approach based on input from Admin, the participating entities (Steering Committee members), the External Stakeholder Group and from the public through the two public forums.

Review of draft report materials. Keen Independent often accelerates preparation of draft report materials as a means to internally identify any gaps or questions concerning results. The study team also typically shares early versions of draft materials with our clients. Keen Independent finds that this is often the best way to ensure that the research is meeting study objectives, and where further investigation or reshaping of the project is needed.

Keen Independent is following this process in the 2025 Study. We have accelerated delivery of certain Phase 1 draft report materials for Admin, participating entities and the External Stakeholder Group members. The study team will continue to submit documents for Admin or other participating entity review as draft components of the entity-specific disparity study reports are prepared.

G. QA/QC Plan — QA process for evaluating adjustments to activities or tasks

Adjustments Related to Changes in Legal or Regulatory Environment

The approach used in a disparity study can be affected by changes in the legal or regulatory environment.

- Keith Wiener of Holland & Knight will closely monitor new court decisions, changes to federal regulations and Minnesota state law, and other legal developments throughout the study.
- The study team will discuss the merits of any changes in approaches based on any such developments. Mr. Wiener and David Keen will do so through telephone communications with Admin.
- Mr. Wiener will document any changes in the legal environment in the legal appendix. He will revise the appendix as necessary over the course of the disparity study.

Admin, as appropriate, will be involved in any discussions of needed changes to the study based on any new legal decisions, changes in federal regulations, changes in state law or other developments. Admin and other participating entities will have access to the draft legal appendix and any revisions to the appendix.

G. QA/QC Plan — QA process for evaluating adjustments to activities or tasks

Adjustments Related to Entity Data

Keen Independent will employ the following process to identify and respond to issues related to contract and other data for an entity.

Initial data collection discussions with Admin and the participating entities. Keen Independent began by reviewing background information about contract data for each participating entity that Admin provided in the RFP and at project initiation. Keen Independent then prepared a general contract data collection guide that anticipated different issues for each entity. Admin distributed the guide to staff from each participating entity.

Keen Independent held a data-focused meeting of the study Steering Committee to review the guide and answer general questions. Keen Independent then held individual virtual meetings with each entity to further discuss needed data and approaches to obtaining the data.

These steps provided Keen Independent the opportunity to identify potential issues with availability, completeness, format or other aspects of the data. Keen Independent, as needed, can redirect the data collection for each entity.

Each participating entity is or will be involved in entity-based data discussions with Keen Independent.

Written data requests. When the data collection guide provided to an entity does not provide enough information, Keen Independent follows up with a written data request. This provides another opportunity to refine, redirect or expand data collection strategies.

The written data requests and any redirection based on early data discussions are important aspects of the QA/QC process.

Initial review of information received. Once initial data are received, Keen Independent begins a comprehensive review process to determine if they meet study needs. (Examples of specific QC steps are discussed under the next portion of this Plan.) The detailed review of the data also provides an opportunity to redirect data collection and analysis approaches.

Client data and Keen Independent review of the data will be available for Admin and individual participating entity review as outlined later in the QA/QC Plan.

Documentation of data or other information refinement. The Keen Independent study team typically employs iterative steps to refine or adapt the data collection and analysis approaches, documenting each major change.

Admin and the participating entities will have copies of these emails, monthly progress reports and other documents. Keen Independent will also compile this information in Phase 3.

Preparation and review of preliminary analyses. Keen Independent typically prepares preliminary analyses using client data and reviews them internally and with the client for a "sniff test" preliminary review. The study team often broadens the client staff or management review of these analyses beyond the staff providing the data. This provides a concrete way to elicit client reactions and suggestions that may redirect data collection and analysis efforts. Keen Independent prepares meeting notes from these review sessions.

Keen Independent will provide Admin and the participating entities preliminary analyses and notes from meetings where the analyses are discussed.

G. QA/QC Plan — QA process for evaluating adjustments to activities or tasks

Adjustments Related to Resources

Our experience with past studies is that Keen Independent team members and subconsultant resources are often shifted between priorities to ensure best completion of the project in a timely manner.

- A Keen Independent Principal will make the decision to increase a subconsultant's budget if its scope of services is materially increased.

- When necessary, Keen Independent will provide other study team resources for a particular subconsultant task if it is under-budgeted or behind schedule.

  Any major revisions to subconsultant budgets will be reported to Admin in a monthly progress report.

G. QA/QC Plan — QC process for validating deliverables for completeness and accuracy

Keen Independent will employ quality control procedures throughout the study to validate deliverables for completeness and accuracy. As data (or other information) are rarely "perfect," the study team also has processes for identifying and assessing issues and risks related to potential limitations in the information.

Internal Team Review and Data-Checking

There are multiple steps of internal team review and information-checking in any Keen Independent study, including reviewing completeness and accuracy of data or other information. Keen Independent also has processes for evaluating whether any data issues warrant further action, or whether they have no material effect on the research.

Below are some of the questions we answer when validating information and deliverables for completeness and accuracy.

Is the information complete? This means that the information requested or intended to be compiled is present. Tools include comparisons to control totals, review of any data gaps and assessment of underrepresentation of certain types of records. This process occurs throughout the data collection stages of a project.

Has information outside the scope of the analysis been properly excluded and are there any duplicate records in the data? Keen Independent checks for data or other information that are properly excluded because of study scope. (For example, does contract data contain an entity's employee payments or do they include contracts for time periods before the study period?). The study team also checks for duplicate records.

Does any aggregated or compiled information accurately represent source information? Keen Independent asks this question when there are opportunities for errors between the source information (hard copy contract records, audio recordings of interviews, transcripts of public meetings) and the compiled or summarized information (databases, interview write-ups, or summaries of public meetings). For a subset of the compiled information, the study team will access the source information to ensure consistency. There is no one sampling plan, and the timing of this review may vary or only be done when questions arise about the set of compiled information.

Is the information understandable? This means that Keen Independent understands the values for each data element or other information provided. If not, we ask the provider of the information questions about the information. The study team may also need to conduct further research when the information comes from secondary sources (such as explanations of U.S. Bureau of the Census data). A qualitative example is whether a quote from an interviewee makes sense or requires further review.

Does the data appear to have correct values and entries/does the collected information appear reasonable? The Keen Independent team is constantly assessing the reasonableness of the information collected. An example is when a contract amount field contains zeros or negative values, or a numeric field contains alpha data. The study team runs internal checks to test for correct values, compares against control totals, examines outliers, analyzes whether values for subparts exceed the whole, and uses other techniques. An example for qualitative information is whether a response to a question is inconsistent with study team experience (for example, if someone reported that she started a business when she was ten years old.) Keen Independent will follow up when those types of issues arise.

G. QA/QC Plan — QC process for validating deliverables for completeness and accuracy

Is the information internally consistent? This means that certain information such as firm revenue is consistent with other information for a record such as number of employees. (Or in a qualitative example, whether answers provided in one part of an interview are consistent with another part of an interview.) Keen Independent has tools to check for internal consistency of information, from calculating ratios or examining outliers to reviewing qualitative information for internal consistency.

Is the information consistent between sources? Consistency of information across data sources is also important in any Keen Independent study. Consistent information about the race, ethnicity and gender ownership of a firm is one example. Keen Independent links data sources to review the consistency of key pieces of information across datasets. The study team takes steps to clarify inconsistent information when the issue arises (for example, calling a firm to further discuss the race, ethnicity and gender ownership of the firm, or to clarify the type of work it performs).

Do results of preliminary analyses make sense? Keen Independent often prepares preliminary analyses to test basic assumptions about the data or other information, from steps as simple as preparing control totals to complex analyses such as regression models.

Can another team member replicate the results? When needed, Keen Independent has a second team member attempt to replicate results based on the data set used for that analysis. One example is whether a second team member can replicate disparity analysis results.

Keen Independent is employing each of these techniques as part of the 2025 Study.

G. QA/QC Plan — QC process for validating deliverables for completeness and accuracy

Internal Review of Written Documents

Keen Independent maintains the following quality control protocols for written and other communications, which will help to ensure quality of report elements and other written materials throughout a study.

Instruction and training for written documents and graphics. Keen Independent employs the following protocols:

- Maintains and regularly updates a style manual for different forms of written and tabular/graphical communication.
- Trains staff members who prepare or review written communications about audiences, style conventions, reading level and word choice, and use of specific terms.
- Uses protocols including checking for spelling and grammar errors, overuse of passive voice and appropriate readability scores (in Word) and spell checking in Excel and PowerPoint documents and in emails.

Internal (and external) use of track changes and comments in Word, Excel and PowerPoint documents. Keen Independent routinely uses track changes to communicate issues regarding draft materials among authors and reviewers. Depending on the project, we encourage our clients to use this as well.

Proofing and final review of draft materials. In addition to staff review of materials, a member of the Keen Independent senior leadership team reviews draft and final materials before forwarding to a client. This involves review of written material, tables and graphics. Keen Independent often requests subconsultant review of draft materials, depending on the subject matter. Keen Independent will typically review any sensitive information that a subconsultant has prepared before forwarding it to the client.

Seeking and responding to external review. Keen Independent has protocols for requesting and receiving client review of draft materials (and public input regarding those materials). The study team typically will receive verbal and written feedback from the client concerning draft materials. We maintain copies of client communications related to their review and, when appropriate, ask clients to return documents with track changes and comments. Keen Independent reports back to clients concerning how any high-level comments or requested changes have been addressed.

Keen Independent also has protocols for collecting and reviewing public comments about draft materials (an issue typically only for disparity study reports). We compile these comments and typically analyze them in a portion of the final report (including verbatim comments as appropriate).

Keen Independent is employing each of these techniques as part of the 2025 Study.

G. QA/QC Plan — QC process for validating deliverables for completeness and accuracy

External Review of Data and other Information

Certain data and other information will be provided to Admin, the Steering Committee, the External Stakeholder Group and individual participating entities for review. Certain confidential information collected as part of the study will be restricted to use by the study team. The study team will provide the databases in Excel through FileShare.

Keen Independent will provide participating entities the following deliverables for review and external QC:

Materials related to analysis of contract data. In chronological order, Keen Independent will provide Admin and the participating entities information including:

- Data Collection Plans (spring 2024);
- Preliminary databases of participating entities' contracts and subcontracts (projected for summer 2024);
- Preliminary analysis of relevant geographic market area and subindustries (projected for late summer 2024);
- Preliminary utilization databases, including race, ethnicity and gender ownership information (projected for late fall 2024);
- Preliminary analysis of the utilization of minority- and women-owned firms in participating entities' contracts (projected for late fall 2024); and
- Draft report chapter and appendix discussing utilization methodology and results (projected for early 2025).

Materials related to public forums. In addition to communications materials for the 2024 and the 2025 public forums, materials for Admin and participating entity review will include draft agendas, topic area lists and PowerPoint presentations to be used at each session. The study team also analyzes results in draft documents that are submitted for review.

Materials related to availability data collection and analysis.
Keen Independent will provide Admin and the participating entities the following deliverables for review and external QC:

- Availability Data Collection Plan (see Appendix C);
- Availability survey instrument (preliminary survey instrument for construction included in Appendix C of this report, refined survey instrument prior to fall 2024);
- List of firms for availability surveys (fall 2024);
- Ability to monitor real-time availability telephone surveys (fall 2024); or test the online survey option (before fall 2024);
- Preliminary counts of available firms by group (late fall 2024);
- Preliminary analysis of response rates and assessment of any potential non-response bias (late fall 2024);
- Preliminary analysis of availability of firms by group, for participating entity contracts (late fall 2024); and
- For each participating entity, draft report chapter and appendix discussing availability methodology and results (projected for early 2025).

G. QA/QC Plan — QC process for validating deliverables for completeness and accuracy

Materials related to in-depth interviews with trade associations, business owners and other groups. The study team will provide Admin and the participating entities materials including:

- Qualitative Information Collection Plan (see Appendix H);
- Preliminary discussions concerning results to date (February and late spring 2017); and
- Draft report chapters and appendices discussing the interview process and analyzing interview results (spring 2025).

Materials related to quantitative analyses of the local marketplace. Keen Independent will make available to Admin and the participating entities the following materials concerning local marketplace analyses:

- Preliminary results (projected for late fall 2024); and
- Draft report chapters and appendices discussing data sources, analyses and results (late fall 2024 and early 2025).

Materials related to disparity analysis. The disparity analysis will use data from the utilization and availability analyses. The study team will also provide Admin and the participating entities:

- General Plan describing the disparity analysis (Appendix D of this report);
- Documentation of the disparity analysis calculations (as requested); and
- Draft report chapters and appendices discussing data sources, analyses and results (spring 2025).

Draft and final report materials. Many of the above review components include Admin and participating entities review of draft report chapters and appendices. Keen Independent will provide:

- Draft disparity study report chapters and appendices as they are completed (beginning in fall 2024 and continuing through spring 2025); and
- Draft final report chapters and appendices (summary 2025).

Other reporting. Keen Independent will provide Admin monthly reports, plans and other materials described throughout this document.

G. QA/QC Plan — QA/QC processes concerning subconsultant activities

Quality assurance and quality control extend to subconsultant activities, as discussed below.

Performance of Subconsultants' Own Internal QA/QC Processes

Keen Independent typically retains subconsultants who have their own QA/QC processes. The study team inquires about those processes and works with the subconsultants to augment or improve them, as necessary. This typically takes place on a task-by-task basis (e.g., training subconsultants to conduct different types of interviews).

In the 2025 Study, each subconsultant has its own internal quality control steps. For example, Customer Research International has its own data-checking processes. Donaldson Consulting, LLC has internal quality procedures as well.

Keen Independent discusses internal QA/QC with each subconsultant and makes suggestions about additional steps.

Keen Independent Subconsultant Training and Supervision

Keen Independent is heavily involved in training and supervision of subconsultants, especially concerning availability surveys and in-depth interviews.

Training, review and feedback concerning availability telephone interviews. The Keen Independent study team will hold training sessions (via telephone) for CRI and provide feedback from listening to initial interviews.

Admin will also have opportunities to review any of this subconsultant work, including listening in on CRI availability survey calls.

Training, review and feedback concerning in-depth interviews. Keen Independent training will include coaching of subconsultant Donaldson Consulting before initiating activities such as in-depth personal interviews with trade associations and business owners.

We will provide intensive post-interview feedback for subconsultants as they complete initial interviews. Because the study team will prepare interview reports for each interview performed based on the audio recordings for those interviews, we can immediately provide feedback to the subconsultant performing an interview.

Keen Independent Review of Subconsultant Work Product

Keen Independent will also review subconsultant interim and final work product.

Admin will also have opportunities to review any of this subconsultant training work (except for any confidential information).

G. QA/QC Plan — Reporting issues and corrective actions to Admin

Keen Independent will report issues and identify needed corrective actions to Admin monthly or more frequently as necessary.

The monthly progress reports submitted to Admin and the check-in meetings with Admin provide regular opportunities to do so.

APPENDIX H. Communications Plan — Overview

Keen Independent developed this draft communication plan to guide Minnesota Department of Administration ("Admin"), participating entity and Keen Independent study team efforts throughout the 2025 Minnesota Joint Disparity Study. The draft plan is flexible, with the study team responding to additional opportunities as they arise.

The study team organized the plan in two parts:

- Engagement of internal and external stakeholders; and
- Summary of messages and initial communications schedule.

H. Communications Plan — Engagement of internal and external stakeholders

Keen Independent plans frequent communications with Admin and each participating entity.

Internal Groups

Communications with key groups follows.

Admin Project Management Group. At the start of Phase 1, Keen Independent will work with Admin to initiate the management of study communications. Keen Independent will stay in close contact with the study project manager, Igbal Mohammed, Manager, Office of Equity in Procurement, as well as primarily route study emails to Ms. Mohammed for dissemination to others. Emails will also be copied to PaZong Thao, Contracts Specialist, Office of State Procurement, for support.

Steering Committee. A steering committee consisting of key staff from Admin and participating entities will be assembled to meet monthly concerning study updates, data and information collection and other study tasks. These meetings will be opened and closed by Igbal Mohammed, with Keen Independent preparing associated agendas and PowerPoints for group discussion.

Ad-hoc groups. It will be beneficial to hold ad-hoc group meetings with representatives of participating entities.

For example, on March 18, Admin hosted a virtual meeting with legal representatives of participating entities along with key staff from each entity. Keith Wiener from Holland & Knight LLP presented information about legal decisions related to MBE/WBE programs and other contract equity programs.

Depending on need, a similar meeting could be scheduled for spring 2025, or earlier.

Individual participating entities. Keen Independent will work with staff of each individual participating entity. We have designated a two-person team from Keen Independent to coordinate with each of the 16 entities. This engagement will include:

- Regular virtual meetings with the lead representative(s) from the entity through completion of the study;
- Virtual meetings with key staff from the entity involved in contract, subcontract and payment data collection;
- Virtual meetings with appropriate entity staff to review preliminary data analyses or results as well as draft report sections;
- Virtual presentations to senior leadership once draft reports are complete and results and conclusions are available; and
- A virtual or in-person presentation to boards or elected officials of the entity in 2025 (as requested by the entity).

H. Communications Plan — Engagement of internal and external stakeholders

External Groups

Keen Independent will gather input from external stakeholders through multiple channels.

External Stakeholder Group. Admin has formed an External Stakeholder Group for the study. The role of the External Stakeholder Group will be to:

- Provide perspectives on marketplace conditions, business assistance needs, contracting practices and other topics;
- Offer insights on current business assistance and contract equity programs;
- Help to communicate the study to other individuals and groups;
- Suggest information sources and other study resources; and
- Serve as a sounding board as the study team develops preliminary results.

The study team expects to hold meetings with the Group quarterly (or more often).

Trade associations and other business groups, business owners, and other interested individuals. Admin, individual participating entities and Keen Independent will collaborate to provide information to trade associations and other business or community groups as well as individual business representatives.

Briefings in newsletters. Keen Independent has developed a study Fact Sheet that can be provided to any interested group, business or individual by any of the study participants, including individual participating entities. In addition, the study team will make the Fact Sheet available to trade associations and other business groups to use in their newsletters or other regular member communications.

The study Fact Sheet will be posted to the study website (described below) and updated when the draft report is complete. It will include the study website address and other key contact information.

Press releases and email blasts. Keen Independent will help to draft Admin press releases and emails concerning the study at key junctures of the project.

Disparity study website. Admin has prepared a study website. Keen Independent has prepared initial content and will continue to do so throughout the study. https://mn.gov/admin/disparity-study/

The website will be used to provide information about the study to any interested party, and as one avenue to solicit public input.

Disparity study email address and telephone hotline. Stakeholders and the general public will be able to ask questions or provide input regarding the study through a dedicated study email address (JointMNDisparityStudy2025@keenindependent.com) and a dedicated telephone hotline (602-704-0125).

Introduction of the study through virtual in-depth interviews. The study team will schedule and conduct in-depth interviews or Business Advisory Groups (BAGs) with up to 140 business owners and managers, trade associations representatives and other groups throughout the state. As part of scheduling these meetings and in the introductory portion of the meetings, the study team will describe the study, its purpose and opportunities for anyone to provide input. This outreach will be particularly valuable as part of the trade association interviews.

H. Communications Plan — Engagement of internal and external stakeholders

Public forums. Admin and Keen Independent held two public forums (one virtual, one hybrid) with the public in April 2024 and will schedule up to five additional forums after release of the draft disparity study reports in mid-2025). Some of these sessions might be conducted in coordination with trade associations or other groups.

- Public announcement of these forums will include information about the purpose and scope of the disparity study and topics for the public forum.
- At the beginning of each public forum, study team representatives will introduce the study, key steps and schedule, and avenues to provide public input throughout the study process.
- Prior to the public comments portion of the meeting, attendees will be given ground rules for length of time available for input, the fact that it will be recorded and that they should state their name, position and organization they are representing at the beginning of any comment.
- The public forums held after release of the draft report will include a brief summary of study results.

Most of the time at each public forum will be devoted to public input. The study team may suggest topics for comment. We may summarize statements or themes as appropriate, and then ask participants for their input. As public comments will be prioritized, Keen Independent may refer participants to the study website or other relevant resources for more information about the study.

H. Communications Plan — Summary of messages and initial communications schedule

There are two phases of study communications, each with a different set of messages.

Study Launch through Early 2025

At the launch of the 2025 Study, Keen Independent assisted with developing communications materials for use by Admin, participating entities and the study team.[1] The materials:

- Provide consistent messaging regarding the purpose of the study and the disparity study process;
- Identify the participating entities as well as the study team;
- Provide information about the study schedule; and
- Urge interested parties to provide input through one or more identified means.

The communications are neutral in tone. They do not presume any result of the study or take any position on contract equity programs or other business assistance.

Admin will be the organization leading external communications efforts throughout the study, with support from Keen Independent.

Each participating entity may choose to post the study Fact Sheet, press releases or similar communications (for consistency, approved by Admin) on their websites.

Launch of the Availability Survey in Fall 2024

Admin will announce the availability survey of Minnesota businesses immediately prior to launch. This will include a press release. (Other entities may issue press releases with messaging consistent with Administration communications.) Admin will also prepare a letter describing the telephone survey to be used by Customer Research International, the survey firm. Keen Independent will help draft these materials.

Admin and Keen Independent will reach out to trade associations and other business groups to inform businesses about the opportunity to respond to the availability survey.

Communications surrounding the availability survey will emphasize:

- Who is sponsoring the survey (the State and other entities);
- The importance of the information to the entities and the value to the business (including adding to lists of businesses known to be interested in entity work);
- The opportunity to give feedback to participating entities about their procurement practices, marketplace conditions and other topics;
- That thousands of businesses are also participating; and
- Different ways to give input in the study.

Communications will be inclusive and not directed toward particular racial, ethnic or gender groups of businesses.

[1] Keen Independent has submitted and received approval for the study Fact Sheet (currently in use) and press release that will initiate the launch of Phase 2.

H. Communications Plan — Summary of messages and initial communications schedule

Explanation of Study Results in 2025

Keen Independent will produce draft reports for individual entities in spring 2025. At that point, the external communications might best be a joint effort between Admin (to businesses, trade associations and other stakeholders statewide) and individual participating entities (to stakeholders and the broader public interested in that entity).

This will require broad communications from Admin (with Keen Independent assistance) that:

- Reinforces all the messages identified in the launch themes to the left;
- Communicates the extent of community involvement in the study to date;
- Describes the overall results of the study, especially concerning conditions in the marketplace;
- Broadly outlines the result of the disparity analyses, perhaps focusing on all entities combined (or for contracts with programs and without programs);
- Identifies where to access results for each study; and
- Encourages the public to attend virtual and any in-person public forums and use other means to provide input or feedback concerning draft study results.

Each participating entity (including Admin) would then individually communicate results to its community, describing results, steps already taken and plans for reviewing the study and seeking community input. Keen Independent will assist in preparing communications materials.

Keen Independent can make a presentation (virtual, hybrid or in-person) to elected officials or board members at the time when the draft report is released (spring 2025) or when the final report is submitted (summer 2025).

Explanation of Entity Action in 2025

After receiving public comments on the draft reports, Keen Independent will prepare final reports for each entity in summer 2025.

We recommend that each entity consider communications that describe how the organization is using the results and what actions might be anticipated over what period. These decisions will be made by the participating entity (although state agency efforts might be coordinated). Therefore, Keen Independent will not be the primary author of these communications. We can serve in a limited advisory role at the time the final reports are submitted.

APPENDIX J. Qualitative Information — Introduction

Appendix J presents qualitative information that Keen Independent collected as part of Phase 1 of the 2025 Minnesota Joint Disparity Study. This appendix is based on input from more than 80 public forum attendees and members of the External Stakeholders Group for this study. It contains results from the initial weeks of the study. Phase 2 of the study will include a greater amount of qualitative research.

Appendix J includes four parts:

- Introduction;
- Groups of business owners that face disadvantages;
- Types of disadvantages faced by business owners; and
- If and how public entities perpetuate any disadvantages.

Study Methodology

In April 2024, the Keen Independent study team collected qualitative information from the following:

- Two public forums;
- One external stakeholder group meeting; and
- Other means.

Participants provided input on which groups of business owners (if any) face disadvantages in the Minnesota marketplace, types of disadvantages (if any) faced by business owners and how/if public entities perpetuate identified disadvantages.

Throughout, Appendix J summarizes examples of comments gathered through these study methods. For anonymity, Keen Independent analyzed and coded comments without identifying any of the participants.[1]

[1] Public forum participants are identified in Appendix J by 2024 public forum participant; external stakeholders are coded as External Stakeholder Group member.

J. Qualitative Information — Business owners that face disadvantages

Keen Independent asked public forum participants to share what, if any, groups of business owners face disadvantages in Minnesota based on their personal characteristics. Examples of responses are provided on the following pages.

People of Color and Women

Businesses owned by people of color and women face disadvantages in the Minnesota marketplace, according to public forum and External Stakeholders Group (ESG) participants. Some individuals reported that the disadvantages faced by these groups are due to systemic barriers.

Examples of comments are shown below.

There are groups of business owners that face disadvantages. If you're not a man or white, you're going to be disadvantaged. If you're a person of color or you're female, there are inherent systemic barriers.

2024 public forum participant

[I] definitely feel the disadvantage of being a woman running a company.

2024 public forum participant

The most apparent disadvantage faced by people of color from the time in memorial is denial of funds and/or business loans.

2024 public forum participant

Individuals with Disabilities

One participant reported that individuals living with a disability face disadvantages within the Minnesota marketplace.

When a website is not accessible to assistive technology users, they're at a disadvantage, and thus exclusively treated differently than other users of programs.

External Stakeholder Group member

J. Qualitative Information — Business owners that face disadvantages

LGBTQ+ Business Owners

Some individuals reported that LGBTQ+ business owners face disadvantages in the Minnesota marketplace.

Examples of comments are shown on the right side of this page.

LGBTQ+ businesses face definite disadvantages in Minnesota based on identity characteristics. Approximately 21,000 of the over 500,000 small businesses in Minnesota are LGBTQ+-owned.

2024 public forum participant

Here in Minnesota, this is the second time LGBT[BE]-certified businesses aren't being included in the disparity study…. There has not been a formal disparity study as it related to LGBT[BE]-certified businesses. It's used as a justification for not including them in the State Supplier Diversity Program.

2024 public forum participant

We have a lot of LGBTQ+, veteran-owned businesses that [have to choose] to identify as [such]. Even if we are a trans-refuge state and doing all of these amazing things in the State of Minnesota, there still exists some structural inequities that deeply impact LGBTQ+ business owners and how they grow and thrive.

2024 public forum participant

Access to capital, homophobia, transphobia, all other exclusionary phobias that really impact the backs of LGBTQ+ small business owners. [There is] a lack of access to programs designed to support small businesses or disadvantaged businesses here in Minnesota. We're not recognized specifically as a disadvantaged business; some of the programs can't be accessed.

2024 public forum participant

LGBTQ-owned business and rural, or remote business owners, I think those two groups could be considered part of this as well.

External Stakeholders Group member

J. Qualitative Information — Types of disadvantages

Participants shared some of the types of disadvantages they see in the Minnesota marketplace.

Access to Information

Access to information can be a disadvantage for business owners in the Minnesota marketplace, according to public forum participants.

Business assistance initiatives, such as guidance in proposal writing and mentor-protégé programs, would be beneficial for firms that face disadvantages in the marketplace. For example:

Can we get more help with proposal writing and collaboration in an RFP? Maybe a mentorship from a successful contractor who has won multiple contracts in the past.

2024 public forum participant

Language Barriers

Some participants indicated that language barriers create disadvantages for firms in the Minnesota marketplace.

If English is not your first language, it is especially challenging to start a business and understand the requirements, much less trying to market to the community.

2024 public forum participant

Access to Capital

Some participants explained that access to capital serves as a major barrier for firms in the marketplace.

For the communities that we try to serve, they have fewer friends and family to raise capital with, so there is a huge capital [disparity].

External Stakeholder Group member

The issue of capital, and the issue of different types of capital, whether that be finance capital, technical or certain types of knowledge capital, or even just social connections or network connections to the streams of institutional advantage [is a type of disadvantage].

External Stakeholder Group member

J. Qualitative Information — Types of disadvantages

Race- and Gender-based Discrimination

Some participants reported that discrimination based on race or gender has been a disadvantage to firms at startup, as well as to firm growth and reputation. Barriers may include stereotyping and unequal access to capital.

Being very active in my business and outside my business working with [other] businesses, I have to [acknowledge] my culture and experience. I'm an African American woman. The wealth of this nation and others has been built on our free labor. We still do the work, yet we don't get paid or acknowledged for it.

2024 public forum participant

Primes don't seem to take [companies owned by a person of color] seriously enough to invite them to their offices.

2024 public forum participant

I had difficulties getting bankers to give me the time of day to be able to pitch the business plan and get a [Small Business Administration] SBA loan. I had many [men reject my loan] and then I finally got a 'yes' from a woman. I still have some difficulties with men thinking women are able to run a multi-million-dollar business.

2024 public forum participant

It's frustrating after being in business for ten years that the only way that I can get any idea how to engage in this type of business is by asking a white [man] for help. It reinforces the patriarchal feel for me.

2024 public forum participant

If I'm looking at buying a building and if I … bring a man beside me, [then] they talk to the man, follow the man, give the man the papers. They automatically think the man is the buyer. They don't think the woman has control over the money or has the final choice.

2024 public forum participant

J. Qualitative Information — How public entities perpetuate any disadvantages

Keen Independent asked meeting participants to explain if and how public entities perpetuate disadvantages. Examples are shown on the following pages.

Lack of Representation

Some participants reported that a lack of representation in the government and within public entities perpetuated the disadvantages they faced.

One participant indicated that systemic inequities contributed to the disadvantages they faced.

These are issues with the systems and how they were designed and have not been rebuilt or reconsidered with the changes of the world. The hoops you have to jump through to work for or respond to an RFP are overwhelming.

2024 public forum participant

Examples of additional comments are shown below and to the right side of this page.

I imagine that it might be easier for large businesses with connections with the systems to get public contracts, compared to the small-owned businesses that have less capacity in terms of staff and resources. Reducing barriers to get certified should also be looked into. [I have also found] that when I speak with small business owners in the Latino community, they do not know about the Office of Equity and Procurement within Admin, and language access is also an issue.

External Stakeholder Group member

There's a lack of representation. There's nobody to go seek help from because there is no Department of Human Resources within these communities to seek help. There is no state representative that people from the City can [reach out to].

2024 public forum participant

I see a difference in the State of Minnesota and some counties and cities that want to have diverse businesses bidding and winning their projects. If they don't have DBE goals within their RFP, there is no opportunity for me. Otherwise, the primes and bigger, older businesses have no reason to team up with us.

2024 public forum participant

It had been about six years at the time, and I couldn't get a newsletter of RFPs that were coming out. I was talking to some [public sector] employees and told them … they need more diverse staff, and maybe more people of color will be able to get more information and feel like they're a part of [the system].

2024 public forum participant

Governments need more diverse staff, and maybe more people of color will be able to get more information and feel like they're a part of [the system].

2024 public forum participant

J. Qualitative Information — How public entities perpetuate any disadvantages

Lack of Resources and Education

Some participants said that a lack of adequate resources, such as time, energy and access to staff, perpetuated disadvantages.

For example, one participant indicated that the sheer number of certifications can be difficult to navigate, and that some firms lack the necessary time and energy to complete the steps.

Another disadvantage is purely time and energy to sort out all of the different certifications. Is this local, is this state, is this federal? There are different websites for different things. Some are using NAICS codes, and some are using other codes.

2024 public forum participant

Examples of additional comments are shown below and on the right side of the page.

The programs are out there, but they are not getting the support, so they can't continue to function. When you need them, they no longer exist.

2024 public forum participant

Are government entities funneling funds [from the State or otherwise], towards everything but Black training programs, at the same level as they do their counterparts? The biggest disadvantage is access to relationships with people who are making decisions, building and sending out the RFPs.

2024 public forum participant

[Lack of education] to help [firms we represent] operate the business; many of them go from [being an] employee to owning a business, and they don't necessarily have the skillsets, education and resources to allow them to lead sustainable businesses.

External Stakeholder Group member

Any policies or regulations that public entities created historically that have contributed directly or indirectly to these existing disadvantages, that is one way [disadvantages have been perpetuated by public entities].

External Stakeholder Group member

Education and outreach are not equal, access to resources and networking is not equal, and advocacy and representation … I think about a lot of these disadvantaged groups; they lack representation in these institutions, so they're not at the table when we're discussing these policies, and so their concerns can be easily overlooked.

External Stakeholder Group member

APPENDIX L. Entity Purchasing and Contract Equity Programs — Introduction

Keen Independent reviewed general concepts concerning public procurement for different types of government agencies in Minnesota. The study team also examined programs that participating entities use to open procurement opportunities for minority- and woman-owned firms and other groups of diverse businesses.

The first part of Appendix L examines procurement and the second part describes current contract equity programs. The discussion of programs includes those required for federally funded contracts (which are not a focus of the balance of the 2025 Minnesota Joint Disparity Study).

These summaries of procurement methods and contract equity programs may be refined in Phase 2 of the study as Keen Independent further explores both topics for each participating entity.

L. Entity Purchasing and Contract Equity Programs — Procurement

Overview of Entity Procurement Methods

Participating entities procure construction, professional and technical services, goods and miscellaneous services by soliciting bids, proposals, qualifications statements or quotes

There are also procedures for sole source and emergency purchases, which do not require bids or proposals from more than one business. Entities can also purchase items using other agencies' contracts or can join other agencies in cooperative purchasing.

Bids for work. Different requests for bids have different names:

- An invitation for bid (IFB) or request for bids (RFB) is typically used when the entity will award the purchase to the lowest responsible bidder. If the low-price bidder is responsive to the requirements specified in the invitation for bid (such as offering the correct item and delivering it when needed), that bidder will typically be awarded that procurement For some of the participating entities, many construction contracts are awarded through IFBs when the design for those projects are complete prior to the construction contract. These are sometimes known as "design-bid-build" projects.

- A request for proposal (RFP) is typically used when an entity will consider factors such as proposed services, experience of the proposer, proposed timeline, price and other factors when selecting the firm for award. An entity can score different evaluation factors, each with a different weight. RFPs can be used for "best value" procurements of construction.

- There are certain types of professional services procurements that do not consider price when determining award. These types of services are often procured through requests for qualifications (RFQs).

- Public entities can make certain small purchases by directly soliciting quotes or informal bids from a small number of firms. For example, some entities attempt to obtain at least three quotes (even though state law requires only two quotes, if possible) if the procurement is estimated to be between $10,000 and $175,000.[1] Many, but not all, participating public entities issue purchasing cards (p-cards) to certain staff that allow them to directly purchase small-dollar items without competition. Entities such as the City of Saint Paul can use p-cards for micro-purchases up to $25,000.

- There are other procurement tools, such as requests for information (RFIs) and statements of interest (SOIs), that entities can use to obtain information from potential vendors.

Each of the participating entities follow somewhat different procedures for preparing and evaluating bids, proposals, qualification statements and quotes from companies competing for those procurements. The largest differences are dollar levels that trigger public advertisement of the procurement opportunity or require obtaining a certain number of quotes; and how procurements are publicly advertised. The following presents information as of spring 2024 (Phase 1 of the 2025 Study).

[1] Minn. Stat. section 471.345 (2023).

L. Entity Purchasing and Contract Equity Programs — Procurement

Formal, publicly advertised bids and proposals. Above a certain dollar limit, each of the participating entities are required to publicly advertise their procurements rather than just directly notifying a small number of firms about the procurement.

Local government agencies in Minnesota must typically follow State requirements set forth in Uniform Municipal Contracting Law.[2] State law sets the dollar thresholds that require use of specific methods for different types of procurement.[3] There are usually requirements about how long a request will be publicly advertised (often at least two weeks). Public entities in Minnesota typically advertise through their own or another agency's website and/or through an official newspaper.

As of spring 2024, the dollar levels that require public advertisement of most types of purchases are shown in Figure L-1.

The dollar values in Figure L-1 identify when formal, publicly advertised bidding is required.[4] An entity can use those methods for a smaller procurement if advantageous, but it is not required to do so. Some entities use these thresholds to consider requiring bid bonds or a bid deposit (often 5%) for bids on those contracts.[5] (Bonds or the deposit forfeited if low bidder withdraws its bid for a disallowed reason.)

There also exceptions, for example for direct solicitation up to $250,000 of an SBE certified by a county-designated certification program.[6]

L-1. Thresholds that require a formal solicitation that is publicly advertised

$250,000

University of Minnesota (construction)

$175,000

Metropolitan Council
Metropolitan Airports Commission
Metropolitan Mosquito Control District
Hennepin County
Ramsey County
City of Bloomington
City of Brooklyn Park
City of Minneapolis
City of Rochester
City of Saint Paul
Saint Paul Public Schools

$100,000

Minnesota Department of Transportation
University of Minnesota (A&E)

$50,000

Minnesota Dept. of Admin (public notice above $25,000)
Minnesota State Colleges and Universities
University of Minnesota (goods and services)
Hennepin Healthcare System

[2] Minn. Stat. section 471.345 (2023).

[3] The University of Minnesota is exempt from this requirement.

[4] The City of Bloomington Housing and Redevelopment Authority and Port Authority may have internal procurement policies that differ from the City's.

[5] Some other entities do not have this requirement. For example, the University of Minnesota does not require bid bonds; it only requires payment and performance on contracts exceeding $175,000.

[6] Minn. Sat. section 471.345 (2023).

L. Entity Purchasing and Contract Equity Programs — Procurement

Cooperative purchasing programs. The Minnesota Department of Administration and other organizations sometimes solicit bids for contracts that allow many other public entities to make purchases at pre-determined prices.

State statute created Minnesota's Cooperative Purchasing Venture (CPV) for certain goods and services, which is operated by the Minnesota Department of Administration Program.[7] As of spring 2024, more than 3,000 organizations in Minnesota were eligible to make CVP purchases, including most of the entities participating in the Joint Disparity Study. Purchasing through other cooperative agreements are also authorized under state law.

Many participating entities have access to regional or national cooperative purchasing specific to their industry as well as to U.S. General Services Administration (GSA) schedules.

[7] Minn. Stat. section 16.C.03 (2023).

Other Laws Affecting Public Procurement

Beyond rules for public bidding, many other laws affect public procurement in Minnesota. Examples are discussed below.

Minnesota certificate of compliance from Minnesota Department of Human Rights. State law (Minnesota Statute Section 363A.36) required firms receiving contracts exceeding $100,000 that are a certain size (more than 40 full time employees) to obtain a Certificate of Compliance from the Minnesota Department of Human Rights.

Responsible Contractor Law. The State passed the Responsible Contractor Law, effective in 2015, that requires public entities in the state to only enter into construction contracts exceeding $50,000 with "responsible contractors." A responsible contractor must be properly registered with the State; be in compliance with workers' comp, unemployment insurance and other requirements; and in the three years prior to submitting the verification, has not violated the following laws:

- Minnesota Prevailing Wage laws;
- Minnesota Wage & Hour laws;
- Minnesota Employee Classification law;
- Federal Fair Labor Standards Act; and
- Federal Davis Bacon Act.

One of the additional requirements is that the contractor has not been sanctioned by the Department of Administration or MnDOT for failure to meet a TGB, DBE or VET goal, due to a lack of good faith effort, more than once in the prior three years.

A prime contractor bidding on a public sector contract complies by submitting with its bid a sworn statement by the company owner or officer stating that it meets the criteria along with a list of first-tier subcontracts and their verifications of compliance. (Subcontractors must meet these requirements, no matter the size of the subcontract.)

Contractor Affidavit (Form IC134). Minnesota Statute section 363A.36 required contractors and subcontractors working on a public sector construction project (of any size) to complete and submit a Contractor Affidavit to the Minnesota Department of Revenue upon completion of the project.[8]

The government entity must obtain all of the completed Affidavits before it can make final payment to the prime contractor. The State of Minnesota directs prime contractors to not make final payments to subcontractors until they have received the Contractor Affidavit from that subcontractor.

Bonding requirements for public works construction contracts. By state law, bidders on public works construction projects in Minnesota must supply a payment and performance bonds before execution of the contract.[9]

[8] The University of Minnesota does not require this.

[9] See Minn. Stat. section 574.26 (2023) (For example, municipalities in the state must require bonding for construction contracts over $175,000).

L. Entity Purchasing and Contract Equity Programs — Procurement

Insurance requirements. Each of the participating entities has standards for the insurance that their contractors, consultants and vendors must have (which sometimes vary based on the work performed or goods supplied). For example, the City of Saint Paul published its minimum requirements, which are summarized in Figure L-2. A firm with a City contract must submit Certificates of Insurance that comply with those requirements prior to being authorized to start work.

Prompt payment. Each of the participating entities is subject to State requirements for prompt payment, and prime contractors on public entity contracts have similar requirements to promptly pay their subcontractors.

- Minnesota Statute 16.A.124 requires the State to pay a valid vendor invoice within 30 days of receiving that invoice "for the completed delivery of the product or service." The statute requires the State to pay interest penalties for certain late payments.
- Minnesota Statute 471.425 has similar requirements for other public entities in the state. Most public agencies are required to pay within 35 days of receipt of invoice (or delivery of the goods or services, whichever is later).
- Subdivision 4a of Minnesota Statute 471.425 requires prime contractors with a state or local government contract to pay subcontractors on that contract within 10 days of when the prime receives payment from the public entity.

L-2. Minimum insurance requirements for City of Saint Paul, April 2024

General or Business Liability Insurance

$1.5 million per occurrence
$2 million aggregate per project
$2 million products/completed operations total limit
$1.5 million personal injury and advertising

Automobile Insurance

Differing limits for Bodily Injury (e.g., up to $750,000) and Property Damage depending on whether commercial, personal, or rental vehicles are used in connection with a contract

Worker's Compensation and Employer's Liability

Worker's Compensation per Minnesota Statutes (except when firm has 10 or fewer employees)

$0.5 million per accident, per employee and per disease policy limit for Employer's Liability

Professional Liability Insurance

$1 million per occurrence
$2 million aggregate

Source: City of Saint Paul Insurance Requirements https://www.stpaul.gov/sites/default/files/Media%20Root/Human%20Rights%20%26%20Equal%20Economic%20Opportunity/Insurance%207-24-17.docx accessed April 6, 2024.

Requirements for federally funded contracts. Although the 2025 Joint Disparity Study did not focus on federally funded contracts, it is important to note that different procurement requirements can apply to those contracts.

For example, the Brooks Act is a federal law that generally requires selection of architecture and engineering firms for federally funded contracts based on factors other than price (such as qualifications and experience). This affects how agencies that receive federal funds for architecture and engineering contracts procure those services.[10]

Examples of other requirements to be able to bid on public contracts. The State and other public entity laws also have other direct and indirect effects on what firms can bid or work on those entities' contracts and subcontracts, or can be legally in business in the state.

For example, Minnesota state law requires certain types of licensing to perform construction work and governs licensing for professional occupations (and businesses) ranging from law, architecture, engineering and accounting firms to various construction industries.

For example, state law requires any person practicing architecture, engineering, land surveying, landscape architecture or other professional services in a public or private project be licensed in the state.[11]

The State requires all general contractors to carry a residential remodeler or building contractor license.[12] General contractors may also have licenses in the electrical and plumbing industries.[13] General contractors seeking licenses in plumbing and electrical work must have a master plumber or electrician or restricted master plumber and master electrician on staff.[14] The master plumber or electrician must perform the majority or all of the work to be in compliance with the statutory requirements.[15]

Examples of other construction fields that require the owner or staff member to have a valid license with the Commissioner for the Minnesota Department of Labor and Industries include elevator constructors, water conditioning installation, pipefitting, boiler inspection and boiler operations.[16]

The Commissioner for the Department of Labor and Industry authorizes licenses. License requirements include either the licensee or an employee of the licensee who performs all the work have an education in the trade and pass all master-level exams.[17] The Commissioner may also require the licensee to submit a background check and carry liability and worker's compensation insurance.[18]

Minnesota state statute 326B.805, subdivision 6 provides exemptions to these requirements.

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[10] https://www.dot.state.mn.us/stateaid/brooks-act.html, accessed April 6, 2024.

[11] Minn. Stat. section 362B.02 (2023).

[12] Minn. Stat. section 326B.805 (2023).

[13] Minn. Stat. section 326B. 33 (2023) and Minn. Stat. § 326B.46 (2023).

[14] Minn. Stat. section 326B. 33 (2023) and Minn. Stat. § 326B.46 (2023).

[15] Minn. Stat. section 326B. 33 (2023) and Minn. Stat. § 326B.46 (2023).

[16] Minn. Stat. section 326B.31, 41, 50, 90, 95, 164 (2023).

[17] Minn. Stat. section 326B.805 (2023).

[18] Minn. Stat. section 326B.805 (2023).

L. Entity Purchasing and Contract Equity Programs — Contract equity programs

Each participating entity operates certain programs providing preferences or assistance to minority- and women-owned businesses, businesses owned by persons with disabilities, veteran-owned businesses, businesses in economically disadvantaged areas and/or small businesses.

Each participating entity provided information about its programs, which Keen Independent supplemented from other sources.

Please note that the City of Bloomington, City of Brooklyn Park and Hennepin Healthcare System do not operate a contract equity program.

The discussion of contract equity programs is organized as follows:

- Program descriptions;
- Program eligibility; and
- Program application.

Programs Descriptions

A summary of participating entities' program follows. Each entity's website provides more detailed information. Figure L-3 on the following pages identifies the major programs by each entity.

Federal programs. Participating entities may receive federal funds that request them to apply certain race- and gender-conscious programs.

Federal DBE Program. The U.S. Department of Transportation requires state and local governments receiving funds from the Federal Highway Administration, Federal Transit Administration and Federal Aviation Administration to implement the Federal Disadvantaged Business Enterprise (DBE) Program. The Federal DBE Program applies to contracts funded by the U.S. Department of Transportation. As such, the Minnesota Department of Transportation, Metropolitan Council and Metropolitan Airports Commission have many contracts where they apply the Federal DBE Program, typically by setting DBE contract goals.[19]

Note that for entities including the City of St. Paul, City of Minneapolis and Hennepin County, MnDOT sets the DBE contract goal and monitors compliance on these local governments' USDOT-funded contracts. To be certified as a DBE, a firm must be socially and economically disadvantaged. Revenue limits, personal net worth limits and other restrictions apply. Most DBEs are minority- or women-owned firms, but white male-owned firms that can demonstrate social and economic disadvantage can be certified as DBEs as well.[20]

Federal ACDBE Program. Certain agencies receiving FAA funds are also required to implement the Federal Airport Concessions Disadvantaged Business Enterprise (ACDBE) Program related to airport concessions activities. The Metropolitan Airports Commission (MAC) operates the Federal ACDBE Program.[21]

U.S. Housing and Urban Development MBE Program and Section 3 Program. HUD has its own MBE Program that extends requirements to open contract opportunities for minority- and women-owned firms to state and local agencies receiving HUD financial assistance. This includes local public housing agencies. These agencies must provide regular reports of MBE and WBE participation to HUD.[22] Information related to grantees is also available.[23] HUD also has a Section 3 Program that encourages utilization of residents and businesses in HUD-supported projects.

U.S. Environmental Protection Agency DBE Program. As with HUD, the EPA has a DBE Program that encourages participation of minority- and women-owned firms, and other groups, in state and local contracts receiving EPA financial assistance.[24]

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[19] See https://www.fhwa.dot.gov/civilrights/programs/dbess.cfm

[20] See http://www.dot.gov/osdbu/disadvantaged-business-enterprise/definition-disadvantaged-business-enterprise

[21] See https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program/

[22] See http://portal.hud.gov/hudportal/HUD?src=/program_offices/sdb/guide/pop

[23] See https://www.hudexchange.info/resource/248/guidance-on-minority-business-enterprise-and-womens-business-enterprise-outreach/

[24] See https://www.epa.gov/sites/production/files/2013-09/documents/final_dbe_rule.pdf

L. Entity Purchasing and Contract Equity Programs — Contract equity programs

L-3. Program application for participating entities that have equity programs, 2024

Agencies	Federal DBE Program (USDOT)	Federal ACDBE Program (USDOT)	HUD Section 3	EPA DBE Program	TGB	VOB	Econ. Disadv. Business	UMN TGB	MCUB
Minn Dept. of Admin					■	■	■		
MnDOT	■				■	■	■		
Minnesota State					■	■	■		
University of Minnesota								■	
MAC	■	■			■	■	■		
Met Council	■			■					■
MMCD					■	■	■		
Hennepin County						■			
Ramsey County									
City of Minneapolis			■						
City of Rochester	■		■	■	■	■	■		
City of St. Paul			■						
Saint Paul Public Schools									

Note: Hennepin County recognizes an applicable subset of Admin's certification veteran-owned small businesses (VOBs and SDVOBs).

L-3. Program application by participating entity, 2024 (cont.)

Agencies	SBE	SMBE/ SWBE	ESBE	SUBP	TMP	TB & WPP	VOP
Minn Dept. of Admin							
MnDOT							
Minnesota State							
University of Minnesota							
MAC							
Met Council							
MMCD							
Hennepin County	■	■	■				
Ramsey County	■						
City of Minneapolis				■	■		
City of Rochester	■					■	
City of St. Paul							■
Saint Paul Public Schools	■						

L. Entity Purchasing and Contract Equity Programs — Contract equity programs

State of Minnesota programs. The State of Minnesota has established three contract equity programs which were developed to level the playing field for targeted businesses located in the state. The State of Minnesota programs include:

- The Minnesota Targeted Group Business Program;
- The Minnesota Economically Disadvantaged Business Program; and
- The Minnesota Veteran-owned Business Program.

Minnesota Targeted Group Business Program. The Minnesota Department of Administration and several other participating entities operate a Targeted Group Business Program (TGB) that sets subcontract goals and provides preferences to Minnesota businesses that are certified as minority- or woman-owned firms or companies owned by people with a substantial physical disability. The program does not apply to certain federally funded contracts.[25]

Minnesota Economically Disadvantaged Business Program. Similar to the TGB Program, the Minnesota Department of Administration sets subcontract goals and provides preferences for small businesses certified as economically disadvantaged (ED) small businesses. A company located in an economically disadvantaged county, which includes federally designated labor surplus areas and low-income counties, can be certified as an economically disadvantaged small business. A firm can also be certified as such if the owner resides in an economically disadvantaged area.[26]

Minnesota Veteran-owned Business Program. The Minnesota Department of Administration and several other public entities operate a Veteran-owned Business Program (VO or VET Program) in parallel to other program elements, including subcontract goals and application of price preferences. A firm owned and controlled by a veteran and located in Minnesota can be certified under this program.[27]

Certification. The Minnesota Department of Administration certifies businesses as TGB/ED and VET firms.

[25] See https://mn.gov/admin/business/vendor-info/oep/sbcp/tg/

[26] See https://mn.gov/admin/business/vendor-info/oep/sbcp/ed/

[27] See https://mn.gov/admin/business/vendor-info/oep/sbcp/vo/.

State agency application of state programs. State agencies may apply the TGB/ED/VET programs if they have sufficient probative evidence that remedial action is necessary to address observed disparities (such as through a disparity study).

Minnesota Department of Administration (Admin). Admin sets TGB/ED/VET subcontracting goals on construction and professional services contracts over $500,000 with subcontracting opportunities.[28] Admin provides a price preference up to 12 percent for TGB/ED/VET firms bidding as prime contractors on certain goods and services.[29]

Minnesota Department of Transportation (MnDOT). MnDOT sets separate TGB and VET subcontracting goals on construction and professional services contracts with subcontracting opportunities. TGB and VET small businesses can receive a price preference of up to 6 percent when they bid or propose as prime contractors or prime consultants. MnDOT applies this preference to all state-funded construction and professional/technical services contracts.[30]

Metropolitan Mosquito Control District (MMCD). MMCD uses TGB/ED/VET directory to identify potential bidders.[31]

Metropolitan Airports Commission (MAC). In 2022, MAC started setting TGB/ED/VET subcontract goals on certain contracts over $175,000.[32]

Minnesota State Colleges and Universities (Minnesota State). Minnesota State provides a price preference of up to 6 percentage points for TGB, ED and VET vendors on construction-related contracts over $100,000.[33] Minnesota State accepts the following certifications:

- State of Minnesota TGB, ED and VET certifications;
- CERT certification;
- Women's Business Enterprise National Council WBENC certification; and
- National Minority Supplier Development Council NMSDC certification.

[28] Minnesota Department of Administration. Goal Setting Process document.

[29] https://mn.gov/admin/business/vendor-info/oep/sbcp/tg/

[30] Minnesota Department of Transportation. MnDOT TGB Vet Special Provisions and Forms Template.

[31] Metropolitan Mosquito Control District. 2025 Minnesota Joint Disparity Study meeting notes.

[32] Metropolitan Airports Commission. 2025 Minnesota Joint Disparity Study meeting notes.

[33] Minnesota State Colleges and Universities. 2025 Minnesota Joint Disparity Study meeting notes.

University of Minnesota Targeted Group Business Program (TGBP). The University of Minnesota (UMN) operates a Targeted Group Business Program (TGBP).[34]

TGB evaluation points. As part of the UMN TGBP, certified woman-, minority- and disabled-owned businesses that bid for a contract as a prime contractor receive additional evaluation points that become part of the total bid score.

Bidders and proposers may obtain additional evaluation points based on the following criteria:

- The bidder or proposer employs a meaningful number of women, minorities and/or persons with disabilities for work on construction projects;
- Subcontracts with or purchase materials from certified woman-, minority- or disabled-owned businesses.

  UMN sets a TGB aspirational goal of 13 percent on construction contracts over $100,000 and an aspirational goal of 6 percent on goods and services contracts over $50,000. Design contracts are under services contracts.
- Participates in key industry organizations, with participation defined as current registered membership and/or demonstrable attendance of three or more events in the past 365 days.[35]

Certifications. UMN accepts the following certifications:

- Central Certification (CERT) Program;
- Disability:IN™ Supplier Diversity;
- Minnesota Unified Certification Program (MnUCP);
- National Minority Supplier Development Council, Inc. (NMSDC);
- State of Minnesota Department of Administration; and
- Women's Business Enterprise National Council (WBENC).

[34] https://osd.umn.edu/programs/supplier-diversity

[35] Key partners include Association of Women Contractors-MN, Disability:IN, Economic Development Assoc. of MN, Minnesota American Indian Chamber of Commerce, Minnesota Minority Goods and Services Association, Minnesota Tribal Contractors Council, National Association of Minority Contractors-Upper Midwest, National Minority Supplier Diversity Council, Summit Academy, Women's Business Development Center and Women's Business Enterprise National Council.

Metropolitan Council MCUB Program. Metropolitan Council (Met Council) operates the Metropolitan Council Underutilized Business (MCUB) Program for non-federally funded contracts. MCUB businesses include certified TGBs, DBEs based in Minnesota, Veteran and Service Disabled Veteran Owned businesses certified by the MN Department of Administration and CERT (WBE and MBE only) certified by the City of Saint Paul. For the MCUB Program, the Metropolitan Council mirrors Federal DBE Program regulations.[36]

Contract goals. Met Council sets MCUB contract goals for eligible locally funded contracts over $175,000.

MCUB Direct. Met Council applies the "micro-level purchase process" for procurements up to $25,000 when one targeted group or veteran-owned business is likely to bid.

MCUB Select. Met Council applies a "sheltered market solicitation" process for a procurement of goods or services up to $175,000 when at least three targeted group or veteran-owned businesses are likely to bid.

MCUB Preference. Met Council provides a 6 percent evaluation preference for procurement of goods and services between $25,000 and $175,000 when one targeted group or veteran-owned business is likely to bid.

Certifications. Met Council accepts the following certifications for a firm to be eligible for the MCUB Program:

- Certified Targeted Group Businesses;
- DBE-certified businesses based in Minnesota;
- Veteran and Service Disabled Veteran Owned businesses certified by the MN Department of Administration; and
- CERT MBE and SBE firms.

Met Council certifies firms as DBEs.

[36] See http://www.metrocouncil.org/About-Us/Organization/Office-of-Equal-Opportunity/Small-Business-Programs/Metropolitan-Council-Underutilized-Business-Progra.aspx.

L. Entity Purchasing and Contract Equity Programs — Contract equity programs

Hennepin County targeted inclusion programs. Hennepin County has administered the Small Business Enterprise (SBE) Program for over 25 years. In 2018, Hennepin County supplemented and enhanced its race- and gender-neutral SBE program with narrowly-tailored contract-specific race- and gender-conscious goals.[37]

SBE goal. Hennepin County may set an SBE participation goal on construction and professional services contracts of over $100,000.

Women-owned small business enterprise (SWBE) and small business enterprise owned by a person of color (SMBE). Following the 2017 Minnesota Joint Disparity Study results, the County supplemented and enhanced the SBE program with narrowly-tailored SMBE and SWBE goals in construction, and SMBE goals in professional service contracts. SMBE and SWBE goals are considered on contracts estimated to be over $100,000. The county may still set an SBE goal, when warranted.

Incentivizing ESBE and SBE participation. In 2018, the County began incentivizing the inclusion of CERT-certified ESBEs and SBEs through use of evaluation criterion points where proposers can earn up to 10 percent of total evaluation points. Where applicable, incentive points may be earned by the self-performance of the prime and subcontractors.

Principal agreement program. The County provides enhanced bidding opportunities to SBE, ESBE and CERT firms on certain contracts.[38]

Examples of principal agreement programs include:

- Small construction roster program. ESBEs with average gross revenue below $4 million are invited to bid on construction-related projects valued at $500,000 or less.
- Building maintenance services roster program. ESBEs with average gross revenue below $3 million are invited to bid on certain maintenance contracts.
- Consulting services program. The County gives first consideration to ESBE and/or SBE CERT firms depending on the estimated value and the availability of relevant certified firms that bid or propose on work related to architecture, engineering, environmental and real estate and other consulting contracts valued at $500,000 or less.

Sheltered markets and mandatory scopes for ESBEs or SBEs. In 2016, Hennepin County launched a pilot program in which prequalified local SBEs were solicited to submit bids to remodel tax-forfeited homes in the neighborhood where they are based. Hennepin County continued the program and may limit invitations to bid to SBE and emerging small business enterprises (ESBE), as permitted by state statute.

Certifications. Hennepin County recognizes CERT program certification and Minnesota Department of Administration veteran-owned small business certifications.

[37] https://www.hennepin.us/business/work-with-henn-co/contracting-with-hennepin-county

[38] https://www.hennepin.us/business/work-with-henn-co/contracting-with-hennepin-county

Ramsey County Small Business Enterprise Quotes (SBEQ) program. Since 2012, Ramsey County has operated a Certified Small Business Enterprise Quotes (SBEQ) program.[39]

This program creates a market for small businesses to compete for relatively small County contracts.

Program application. The SBEQ program applies to County construction, professional services, goods and other services purchases valued between $10,000 and $250,000 (as of September 2018).

Program operation. The County must receive at least two responses from certified SBEs in response to solicitations for bids or proposals.

Certification. SBEs certified through the City of Saint Paul certification program (CERT) are eligible to participate in the SBEQ program.

As of 2019, veteran-owned small businesses certified through the U.S. Department of Veterans Affairs or the Office of State Procurement are also eligible to participate in the program.

[39] Certified Small Business Enterprise Quotes (SBEQ) Policy.

City of Minneapolis Small Underutilized Business Program (SUBP). The City of Minneapolis operates the Small Underutilized Business Program (SUBP) for minority- and woman-owned firms and the Target Market Program for small businesses.[40]

SUBP goals. The City sets separate MBE and WBE participation goals on locally funded construction, professional services and good contracts over $175,000.[41] The threshold for program application changed from $200,000 to $175,000 in 2019.

MBEs and WBEs must be certified as Disadvantaged Business Enterprises (DBEs) and have its primary location of work in the Minnesota counties of Anoka, Carver, Chisago, Dakota, Hennepin, Isanti, Le Sueur, Mille Lacs, Ramsey, Scott, Sherburne, Sibley, Washington, or Wright; or the Wisconsin counties of Pierce or St. Croix.

Target Market Program (TMP). The TMP is a race- and gender-neutral program that applies to contracts less than $175,000. As part of this program, the City invites small firms in the relevant marketplace area to participate in certain contracts below $175,000.[42]

Small firms need to enroll in the Targeted Market Program to participate in this program.

Firms should meet Small Business Administration (SBA) size standards and be located in the 13-county Minnesota metropolitan area.

Certification. The City of Minneapolis certifies and accepts Disadvantaged Business Enterprise certification for the Small Underutilized Business Program.

The City accepts certifications through CERT for its Target Market Program.

[40] https://www2.minneapolismn.gov/government/departments/civil-rights/contract-compliance-division/small-underutilized-business/

[41] https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=MICOOR_TIT16PLDE_CH423SMUNBUENPR#TOPTITLE

[42] https://www.minneapolismn.gov/business-services/doing-business-with-the-city/target-market/

City of Rochester Targeted Business Program. In November 2020, the City of Rochester adopted a contract goals program, the Targeted Business (TB) program.

The program includes SBE and VBE price preferences, as well as workforce employment goals for women and people of color. The City began phasing in a TB contract goals element for City infrastructure projects in 2021.[43]

TB program elements. The City's TB program contains the following elements relating to workforce participation and TB participation in City procurement related to infrastructure projects.

- Workforce employment. The City has workforce employment goals of 15 percent for people of color and 9 percent for women.
- TB participation. The City may apply a 4 percent subcontract participation goal for each City contract in heavy civil construction and a 7 percent subcontract participation goal for each City contract in commercial construction. Professional Technical services contract goals are set contract-by-contract.
- VBE and SBE price preferences. VBEs and SBEs receive a 6 percent price preference on bids and proposals (up to $1 million).

Certification. The City accepts certification from the following certification agencies:

- Minnesota Unified Certification Program for DBEs (MnUCP);
- CERT certification; and
- Minnesota Office of State Procurement.

[43] City of Rochester. 2025 Minnesota Joint Disparity Study meeting notes.

City of Saint Paul Vendor Outreach Program (VOP). The City of Saint Paul operates the Vendor Outreach Program (VOP) on non-federally funded contracts.[44]

Business inclusion goals. The City of Saint Paul sets subcontracting goals on locally funded construction, goods and services contracts with a total cost of over $50,000.

For eligible contracts, the City sets goals of 25 percent for the share of the subcontracted amount of the project to go to CERT businesses. The business inclusion goal is broken down as follows:

- 5 percent MBEs;
- 10 percent SBEs; and
- 10 percent WBEs.

CERT vendor quote requirements. All new purchases up to $175,000 require at least one quote from a CERT vendor if available.[45] Exceptions include purchases made with an existing contract.

[44] https://www.stpaul.gov/departments/human-rights-equal-economic-opportunity/contract-compliance/vendor-outreach-program

[45] City of Saint Paul Human Rights and Equal Opportunity, CERT Vendor Quote Requirements.

CERT certification. The Central Certification Program (CERT) is a joint powers agreement (JPA) with board members from Saint Paul, Minneapolis, Hennepin County, and Ramsey County.

The program certifies eligible small local businesses. All CERT vendors must meet the Small Business Enterprise criteria and be a part of the local marketplace.

Emerging Small Business Enterprise (ESBE) is an additional certification with a greatly reduced size standard. Eligible businesses who apply for CERT certification will automatically be certified as an ESBE if they qualify.

CERT-eligible firm. A business entity whose principal place of business is in the marketplace that:

- Is at least fifty-one (51) percent owned by one or more native or naturalized citizens of the United States, or lawfully admitted permanent residents of the United States, and
- Is not a broker, or a manufacturer's representative, does not operate as a franchisee or under a franchise agreement, and is not a business in which the owner is also owner or part owner of one or more businesses that is dominant in the same field of operation; and
- Performs a commercially useful function; and
- Has been in operation for at least one (1) year or, in operation for less than one year and is able to provide documentation showing that it has an established record of generating revenue while performing the business function represented in its application for certification or, if a professional service, is able to provide documentation showing that it possesses applicable licenses or professional certifications or credentials.

Small Business Enterprise (SBE). It is not a business enterprise dominant in its field of operation.

Minority-owned Business Enterprise (MBE). An eligible business that is at least fifty-one (51) percent owned by one or more minority persons, and has its management and daily business operations controlled by one or more minority persons who own it.

Women-owned Business Enterprise (WBE). An eligible business that is at least fifty-one (51) percent owned by one or more women, and has its management and daily business operations controlled by one or more women who own it.

CERT firms should have a place of business in the marketplace (Minnesota counties of Anoka, Benton, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne, Stearns, Washington, and Wright; and the Wisconsin counties of Pierce and St. Croix.)

Saint Paul Public Schools Small Business Enterprise Program. Saint Paul Public Schools ("SPPS" or "District") operates an Equal Opportunity Procurement program that includes overall aspirational SBE or micro-SBE goals and contract-specific SBE or micro-SBE goals.[46]

Aspirational goals. Saint Paul Public Schools sets overall annual aspirational SBE and micro-SBE goals for District construction projects. Goals are evaluated and adjusted annually (as appropriate). Aspirational goals include:

- 10 percent for qualified SBEs; and
- 15 percent for qualified micro-SBEs.

SBE subcontract participation goals. The District is authorized to set SBE and micro-SBE participation goals on a contract-by-contract basis for its construction projects. This program element was implemented in 2023.

Certifications. SPPS accepts City of Saint Paul CERT certification for its SBE Program.

Hennepin Healthcare System. Hennepin Healthcare does not operate a contract equity program. However, Hennepin Healthcare has started including assessment of staff diversity in its evaluation criteria for RFP/FRQs.

City of Bloomington and City of Brooklyn Park. The City of Bloomington and the City of Brooklyn Park do not operate a contract equity program.

[46] Saint Paul Public Schools Policy 713.00 Equal Opportunity Procurement.

Program Eligibility

Figure L-4 summarizes eligibility and certification requirements for each program and identifies certifying agencies. In general, certification limits eligibility based on:

- Revenue or employment size of business;
- Personal net worth of the business owner (for State TG/ED/VO programs and Federal DBE and ACDBE programs);
- Location of business; and
- Race, ethnicity or gender of business (for race- and gender-conscious programs).

Figure L-5 presents relevant certifications and certifying agencies for the programs operated by each participating entity.

L. Entity Purchasing and Contract Equity Programs — Contract equity programs

L-4. Summary of firm eligibility for equity programs

	Federal DBE Program (USDOT)	Federal ACDBE Program (USDOT)	HUD Section 3 Program	EPA DBE Program	TGB	VOB	Econ. Disadv. Business	UMN TGB
Firm ownership eligibility criteria								
Minority-owned small business	■	■	■	■	■			■
Woman-owned small business	■	■	■	■	■			■
Other small businesses	*	*						
Small businesses owned by persons with disabilities	*	*			■			■
Veteran-owned small business						■		■
Small businesses (or owners) located in labor surplus or low income counties							■	
Firm location eligibility criteria								
13-County Metro Area								
15-County Metro Area								
Minnesota					■	■	■	■
United States	■	■	■	■				

L-4. Summary of firm eligibility for equity programs (cont.)

	MCUB	SBE	SMBE/ SWBE	ESBE	SUBP	TMP	TB & WPP	VOP (CERT)
Firm ownership eligibility criteria								
Minority-owned small business	■		■ **		■ (DBEs)		■	■ **
Woman-owned small business	■		■ **		■ (DBEs)		■	■ **
Other small businesses	*	■	■ **	■	*	■		■ **
Small businesses owned by persons with disabilities	■				*		■	
Veteran-owned small business	■						■	
Small businesses (or owners) located in labor surplus or low income counties							■	
Firm location eligibility criteria								
13-County Metro Area						■		
15-County Metro Area		■	■	■	■			■
Minnesota	■						■	
United States								

* Can apply for social disadvantage under the Federal DBE Program.
** Separate contract goals for MBE, WBE and SBE.

L. Entity Purchasing and Contract Equity Programs — Contract equity programs

L-5. Summary of programs operated by participating entities

Agencies	Certification					
	DBE ACDBE	CERT	Other	TGB (MBE/WBE/ Disability)	Economic disadvantaged	Veteran
Minn Dept. of Admin				■	■	■
MnDOT	■			■		■
Minnesota State		■	■	■	■	■
University of Minnesota		■	■	■		
MAC	■			■	■	■
Met Council	■	■		■		■
MMCD				■	■	■
Hennepin County		■				
Ramsey County		■				
City of Minneapolis	■	■				
City of Rochester	■	■		■	■	■
City of St. Paul		■				
St. Paul Public Schools		■				

Program Application

Each program uses a set of tools to encourage participation of minority- and women-owned businesses or other groups.

Price preferences and incentive points. The TGB Program, Veteran-owned Business Program and Economically Disadvantaged Business Program apply price preferences (or other point preferences) for certified firms when bidding or proposing on certain procurements. The preference can be as much as 12 percent. Sometimes there is a limit on the amount of price preference applied (e.g., maximum of $60,000).

The Met Council MCUB and the City of Rochester Targeted Business Program offer similar preferences.

Hennepin County and the University of Minnesota prime contractors may receive incentive evaluation points for including a particular group in their bid proposal.

Figure L-6 identifies programs that use price preferences and incentive points (as of the time of this Phase 1 report).

Contract goals. Certain programs include use of contract goals, where prime contractors must either include a level of participation of a particular group in their bid or proposal that meets the goal set for the contract or show good faith efforts to do so. Participating entities can set 0 percent goals or not set a goal at all in certain, for example when there are very limited subcontracting opportunities on a contract or insufficient availability of certified firms for scopes of work involved.

Figure L-6 identifies programs that provide for use of contract goals.

Sheltered market programs. A sheltered market program limits participation in bidding for certain procurements to certified firms.

Met Council, City of St. Paul and Hennepin County provide bidding opportunities to particular groups on certain contracts.

Figure L-6 on the following page describes the application of sheltered market programs at the time of this Phase 1 report.

L. Entity Purchasing and Contract Equity Programs — Contract equity programs

L-6. Summary of price preferences and contract goals program tools used by participating entities

Agencies	Price/incentive points for bidder or proposer				Contract goals		
	Construction	Professional services	Goods and other services	Limits or thresholds	Construction	Professional services	Goods and other services
Minn Dept. of Admin	■	■	■	TG/ED/VO may receive up to 12% preference	■	■	
MnDOT	■	■		TG/ED/VO may receive up to 12% preference	■	■	
Minnesota State	■	■	■	TG/ED/VO may receive up to 6% preference			
University of Minnesota	■	■	■	TGBs earn additional points that become part of total bid score	■ For contracts over $100,000		■ For contracts over $50,000
MAC				TG/ED/VO may receive up to 12% preference	■	■	■
Met Council[1]	■	■	■	MCUB may receive 6% preference for contracts $25,000–$175,000	■	■ For contracts over $175,000	■
MMCD				MMCD has not applied preferences or goals			

L-6. Summary of price preferences and contract goals program tools used by participating entities (cont.)

Agencies	Price/incentive points for bidder or proposer				Contract goals		
	Construction	Professional services	Goods and other services	Limits or thresholds	Construction	Professional services	Goods and other services
Hennepin County	■	■		Proposers may be incentivized and receive up to 10% of total evaluation points for their inclusion of SBEs and/or ESBEs	■	■	
					Generally for contracts over $100,000		
Ramsey County				Reaches out to 2 CERT firms for contracts between $10,000 and $250,000			
City of Minneapolis[2]				No price preference in SUBP Program	■	■	■
					For contracts over $175,000		
City of Rochester	■	■		Firms can receive 4%–7% preference depending on type of project	■		
City of St. Paul				No price preference in the VOP Program	■	■	■
					VOP applies for contracts over $50,000		
St. Paul Public Schools					■		

Note: 1. Met Council's MCUB procurement programs are Direct, Select or Preference. Direct applies a micro level purchase process, Select applies a sheltered market process and Preference provides the 6 percent evaluation preference.

2. In the City of Minneapolis, certain housing construction projects receive HUD financial assistance to promote inclusive subcontracting based on income and worker residency.

HOLLAND & KNIGHT LLP

APPENDIX N

PRIVILEGED AND CONFIDENTIAL

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CONFIDENTIAL MAY 31, 2024
DRAFT REPORT

MINNESOTA JOINT STUDY

REPORT ON LEGAL FRAMEWORK AND ANALYSIS

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APPENDIX N. Legal Framework and Analysis — Table of contents

APPENDIX N. Legal Framework and Analysis — Introduction

A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases involving local and state government minority and woman-owned and disadvantaged-owned business enterprise ("MBE/WBE/DBE") programs.

The appendix also reviews recent cases, which are instructive to the study and MBE/WBE/DBE programs, regarding the Federal Disadvantaged Business Enterprise ("Federal DBE") Program[1] and the implementation of the Federal DBE Program by local and state governments. The Federal DBE Program was continued and reauthorized by Congress in the Infrastructure Investment and Jobs Act of 2021, which reauthorized the Federal DBE Program based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs,[2] and contains certain types of findings and an evidentiary basis referenced in recent court decisions that are instructive to the study. The appendix provides a summary of the legal framework for a disparity study in general for Minnesota and local and state government minority and woman-owned and disadvantaged-owned business enterprise ("MBE/WBE/DBE") programs. .

Appendix N begins with a review of the landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson*.[3] *Croson* sets forth the strict scrutiny constitutional analysis applicable in the legal framework for conducting a disparity study. This section also notes the United States Supreme Court decision in *Adarand Constructors, Inc. v. Pena*,[4] ("*Adarand I*"), which applied the strict scrutiny analysis set forth in *Croson* to federal programs that provide federal assistance to a recipient of federal funds. The Supreme Court's decisions in *Adarand I* and *Croson*, and subsequent cases and authorities provide the basis for the legal analysis in connection with the study.

The legal framework analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to a disparity study and the strict scrutiny analysis. Minnesota and local governments in Minnesota are within the jurisdiction of the U.S. Court of Appeals for the Eighth Circuit. This analysis reviews in Section D below court decisions that are within the Eighth Circuit Court of Appeals.

In particular, this analysis reviews in Section D recent decisions within the Eighth Circuit Court of Appeals that are instructive to the study, including *Mark One Electric Company, Inc. v. City of Kansas City, Missouri*,[5] *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads,*[6] *Geyer Signal, Inc. v. Minnesota DOT,*[7] *CCI Environmental, Inc., D.W. Mertzke Excavating & Trucking, Inc., et al.,*

[1] 49 CFR Part 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs ("Federal DBE Program"). *See* the Transportation Equity Act for the 21st Century (TEA-21) as amended and reauthorized ("MAP-21," "SAFETEA" and "SAFETEA-LU"), and the United States Department of Transportation ("USDOT" or "DOT") regulations promulgated to implement TEA-21 the Federal regulations known as Moving Ahead for Progress in the 21st Century Act ("MAP-21"), Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.; preceded by Pub L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1156; preceded by Pub L. 105-178, Title I, § 1101(b), June 9, 1998, 112 Stat. 107.

[2] Pub. L. 117-58, H.R. 3684, § 11101(e), November 15, 2021, 135 Stat 443-449.

[3] *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

[4] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

[5] *Mark One Electric Company, Inc. v. City of Kansas City, Missouri,* 2022 WL 330525 (8th Cir. 2022)

[6] *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004).

[7] *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014).

v. City of St. Louis, St. Louis Airport Authority, et al,[8] *and Thomas v. City of Saint Paul.*[9]

The appendix reviews certain pending cases and very recent decisions that are instructive to the legal framework in Section C. 4. Below.

The analysis also reviews court decisions that involved challenges to MBE/WBE/DBE programs in other local and state government jurisdictions in Section E below, which are informative to the study.

In addition, the analysis reviews other federal cases instructive to the study that have considered the validity of the Federal DBE Program and its implementation by a state or local government , state DOT, other state agency or a recipient of U.S. DOT federal funds, including: *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.,*[10] *Dunnet Bay Construction Co. v. Illinois DOT,*[11] *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation ("Caltrans"), et al.,*[12] *Western States Paving Co. v. Washington State DOT,*[13] *Mountain West Holding Co. v. Montana, Montana DOT, et al.,*[14] *M.K. Weeden Construction v. Montana, Montana DOT, et al.,*[15] *Orion Insurance Group,* and *Ralph G. Taylor v. Washington State Office of Minority and Woman's Business Enterprises, United States DOT, et al.*,[16] *Northern Contracting, Inc. v. Illinois DOT,*[17] *Adarand Construction, Inc. v. Slater*[18] *("Adarand VII")*, *Geod Corporation v. New Jersey Transit Corporation,*[19] and *South Florida Chapter of the A.G.C. v. Broward County, Florida.*[20]

The analyses of these and other cases summarized below are instructive to the disparity study because they are the most recent and significant decisions by courts setting forth the legal framework applied to MBE/WBE/DBE Programs and disparity studies, and construing the validity of government programs involving MBE/WBE/DBEs.

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[8] *CCI Environmental, Inc., D.W. Mertzke Excavating & Trucking, Inc., et al., v. City of St. Louis, St. Louis Airport Authority, et al.;* U.S. District Court for the Eastern District of Missouri, Eastern Division; Case No: 4:19-cv-03099)

[9] *Thomas v. City of Saint Paul. Thomas v. City of Saint Paul*, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009)].

[10] *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.,* 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016). *Midwest Fence* filed a Petition for a Writ of Certiorari with the U.S. Supreme Court, *see* 2017 WL 511931 (Feb. 2, 2017), which was *denied,* 2017 WL 497345 (June 26, 2017).

[11] *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.,* 799 F.3d 676, 2015 WL 4934560 (7th Cir., 2015), *cert. denied*, 2016 WL 193809, (2016), Docket No. 15-906; *Dunnet Bay Construction Co. v. Illinois DOT*, et al. 2014 WL 552213 (C. D. Ill. 2014), *affirmed by Dunnet Bay,* 2015 WL 4934560 (7th Cir., 2015).

[12] *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.,* 713 F.3d 1187, (9th Cir. 2013); U.S.D.C., E.D. Cal, Civil Action No. S-09-1622, Slip Opinion Transcript (E.D. Cal. April 20, 2011), *appeal dismissed based on standing, on other grounds Ninth Circuit held Caltrans' DBE Program constitutional, Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.,* F.3d 1187, (9th Cir. 2013).

[13] *Western States Paving Co. v. Washington State DOT,* 407 F.3d 983 (9th Cir. 2005), *cert. denied,* 546 U.S. 1170 (2006).

[14] *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 (9th Cir. May 16, 2017).

[15] *M. K. Weeden Construction v. State of Montana, Montana DOT,* 2013 WL 4774517 (D. Mont. 2013).

[16] *Orion Insurance Group, Taylor v. WSOMWBE, U.S. DOT, et al.,* 2018 WL 6695345 (9th Cir. 2018), Memorandum opinion (not for publication and not precedent); *cert. denied* (June 24, 2019).

[17] *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007).

[18] *Adarand Construction, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000)("*Adarand VII*").

[19] *Geod Corporation v. New Jersey Transit Corporation*, 766 F.Supp. 2d 642 (D. N. J. 2010).

[20] *South Florida Chapter of the A.G.C. v. Broward County, Florida,* 544 F. Supp.2d 1336 (S.D. Fla. 2008).

N. Legal — Introduction

As stated above and shown in detail below in Sections C, D, E and F, these cases establish legal standards for satisfying the strict scrutiny test regarding whether there is a "compelling governmental interest" in a state or local government's marketplace to have a narrowly tailored race and ethnic conscious MBE/WBE/DBE program, that the MBE/WBE/DBE Program is "narrowly tailored," race, ethnic and gender neutral measures, disparity studies, and the legal standard relevant to cases involving challenges to MBE/WBE/DBE Programs and their implementation by government authorities and state and local governments. Section G below reviews instructive cases involving challenges to federal government social and economic disadvantaged business and MBE/WBE/DBE type programs.

The appendix also points out recent informative Congressional findings as to discrimination regarding MBE/WBE/DBEs, including relating to the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program,[21] and the Federal DBE Program that was continued and reauthorized by the Fixing America's Surface Transportation Act (2015 FAST Act); which set forth Congressional findings as to discrimination against minority-woman-owned business enterprises and disadvantaged business enterprises, including from disparity studies and other evidence[22]. In October 2018, Congress passed the FAA Reauthorization Act, which also provides Congressional findings as to discrimination against MBE/WBE/DBEs, including from disparity studies and other evidence[23]. Most recently, in November 2021, Congress passed the Infrastructure Investment and Jobs Act (H.R. 3684 – 117th Congress, Section 1101) that reauthorized the Federal DBE Program and its implementation by local and state governments based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.[24]

It is noteworthy to the study that the U.S. Department of Justice in January 2022 issued a report: "The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence." This report "summarizes recent evidence required to justify the use of race- and sex-conscious provisions in federal contracting programs." The "Notice of Report on Lawful Uses of Race or Sex in Federal Contracting Programs" is published in the Federal Register, Vol. 87 at page 4955, January 31, 2022. This notice provides the availability on the Department of Justice's website of the "updated report regarding the legal and evidentiary frameworks that justify the continued use of race or sex, in appropriate circumstances, by federal agencies to remedy the current and lingering effects of past discrimination in federal contracting programs." The report is available on the Department of Justice's website at: https://www.justice.gov/crt/page/file/1463921/download.

[21] 49 CFR Part 23 (Participation of Disadvantaged Business Enterprises in Airport Concessions).

[22] Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

[23] Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.

[24] Pub L. 117-58, H.R. 3684, § 11101(e), November 15, 2021, 135 Stat 443-449.

B. U.S. Supreme Court Cases

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

In *Croson*, the U.S. Supreme Court struck down the City of Richmond's "set-aside" program as unconstitutional because it did not satisfy the strict scrutiny analysis applied to "race-based" governmental programs.[25] *J.A. Croson Co*. ("*Croson*") challenged the City of Richmond's minority contracting preference plan, which required prime contractors to subcontract at least 30 percent of the dollar amount of contracts to one or more Minority Business Enterprises ("MBE"). In enacting the plan, the City cited past discrimination and an intent to increase minority business participation in construction projects as motivating factors.

The Supreme Court held the City of Richmond's "set-aside" action plan violated the Equal Protection Clause of the Fourteenth Amendment. The Court applied the "strict scrutiny" standard, generally applicable to any race-based classification, which requires a governmental entity to have a "compelling governmental interest" in remedying past identified discrimination and that any program adopted by a local or state government must be "narrowly tailored" to achieve the goal of remedying the identified discrimination.

The Court determined that the plan neither served a "compelling governmental interest" nor offered a "narrowly tailored" remedy to past discrimination. The Court found no "compelling governmental interest" because the City had not provided "a strong basis in evidence for its conclusion that [race-based] remedial action was necessary."[26] The Court held the City presented no direct evidence of any race discrimination on its part in awarding construction contracts or any evidence that the City's prime contractors had discriminated against minority-owned subcontractors.[27] The Court also found there were only generalized allegations of societal and industry discrimination coupled with positive legislative motives. The Court concluded that this was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

Similarly, the Court held the City failed to demonstrate that the plan was "narrowly tailored" for several reasons, including because there did not appear to have been any consideration of race-neutral means to increase minority business participation in city contracting, and because of the over inclusiveness of certain minorities in the "preference" program (for example, Aleuts) without any evidence they suffered discrimination in Richmond.[28]

The Court stated that reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond was misplaced. There is no doubt, the Court held, that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination" under Title VII.,[29]. But it is equally clear that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." [30]

[25] 488 U.S. 469 (1989).

[26] 488 U.S. at 500, 510.

[27] 488 U.S. at 480, 505.

[28] 488 U.S. at 507-510.

[29] 488 U.S. at 501, *quoting Hazelwood School Dist. v. United States,* 433 U.S. 299, 307–308, 97 S.Ct. 2736, 2741.

[30] 488 U.S. at 501 *quoting Hazelwood,* 433 U.S. at 308, n. 13, 97 S.Ct., at 2742, n. 13.

The Court concluded that where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. The Court noted that "the city does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction projects."[31] "Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city."[32]

The Supreme Court stated that it did not intend its decision to preclude a state or local government from "taking action to rectify the effects of identified discrimination within its jurisdiction."[33] The Court held that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise."[34]

The Court said: "If the City of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion."[35] "Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria." "In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."[36]

The Court further found "if the City could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the City could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."[37]

2. *Adarand Constructors, Inc. v. Pena ("Adarand I")*, 515 U.S. 200 (1995)

In *Adarand I*, the U.S. Supreme Court extended the holding in *Croson* and ruled that all federal government programs that use racial or ethnic criteria as factors in procurement decisions must pass a test of strict scrutiny in order to survive constitutional muster.

The cases following and interpreting *Adarand I* and *Croson* are the most recent and significant decisions by federal courts setting forth the legal framework for disparity studies as well as the predicate to satisfy the constitutional strict scrutiny standard of review, which applies to the implementation of local and state government MBE/WBE/DBE programs and the Federal DBE Program by local and state government recipients of federal funds.

[31] 488 U.S. at 502.

[32] *Id*.

[33] 488 U.S. at 509.

[34] *Id*.

[35] 488 U.S. at 509.

[36] *Id*.

[37] 488 U.S. at 492.

C. The Legal Framework Applied to State and Local Government MBE/WBE/DBE Programs, the Federal DBE Program and its Implementation by State and Local Governments

The following provides an analysis for the legal framework focusing on recent key cases regarding state and local MBE/WBE/DBE programs, and their implications for a disparity study. The recent decisions involving these programs, the Federal DBE Program, and its implementation by state and local government programs and recipients of federal funds, and social and economic disadvantaged business programs are instructive because they concern the strict scrutiny analysis, the legal framework in this area, challenges to the validity of MBE/WBE/DBE programs, challenges to social and economic disadvantaged business enterprise contracting programs, and an analysis of disparity studies.

1. Strict scrutiny analysis

A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.[38] The implementation of the Federal DBE Program by state and local government and transit/transportation authorities and recipients of federal funds also are subject to and must follow the strict scrutiny analysis if they utilize race- and ethnicity-based measures. [39]

The strict scrutiny analysis is comprised of two prongs:

- The program must serve an established compelling governmental interest; and
- The program must be narrowly tailored to achieve that compelling government interest.[40]

The compelling governmental interest requirement. The first prong of the strict scrutiny analysis requires a governmental entity to have a "compelling governmental interest" in remedying past identified discrimination in order to implement a race- and ethnicity-based program.[41] State and local governments cannot rely on national

[38] *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Pena (Adarand I)*, 515 U.S. 200, 227 (1995); see, e.g., *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013) ; *Midwest Fence v. Illinois DOT,* 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H.B. Rowe Co., Inc. v. NCDOT,* 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP II"), 91 F.3d 586 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 990 (3d. Cir. 1993).

[39] *Adarand I*, 515 U.S. 200, 227 (1995); *Croson*, 448 U.S. at 492-493; *Mountain West Holding,* 2017 WL 2179120*; Midwest Fence,* 840 F.3d 930; *Dunnet Bay,* 799 F.3d 676; *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; *M.K. Weeden Construction,* 2013 WL 4774517; *South Florida,* 544 F.Supp. 2d 1336; *Geod Corp.,* 746 F.Supp. 2d 642.

[40] *Adarand I*, 515 U.S. 200, 227 (1995); *Croson*, 448 U.S. at 492-493; *Midwest Fence v. Illinois DOT,* 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; *Associated Gen. Contractors of Ohio, Inc. v. Drabik ("Drabik II")*, 214 F.3d 730 (6th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng'g Contractors Ass'n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I"),* 6 F.3d 990 (3d. Cir. 1993).

[41] *Id.*

statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions.[42] Rather, state and local governments must measure discrimination in their state or local market. However, that is not necessarily confined by the jurisdiction's boundaries.[43]

The federal courts have held that, with respect to the Federal DBE Program, recipients of federal funds do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.[44] The federal courts also have held that Congress had ample evidence of discrimination in the transportation contracting industry to justify the Federal DBE Program (TEA-21), and the federal regulations implementing the program (49 CFR Part 26).[45]

It is instructive to review the type of evidence utilized by Congress and considered by the courts to support the Federal DBE Program, and its implementation by local and state governments and agencies, which is similar to evidence considered by cases ruling on the validity of MBE/WBE/DBE programs. The federal courts found Congress "spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry."[46] The evidence found to satisfy the compelling interest standard included numerous congressional investigations and hearings, and outside studies of

[42] *Id.*; *see, e.g.*, *Concrete Works, Inc. v. City and County of Denver ("Concrete Works I"),* 36 F.3d 1513, 1520 (10th Cir. 1994).

[43] *See, e.g., Concrete Works I,* 36 F.3d at 1520.

[44] *N. Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; *See Midwest Fence,* 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), and *affirming*, 84 F. Supp. 3d 705, 2015 WL 1396376.

[45] *Id*. In the case of *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so "outdated" so as to provide an insufficient basis in evidence for the Department of Defense program (*i.e.*, whether a compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Federal Circuit Court of Appeals after its 2005 decision remanded the case to the district court to rule on this issue. *Rothe* considered the validity of race- and gender-conscious Department of Defense ("DOD") regulations (2006 Reauthorization of the 1207 Program). The decisions in *N. Contracting*, *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in *Rothe* on August 10, 2007, issued its order denying plaintiff *Rothe's* Motion for Summary Judgment and granting Defendant United States Department of Defense's Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe Devel. Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D. Tex. 2007). The district court found the data contained in the Appendix (The Compelling Interest, 61 Fed. Reg. 26050 (1996)), the Urban Institute Report, and the Benchmark Study – relied upon in part by the courts in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* in upholding the constitutionality of the Federal DBE Program – was "stale" as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F.3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F.3d 1023, 1050. See the discussion of the 2008 Federal Circuit Court of Appeals decision below in Section G. *see, also*, the discussion below in Section G of the 2012 district court decision *in DynaLantic Corp. v. U.S. Department of Defense, et al.,* 885 F.Supp.2d 237, (D.D.C.). Recently, in *Rothe Development, Inc. v. U.S. Dept of Defense and U.S. S.B.A.*, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016), the United States Court of Appeals, District of Columbia Circuit, upheld the constitutionality of the Section 8(a) Program on its face, finding the Section 8(a) statute was race-neutral. The Court of Appeals affirmed on other grounds the district court decision that had upheld the constitutionality of the Section 8(a) Program. The district court had found the federal government's evidence of discrimination provided a sufficient basis for the Section 8(a) Program. 107 F.Supp. 3d 183, 2015 WL 3536271 (D. D.C. June 5, 2015). See the discussion of the 2016 and 2015 decisions in *Rothe* in Section G below.

[46] *Sherbrooke Turf*, 345 F.3d at 970, (*citing Adarand VII*, 228 F.3d at 1167 – 76); *Western States Paving*, 407 F.3d at 992-93.

statistical and anecdotal evidence (*e.g.*, disparity studies).[47] The evidentiary basis on which Congress relied to support its finding of discrimination includes:

- **Barriers to minority business formation**. Congress found that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide, noting the existence of "good ol' boy" networks, from which minority firms have traditionally been excluded, and the race-based denial of access to capital, which affects the formation of minority subcontracting enterprise.[48]

- **Barriers to competition for existing minority enterprises**. Congress found evidence showing systematic exclusion and discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies precluding minority enterprises from opportunities to bid. When minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. Congress found evidence of the same prime contractor using a minority business enterprise on a government contract not using that minority business enterprise on a private contract, despite being satisfied with that subcontractor's work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.[49]

- **Local disparity studies**. Congress found that local studies throughout the country tend to show a disparity between utilization and availability of minority-owned firms, raising an inference of discrimination.[50]

- **Results of removing affirmative action programs**. Congress found evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears, which courts have found strongly supports the government's claim that there are significant barriers to minority competition, raising the specter of discrimination.[51]

- **Infrastructure Investment and Jobs Act of 2021, F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21**. In November 2021, October 2018, December 2015 and in July 2012, Congress passed the Infrastructure Investment and Jobs Act or 2021, the F.A.A. Reauthorization Act, FAST Act and MAP-21, respectively, which made "Findings" that "discrimination and related barriers continue to pose significant obstacles for minority- and woman-owned businesses seeking to do business in "federally-assisted surface transportation markets," in airport-related markets, and that the continuing barriers "merit the continuation" of the Federal

[47] *See*, *e.g.*, *Adarand VII*, 228 F.3d at 1167– 76; *see also Western States Paving*, 407 F.3d at 992 (Congress "explicitly relied upon" the Department of Justice study that "documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts"); *Geyer Signal, Inc.*, 2014 WL 1309092.

[48] *Adarand VII*, 228 F.3d. at 1168-70; *Western States Paving*, 407 F.3d at 992; *see Geyer Signal, Inc.,* 2014 WL 1309092; *DynaLantic,* 885 F.Supp.2d 237.

[49] *Adarand VII*. at 1170-72; *see DynaLantic, 885* F.Supp.2d 237.

[50] *Id*. at 1172-74; *see DynaLantic,* 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092; *see Midwest Fence v. Illinois DOT,* 840 F.3d 932, 935, 948-954 (7th Cir. 2016).

[51] *Adarand VII*, 228 F.3d at 1174-75; *see H. B. Rowe,* 615 F.3d 233, 241-2, 247-258 (4th Cir. 2010); *Sherbrooke Turf,* 345 F.3d at 973-4.

DBE Program and the Federal ACDBE Program.[52] Congress also found in the Infrastructure Investment and Jobs Act of 2021, the F.A.A. Reauthorization Act of 2018, the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which "provide a strong basis that there is a compelling need for the continuation of the" Federal ACDBE Program and the Federal DBE Program.[53]

Therefore, Congress in the Infrastructure Investment and Jobs Act passed on November 15, 2021 found based on testimony, evidence and documentation updated since the FAST Act adopted in 2015 and MAP-21 adopted in 2012, as follows: (1) discrimination and related barriers continue to pose significant obstacles for minority- and woman-owned businesses seeking to do business in federally assisted surface transportation markets across the United States; (2) the continuing barriers described in § 11101(e), subparagraph (A) merit the continuation of the disadvantaged business enterprise program; and (3) there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.[54]

The Federal DBE Program and its implementation by state and local governments is instructive to analyze because the Program on its face and as applied by state and local governments has survived challenges to its constitutionality, concerned application of the strict scrutiny standard, considered findings as to disparities, discrimination and barriers to MBE/WBE/DBEs, examined narrow tailoring by local and state governments of their DBE program implementing the federal program, and involved consideration of disparity studies. The cases involving the Program and its implementation by state DOTs and state and local governments are informative, recent and applicable to the legal framework regarding state DOT DBE programs and MBE/WBE/DBE state and local government programs, and availability and disparity studies.

And, as stated above, the U.S. Department of Justice in January 2022 issued a report entitled: "The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence," which "summarizes recent evidence required to justify the use of race- and sex-conscious provisions in federal contracting programs."[55] This "updated report" by the U.S. DOJ, is issued "regarding the legal and evidentiary frameworks that justify the continued use of race or sex, in appropriate circumstances, by federal agencies to remedy the current and lingering effects of past discrimination in federal contracting programs."[56]

Burden of proof to establish the strict scrutiny standard. Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.[57] If the government makes its initial showing, the

[52] Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021; Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

[53] Id. at Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021; Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94. H.R. 22, § 1101(b)(1)(2015).

[54] Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021, 135 Stat 443-449.

[55] Vol. 87 Fed. Reg. 4955, January 31, 2022; located at https://www.justice.gov/crt/page/file/1463921/download.

[56] Id; see https://www.justice.gov/crt/page/file/1463921/download.

[57] *See AGC, SDC v. Caltrans,* 713 F.3rd at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242, 247-258 (4th Cir. 2010); *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at

burden shifts to the challenger to rebut that showing.[58] The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."[59]

In applying the strict scrutiny analysis, the courts hold that the burden is on the government to show both a compelling interest and narrow tailoring.[60] It is well established that "remedying the effects of past or present racial discrimination" is a compelling interest.[61] In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."[62]

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."[63] "An inference of discrimination may be made with empirical evidence that demonstrates 'a significant statistical disparity between a number of qualified minority contractors … and the number of such contractors actually engaged by the locality or the locality's prime contractors.'"[64] Anecdotal evidence may be used in combination

715, 721 (7th Cir. 2007) Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9th Cir. 2005)(Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003)(Federal DBE Program); *Adarand Constructors Inc. v. Slater* ("*Adarand VII*"), 228 F.3d 1147, 1166 (10th Cir. 2000)(Federal DBE Program); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP II"), 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813; *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

[58] *Adarand VII*, 228 F.3d at 1166; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Geyer Signal, Inc.*, 2014 WL 1309092.

[59] *See*, *e.g.*, *Adarand VII*, 228 F.3d at 1166; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *see also Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721; *Geyer Signal, Inc.*, 2014 WL 1309092.

[60] *Id.*; *Midwest Fence,* 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe v. NCDOT,* 615 F.3d 233, 241-242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990; *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003); *See also Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000); *Geyer Signal, Inc., 2014* WL 1309092.

[61] *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989); *see, e.g., Midwest Fence,* 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

[62] *Croson*, 488 U.S. at 500; *see, e.g.*, *Midwest Fence,* 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT,* 615 F.3d 233, 241-242; *Sherbrooke Turf,* 345 F.3d at 971-972; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092.

[63] *Midwest Fence*, 2015 W.L. 1396376 at *7 (N.D. Ill. 2015), *affirmed,* 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *see, e.g., Midwest Fence,* 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003); *AGC, SDC v. Caltrans*, 713 F.3rd at 1195-1200; *H. B. Rowe Co., Inc. v. NCDOT,* 615 F.3d 233, 241-242 (4th Cir. 2010); *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994), *Geyer Signal,* 2014 WL 1309092 (D. Minn, 2014); *see also, Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

[64] *See e.g., H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 2015 W.L. 1396376 at *7, *quoting Concrete Works*; 36 F.3d 1513, 1522 (*quoting Croson*, 488 U.S. at 509), *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *see also, Sherbrooke Turf,* 345 F.3d 233, 241-242 (8th Cir. 2003); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

with statistical evidence to establish a compelling governmental interest.[65]

In addition to providing "hard proof" to support its compelling interest, the government must also show that the challenged program is narrowly tailored.[66] Once the governmental entity has shown acceptable proof of a compelling interest and remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.[67] Therefore, notwithstanding the burden of initial production rests with the government, the ultimate burden remains with the party challenging the application of a DBE or MBE/WBE Program to demonstrate the unconstitutionality of an affirmative-action type program.[68]

To successfully rebut the government's evidence, a challenger must introduce "credible, particularized evidence" of its own that rebuts the government's showing of a strong basis in evidence.[69] This rebuttal can be accomplished by providing a neutral explanation for the disparity between MBE/WBE/DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data.[70] Conjecture and unsupported criticisms of the government's methodology are insufficient.[71] The courts have held that mere speculation the government's evidence is insufficient or

[65] *Croson*, 488 U.S. at 509*; see, e.g., AGC, SDC v. Caltrans*, 713 R.3d at 1196; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010);*Midwest Fence*, 84 F.Supp. 3d 705, 2015 WL 1396376 at *7, *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

[66] *Adarand Constructors, Inc. v. Pena, ("Adarand III"),* 515 U.S. 200 at 235 (1995); *see, e.g., Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003); *Majeske v. City of Chicago*, 218 F.3d at 820; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

[67] *Majeske,* 218 F.3d at 820; *see, e.g., Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277-78; *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003); *Midwest Fence,* 2015 WL 1396376 *7, *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Geyer Signal, Inc.,* 2014 WL 1309092; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598; 603; (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1002-1007 (3d. Cir. 1993).

[68] *Id.; Adarand VII*, 228 F.3d at 1166.

[69] *See, e.g., H.B. Rowe v. NCDOT,* 615 F.3d 233, at 241-242(4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (*quoting Adarand Constructors, Inc. vs. Slater,* 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at *7, *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *see also*, *Sherbrooke Turf,* 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.

[70] *See, e.g., H.B. Rowe v. NCDOT,* 615 F.3d 233, at 241-242(4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (*quoting Adarand Constructors, Inc. vs. Slater,* 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598; 603; (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1002-1007 (3d. Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at *7, *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *see also*, *Sherbrooke Turf,* 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092*; see, generally, Engineering Contractors*, 122 F.3d at 916; *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

[71] *Id.; H. B. Rowe,* 615 F.3d at 242; *see also, Midwest Fence, 840 F.3d 932, 952-954 (7th Cir. 2016); Sherbrooke Turf,* 345 F.3d at 971-974; *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal,* 2014 WL 1309092.

methodologically flawed does not suffice to rebut a government's showing.[72]

The courts have noted that "there is no 'precise mathematical formula to assess the quantum of evidence that rises to Croson 'strong basis in evidence' benchmark.'"[73] It has been held that a state need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary.[74] Instead, the Supreme Court stated that a government may meet its burden by relying on "a significant statistical disparity" between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.[75] It has been further held that the statistical evidence be "corroborated by significant anecdotal evidence of racial discrimination" or bolstered by anecdotal evidence supporting an inference of discrimination.[76]

Statistical evidence. Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental interest), or in the case of a recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state recipient level.[77] "Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination."[78]

One form of statistical evidence is the comparison of a government's utilization of MBE/WBEs compared to the relative availability of qualified, willing and able MBE/WBEs.[79] The federal courts have held

[72] *H.B. Rowe*, 615 F.3d at 242; *see Midwest Fence, 840 F.3d 932, 952-954 (7th Cir. 2016); Concrete Works,* 321 F.3d at 991; *see also, Sherbrooke Turf,* 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

[73] *H.B. Rowe*, 615 F.3d at 241, *quoting Rothe Dev. Corp. v. Dep't of Def.,* 545 F.3d 1023, 1049 (Fed. Cir. 2008)(*quoting W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 n. 11 (5th Cir. 1999)); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *see, Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 996, 1002-1007 (3d Cir. 1993).

[74] *H.B. Rowe Co.*, 615 F.3d at 241; *see, e.g., Midwest Fence, 840 F.3d 932, 952-954 (7th Cir. 2016); Concrete Works*, 321 F.3d at 958; *, Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 996, 1002-1007 (3d Cir. 1993).

[75] *Croson*, 488 U.S. at 509, *see, e.g., Midwest Fence, 840 F.3d 932, 952-954 (7th Cir. 2016); H.B. Rowe*, 615 F.3d at 241; *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 996, 1002-1007 (3d Cir. 1993).

[76] *H.B. Rowe*, 615 F.3d at 241, *quoting Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); *see, e.g., Midwest Fence, 840 F.3d 932, 952-954 (7th Cir. 2016); AGC, San Diego v. Caltrans*, 713 F.3d at 1196; *see also, Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

[77] *See, e.g.*, *Croson*, 488 U.S. at 509; *Midwest Fence, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf,* 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); *see also, Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal,* 2014 WL 1309092.

[78] *Croson*, 488 U.S. at 501, *quoting Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); *See Midwest Fence,* 840 F.3d 932, 953; *AGC , SDC v. Caltrans,* 713 F.3d at 1196-1197; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf,* 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999).

[79] *Croson*, 448 U.S. at 509; *see Midwest Fence, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); AGC, SDC v. Caltrans,* 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT,* 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041-1042; *Sherbrooke Turf,* 345 F.3d 964,

that a significant statistical disparity between the utilization and availability of minority- and woman-owned firms may raise an inference of discriminatory exclusion.[80] However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.[81]

Other considerations regarding statistical evidence include:

- **Availability analysis**. A disparity index requires an availability analysis. MBE/WBE and DBE availability measures the relative number of MBE/WBEs and DBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.[82] There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,[83] "An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach."[84]

- **Utilization analysis**. Courts have accepted measuring utilization based on the proportion of an agency's contract dollars going to MBE/WBEs and DBEs.[85]

- **Disparity index**. An important component of statistical evidence is the "disparity index."[86] A disparity index is defined as the ratio of the percent utilization to the percent availability times 100. A disparity index below 80 has been accepted as evidence of adverse

973-974 (8th Cir. 2003); *Concrete Works of Colo., Inc. v. City and County of Denver* ("*Concrete Works II*"), 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736*; W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); *see also, Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

[80] *See*, *e.g.*, *Croson*, 488 U.S. at 509; *Midwest Fence, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); AGC, SDC v. Caltrans,* 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT,* 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Sherbrooke Turf,* 345 F.3d at 973-974; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 596-605 (3d Cir. 1996)*; Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 990, 999, 1002, 1005-1008 (3d. Cir. 1993); *see also Western States Paving*, 407 F.3d at 1001; *Kossman Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

[81] *Western States Paving*, 407 F.3d at 1001.

[82] *See*, *e.g.*, *Croson*, 448 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans,* 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995; *Sherbrooke Turf,* 345 F.3d 964, at 973-974; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 602-603 (3d. Cir. 1996); *see also, Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

[83] *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 603 (3d Cir. 1996); *see, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1197, *quoting, Croson*, 488 U.S. at 706 ("degree of specificity required in the findings of discrimination … may vary."); *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *see also, Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

[84] *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 603 (3d Cir. 1996); *see, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1197, *quoting Croson*, 488 U.S. at 706 ("degree of specificity required in the findings of discrimination … may vary."); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *see also, Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

[85] *See Midwest Fence,* 840 F.3d 932, 949-953 (7th Cir. 2016); *AGC, SDC v. Caltrans,* 713 F.3d at 1191-1197; *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng'g Contractors Ass'n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

[86] *Midwest Fence,* 840 F.3d 932, 949-953 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng'g Contractors Ass'n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 602-603 (3d. Cir. 1996); *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

impact. This has been referred to as "The Rule of Thumb" or "The 80 percent Rule."[87]

- **Two standard deviation test**. The standard deviation figure describes the probability that the measured disparity is the result of mere chance. Some courts have held that a statistical disparity corresponding to a standard deviation of less than two is not considered statistically significant.[88]

In terms of statistical evidence, Courts have held that a state "need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence," but rather it may rely on "a significant statistical disparity" between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.[89]

The U.S. Supreme Court has made clear that combating racial discrimination is a compelling government interest.[90] The Supreme Court found a governmental entity can enact a race-conscious program to remedy past or present discrimination where it has actively discriminated in its award of contracts or has been a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry."[91]

The Supreme Court in *Croson* regarding statistical evidence noted as follows:

> [i]f the City of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. *Where there is a significant statistical disparity* between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.
>
> ... Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate

[87] *See*, *e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *Midwest Fence,* 840 F.3d 932, 950 (7th Cir. 2016); *AGC, SDC v. Caltrans,* 713 F.3d at 1191; *H.B. Rowe Co.,* 615 F.3d 233, 243-245; *Rothe*, 545 F.3d at 1041; *Eng'g Contractors Ass'n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

[88] *See, e.g., H.B. Rowe Co. v. NCDOT,* 615 F.3d 233, 243-245; *Eng'g Contractors Ass'n*, 122 F.3d at 914, 917, 923. The Eleventh Circuit found that a disparity greater than two or three standard deviations has been held to be statistically significant and may create a presumption of discriminatory conduct.; *Peightal v. Metropolitan Eng'g Contractors Ass'n*, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in *Kadas v. MCI Systemhouse Corp*., 255 F.3d 359 (7th Cir. 2001), raised questions as to the use of the standard deviation test alone as a controlling factor in determining the admissibility of statistical evidence to show discrimination. Rather, the Court concluded it is for the judge to say, on the basis of the statistical evidence, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury. 255 F.3d at 363.

[89] *H. B. Rowe,* 615 F.3d 233 at 241, *citing Croson*, 488 U.S. at 509 (plurality opinion), and *citing Concrete Works*, 321 F.3d at 958; *see, e.g.*; *Croson*, 488 U.S. at 509; *Midwest Fence,* 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans,* 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT,* 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 596-605*; Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 990, 999, 1002, 1005-1008 (3d. Cir. 1993); *see also Western States Paving*, 407 F.3d at 1001; *Kossman Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

[90] *See, e.g.*, *W. H. Scott Constr. Co. v. City of Jackson, Mississippi*,199 F.3d 206, 218, *citing Croson,* 448 U.S. at 492.

[91] *Id.*

statistical proof, lend support to a local government's determination that broader remedial relief is justified.[92]

Marketplace discrimination and data. In a leading case regarding marketplace discrimination and data, the Tenth Circuit in *Concrete Works* held the district court erroneously rejected the evidence the local government presented on marketplace discrimination.[93] The Court rejected the district court's "erroneous" legal conclusion that a municipality may only remedy its own discrimination. The Court stated this conclusion is contrary to the holdings in its 1994 decision in *Concrete Works II* and the plurality opinion in *Croson*[94]. The Court held it previously recognized in this case that "a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area."[95] In Concrete Works II, the court stated that "we do not read Croson as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination."[96]

The Court stated that the local government could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination.[97] Thus, the local government was not required to demonstrate that it is "guilty of prohibited discrimination" to meet its initial burden.[98]

Additionally, the Court had previously concluded that the local government's statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that "local prime contractors" are engaged in racial and gender discrimination.[99] Thus, the Court held the local government's disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination.[100]

The Court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which the local government relied were significantly flawed because they measured discrimination in the overall local government MSA construction industry, not discrimination by the municipality itself.[101] The Court found that the district court's conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant.[102]

In *Adarand VII*, the Tenth Circuit noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation.[103] ("[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*"[104] Further, the Court pointed out that it earlier rejected the

[92] *Croson*, 448 U.S. at 509 (emphasis in original).

[93] 321 F.3d at 973.

[94] *Id.*

[95] *Id., quoting Concrete Works II*, 36 F.3d at 1529 (emphasis added).

[96] *Concrete Works*, 321 F.3d 950, 973 (10th Cir. 2003), *quoting Concrete Works II*, 36 F.3d at 1529 (10th Cir. 1994).

[97] *Id.* at 973.

[98] *Id.*

[99] *Id*. at 974, *quoting Concrete Works II*, 36 F.3d at 1529.

[100] *Id.*

[101] *Id*. at 974.

[102] *Id., citing Adarand VII*, 228 F.3d at 1166-67.

[103] *Concrete Works*, 321 F.3d at 976, *citing Adarand VII*, 228 F.3d at 1166-67.

[104] *Id.* (emphasis added).

argument CWC reasserted that marketplace data are irrelevant, and remanded the case to the district court to determine whether Denver could link its public spending to "the Denver MSA evidence of industry-wide discrimination."[105] The Court stated that evidence explaining "the Denver government's role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*" was relevant to Denver's burden of producing strong evidence.[106]

Consistent with the Court's mandate in Concrete Works II, the local government attempted to show at trial that it "indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business."[107] The Court ruled that the local government can demonstrate that it is a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination.[108]

The Court in *Concrete Works* rejected the argument that the lending discrimination studies and business formation studies presented by the local government were irrelevant. In *Adarand VII*, the Court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a "strong link" between a government's "disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination."[109]

The Court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The Court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the local government MSA construction industry, studies showing that discriminatory barriers to business formation exist in the local government construction industry are relevant to the municipality's showing that it indirectly participates in industry discrimination.[110]

In *Concrete Works*, Denver presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation. Denver introduced a disparity study. The study ultimately concluded that "despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial."[111] In *Adarand VII*, the Court concluded that this study, among other evidence, "strongly support[ed] an initial showing of discrimination in lending."[112]

The Court in *Concrete Works* concluded that discriminatory motive can be inferred from the results shown in disparity studies. The Court noted that in *Adarand VII* it took "judicial notice of the obvious causal

[105] *Id., quoting Concrete Works II*, 36 F.3d at 1529.

[106] *Id., quoting Concrete Works II*, 36 F.3d at 1530 (emphasis added).

[107] *Id.*

[108] *Concrete Works*, 321 F.3d at 976, *quoting Croson*, 488 U.S. at 492.

[109] *Id*. at 977, *quoting Adarand VII*, 228 F.3d at 1167-68.

[110] *Id*. at 977.

[111] *Id*. at 977-78.

[112] *Id.* at 978, *quoting, Adarand VII*, 228 F.3d at 1170, n. 13

connection between access to capital and ability to implement public works construction projects."[113]

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The Court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. "[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion.[114]

In sum, in this informative court decision, the Tenth Circuit held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the City's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary.[115]

Anecdotal evidence. Anecdotal evidence includes personal accounts of incidents, including of discrimination, told from the witness' perspective. Anecdotal evidence of discrimination, standing alone, generally is insufficient to show a systematic pattern of discrimination.[116] But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.[117] It has been held that anecdotal evidence of a local or state government's institutional practices that exacerbate discriminatory market conditions are often particularly probative.[118]

Examples of anecdotal evidence may include:

- Testimony of MBE/WBE or DBE owners regarding whether they face difficulties or barriers;
- Descriptions of instances in which MBE/WBE or DBE owners believe they were treated unfairly or were discriminated against based on their race, ethnicity, or gender or believe they were treated fairly without regard to race, ethnicity, or gender;
- Statements regarding whether firms solicit, or fail to solicit, bids or price quotes from MBE/WBEs or DBEs on non-goal projects; and
- Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets.[119]

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[113] *Id*. at 978, *quoting Adarand VII*, 228 F.3d at 1170.

[114] *Id*. at 979, *quoting Adarand VII*, 228 F.3d at 1174.

[115] *Id.* at 979-80.

[116] *See, e.g.*, *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng'g Contractors Ass'n*, 122 F.3d at 924-25; *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 990, 1002-1003 (3d. Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O'Donnel Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

[117] *See*, *e.g.*, *Midwest Fence*, 840 F.3d 932, 953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *H. B. Rowe*, 615 F.3d 233, 248-249; *Eng'g Contractors Ass'n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520; *Contractors Ass'n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *see also, Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

[118] *Concrete Works I*, 36 F.3d at 1520.

[119] *See*, *e.g.*, *AGC, SDC v. Caltrans, 713 F.3d at 1197*; *H. B. Rowe,* 615 F.3d 233, 248-249; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7th Cir. 2007); *e.g.*, *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76. For additional examples of anecdotal evidence, *see Eng'g Contractors Ass'n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic,* 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

Courts have accepted and recognize that anecdotal evidence is the witness' narrative of incidents told from his or her perspective, including the witness' thoughts, feelings, and perceptions, and thus anecdotal evidence need not be verified.[120]

The narrow tailoring requirement. The second prong of the strict scrutiny analysis requires that a race- or ethnicity-based program or legislation implemented to remedy past identified discrimination in the relevant market be "narrowly tailored" to reach that objective.

The narrow tailoring requirement has several components and the courts, including the Eighth Circuit, analyze several criteria or factors in determining whether a program or legislation satisfies this requirement including:

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;
- The relationship of numerical goals to the relevant labor market; and
- The impact of a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.[121]

[120] *See*, *e.g.*, *AGC, SDC v. Caltrans,* 713 F.3d at 1197; *H. B. Rowe,* 615 F.3d 233, 248-249; *Concrete Works II*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at *21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

[121] *See*, *e.g.*, *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe,* 615 F.3d 233, 252-255; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng'g Contractors Ass'n*, 122 F.3d at 927 (internal quotations and citations omitted); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 605-610 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 990, 1008-1009 (3d. Cir. 1993); *see also*, Geyer Signal, Inc., 2014 WL 1309092.

N. Legal — Legal framework applied to state and local government MBE/WBE/DBE programs

To satisfy the narrowly tailored prong of the strict scrutiny analysis in the context of the Federal DBE Program, which is instructive to the study, the federal courts that have evaluated state and local DBE Programs and their implementation of the Federal DBE Program, held the following factors are pertinent:

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.[122]

The Eleventh Circuit described the "the essence of the 'narrowly tailored' inquiry [as] the notion that explicitly racial preferences … must only be a 'last resort' option."[123] Courts have found that "[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake."[124]

Similarly, the Sixth Circuit Court of Appeals in *Associated Gen. Contractors v. Drabik ("Drabik II")*, stated: "*Adarand* teaches that a court called upon to address the question of narrow tailoring must ask, "for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting … or whether the program was appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'"[125]

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*[126] also found that race- and ethnicity-based measures should be employed as a last resort. The majority opinion stated: "Narrow tailoring requires 'serious, good faith consideration of workable race-neutral alternatives,' and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration."[127] The Court found that the District failed to show it seriously considered race-neutral measures.

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[122] *See, e.g., Midwest Fence,* 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971 (8th Cir.); *Adarand VII*, 228 F.3d at 1181; *see, also, Geyer Signal, Inc.*, 2014 WL 1309092; *see generally*, *H.B. Rowe Co. v. NCDOT,* 615 F.3d 233, 243-245, 252-254; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248.

[123] *Eng'g Contractors Ass'n*, 122 F.3d at 926 (internal citations omitted); *see also Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 264, 2005 WL 138942 (11th Cir. 2005)(unpublished opinion); *Webster v. Fulton County*, 51 F. Supp.2d 1354, 1380 (N.D. Ga. 1999), *aff'd per curiam* 218 F.3d 1267 (11th Cir. 2000).

[124] *See Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf,* 345 F.3d at 972; *see also Adarand I*, 515 U.S. at 237-38.

[125] *Associated Gen. Contractors of Ohio, Inc. v. Drabik* ("Drabik II"), 214 F.3d 730, 738 (6th Cir. 2000).

[126] 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007).

[127] 551 U.S. 701, 734-37, 127 S.Ct. at 2760-61; *see also Fisher v. University of Texas,* 133 S.Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 305 (2003).

The second prong of the strict scrutiny analysis, as discussed above, similar to MBE/WBE programs, requires the implementation of the Federal DBE Program by state and local governments and recipients of federal funds be "narrowly tailored" to remedy identified discrimination in the particular state or local government or recipient's transportation contracting and procurement market.[128]

The "narrowly tailored" analysis is instructive in terms of developing any potential legislation or programs that involve DBEs and implementing the Federal DBE Program, or in connection with determining appropriate remedial measures to achieve legislative objectives.

Race-, ethnicity-, and gender-neutral measures. To the extent a "strong basis in evidence" exists concerning discrimination in a local or state government's relevant contracting and procurement market, the courts analyze several criteria or factors to determine whether a state's implementation of a race- or ethnicity-conscious program is necessary and thus narrowly tailored to achieve remedying identified discrimination. One of the key factors discussed above is consideration of race-, ethnicity- and gender-neutral measures.

The courts, including the Eighth Circuit, require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.[129] And the courts have held unconstitutional those race- and ethnicity-conscious programs implemented without consideration of race- and ethnicity-neutral alternatives to increase minority business participation in state and local contracting.[130]

In holding the Federal DBE regulations were narrowly tailored, the Eighth Circuit stated those regulations "place strong emphasis on 'the use of race-neutral means to increase minority business participation in government contracting'." [131]

Courts, including the Eighth Circuit, have found that "[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake."[132]

Similarly, the Sixth Circuit Court of Appeals in *Associated Gen. Contractors v. Drabik ("Drabik II")*, stated: "*Adarand* teaches that a court called upon to address the question of narrow tailoring must ask, "for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting … or whether the program was appropriately

[128] *AGC, SDC v. Caltrans,* 713 F.3d at 1197-1199 (9th Cir. 2013); *Western States Paving*, 407 F3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71; *see, e.g., Midwest Fence,* 840 F.3d 932, 949-953.

[129] *See*, *e.g.*, *Midwest Fence*, 840 F.3d 932, 937-938, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans, 713 F.3d at 1199*; *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972 (8th Cir. 2003); *Adarand VII*, 228 F.3d at 1179; *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP II),* 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n (CAEP I),* 6 F.3d at 1008-1009 (3d. Cir. 1993); *Coral Constr.*, 941 F.2d at 923.

[130] *See, Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); *see also, Eng'g Contractors Ass'n*, 122 F.3d at 927; *Virdi*, 135 Fed. Appx. At 268; *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP II),* 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n (CAEP (I),* 6 F.3d at 1008-1009 (3d. Cir. 1993).

[131] *Sherbrooke Turf, Inc.*, 345 F. 3d at 972, *quoting Adarand Constrs., Inc.*, 515 U.S. at 237-38.

[132] *See Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *see also, Adarand I*, 515 U.S. at 237-38.

limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'"[133]

As noted above the majority opinion by the Supreme Court in *Parents Involved in Community Schools v. Seattle School District*[134] stated: "Narrow tailoring requires 'serious, good faith consideration of workable race-neutral alternatives,' and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration."[135] The Court found that the District failed to show it seriously considered race-neutral measures.

The Court in *Croson* followed by decisions from federal courts of appeal found that local and state governments have at their disposal a "whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races."[136]

Examples of race-, ethnicity-, and gender-neutral alternatives include, but are not limited to, the following:

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- "How to do business" seminars;
- Sponsoring networking sessions throughout the state acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.[137]

[133] *Associated Gen. Contractors of Ohio, Inc. v. Drabik* ("Drabik II"), 214 F.3d 730, 738 (6th Cir. 2000).

[134] 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007)

[135] 551 U.S. 701, 734-37, 127 S.Ct. at 2760-61; *see also Fisher v. University of Texas,* 133 S.Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 305 (2003).

[136] *Croson*, 488 U.S. at 509-510.

[137] S*ee*, *e.g.*, *Croson*, 488 U.S. at 509-510; *H. B. Rowe,* 615 F.3d 233, 252-255; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179; 49 CFR § 26.51(b); *see also, Eng'g Contractors Ass'n*, 122 F.3d at 927-29; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

Thus, it is established by the courts that although the narrow tailoring requirement does not require a governmental entity to exhaust every possible race-, ethnicity-, and gender-neutral alternative, it does "require serious, good faith consideration of workable race-neutral alternatives.[138]

Additional factors considered under narrow tailoring. In addition to the required consideration of the necessity for the relief and the efficacy of alternative remedies (race- and ethnicity-neutral efforts), the courts require evaluation of additional factors as listed above.[139] For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;[140] (2) good faith efforts provisions;[141] (3) waiver provisions;[142] (4) a rational basis for goals;[143] (5) graduation provisions;[144] (6) remedies only for groups for which there were findings of discrimination;[145] (7) sunset provisions;[146] and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.[147]

2. Intermediate scrutiny analysis

Certain Federal Courts of Appeal, including in the Eighth Circuit, and the state of Minnesota, apply intermediate scrutiny to gender-conscious programs.[148] The district court in *Geyer Signal, Inc. v. Minnesota DOT*

[138] *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 732-47, 127 S.Ct 2738, 2760-61 (2007); *AGC, SDC v. Caltrans*, 713 F.3d at 1199, *citing Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *H. B. Rowe,* 615 F.3d 233, 252-255 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Eng'g Contractors Ass'n*, 122 F.3d at 927.

[139] *See Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255; *Sherbrooke Turf,* 345 F.3d at 971-972; *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

[140] *See, e.g., Midwest Fence,* 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe,* 615 F.3d 233, 252-255 (4th Cir. 2010); *Sherbrooke Turf,* 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality* ("AGC of Ca."), 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir. 1990).

[141] *See, e.g., Midwest Fence,* 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe,* 615 F.3d 233, 252-255 (4th Cir. 2010); *Sherbrooke Turf,* 345 F.3d at 971-972; *CAEP* I, 6 F.3d at 1019; *Cone Corp*., 908 F.2d at 917.

[142] *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; AGC of Ca., 950 F.2d at 1417; *Cone Corp*., 908 F.2d at 917; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

[143] *Id; Sherbrooke Turf,* 345 F.3d at 971-973; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

[144] *Id*.

[145] *See, e.g*., *AGC, SDC v. Caltrans,* 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 253-255; *Western States Paving*, 407 F.3d at 998; *AGC of Ca*., 950 F.2d at 1417; *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d at 593-594, 605-609 (3d. Cir. 1996); *Contractors Ass'n (CAEP I),* 6 F.3d at 1009, 1012 (3d. Cir. 1993); *Kossman Contracting Co., Inc., v. City of Houston,* 2016 WL 1104363 (W.D. Tex. 2016); *Sherbrooke Turf,* 2001 WL 150284 (unpublished opinion), aff'd 345 F.3d 964.

[146] *See, e.g., H. B. Rowe*, 615 F.3d 233, 254; *Sherbrooke Turf,* 345 F.3d at 971-972; *Peightal*, 26 F.3d at 1559; . *see also, Kossman Contracting Co., Inc. v. City of Houston,* 2016 WL 1104363 (W.D. Tex. 2016).

[147] *Coral Constr*., 941 F.2d at 925.

[148] *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1195 (9th Cir. 2013); *H. B. Rowe,* 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co*., 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnat*i, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n,* 122 F.3d at 905, 908, 910 (11th Cir. 1997); *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989)(*citing Craig v. Boren*, 429 U.S. 190 (1976), and *Lalli v. Lalli*, 439 U.S. 259(1978)); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification."); *Geyer Signal, Inc., 2014* WL 1309092; *see, In re Guardianship, Conservatorship of Durand, 859 N.W.2d 789 (Minn. 2013); State ex rel. Forslund v. Bronson,* 305 N.W.2d 748, 750 (Minn.1981).

recognized the intermediate scrutiny standard, stating that because the Federal DBE Program contains a gender conscious provision, it is a classification that would be subject to intermediate scrutiny.[149]

The courts have applied "intermediate scrutiny" to classifications based on gender.[150] Restrictions subject to intermediate scrutiny are permissible so long as they are narrowly tailored to serve a significant governmental interest.[151]
The courts have interpreted this intermediate scrutiny standard to require that gender-based classifications be:

1. Supported by both "sufficient probative" evidence or "exceedingly persuasive justification" in support of the stated rationale for the program; and

2. Substantially related to the achievement of that underlying objective.[152]

Under the traditional intermediate scrutiny standard, the court reviews a gender-conscious program by analyzing whether the state actor has established a sufficient factual predicate for the claim that female-owned businesses have suffered discrimination, and whether the gender-conscious remedy is an appropriate response to such discrimination. This standard requires the state actor to present "sufficient probative" evidence in support of its stated rationale for the program.[153]

Intermediate scrutiny, as interpreted by federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective.[154] The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that the intermediate scrutiny standard does

[149] 2014 W.L. 1309092 at footnote 4, *citations omitted*.

[150] *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989)(*citing Craig v. Boren*, 429 U.S. 190 (1976), and *Lalli v. Lalli*, 439 U.S. 259(1978)); *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014) *see, In re Guardianship, Conservatorship of Durand, 859 N.W.2d 789 (Minn. 2013); State ex rel. Forslund v. Bronson,* 305 N.W.2d 748, 750 (Minn.1981). .

[151] *Serv. Emp. Int'l Union, Local 5 v. City of Hous*., 595 F.3d 588, 596 (5th Cir. 2010); *see, In re Guardianship, Conservatorship of Durand, 859 N.W.2d 789 (Minn. 2013); State ex rel. Forslund v. Bronson,* 305 N.W.2d 748, 750 (Minn.1981).

[152] *Id*.; *See,* e.g., , *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT,* 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d at 1009-1011 (3d Cir. 1993); *see, also, U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification."); *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014) s*ee, In re Guardianship, Conservatorship of Durand, 859 N.W.2d 789 (Minn. 2013); State ex rel. Forslund v. Bronson,* 305 N.W.2d 748, 750 (Minn.1981); *N.H. Anoka – Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553 (Minn. Ct. App. 2020).

[153] *Id*. The Seventh Circuit Court of Appeals, however, in *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, did not hold there is a different level of scrutiny for gender discrimination or gender based programs. 256 F.3d 642, 644-45 (7th Cir. 2001). The Court in *Builders Ass'n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors*.

[154] *See e.g.,*, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT,* 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d at 1009-1011 (3d Cir. 1993); *see, also, U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification."); *In re Guardianship, Conservatorship of Durand, 859 N.W.2d 789 (Minn. 2013); State ex rel. Forslund v. Bronson,* 305 N.W.2d 748, 750 (Minn.1981); *N.H. Anoka – Hennepin Sch. Dist. No. 11,* 950 N.W.2d 553 (Minn. Ct. App. 2020).

not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.[155]

Certain courts have held that "[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort …. Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market."[156]

The Tenth Circuit in *Concrete Works,* stated with regard evidence as to woman-owned business enterprises as follows:

> "We do not have the benefit of relevant authority with which to compare Denver's disparity indices for WBEs. See *Contractors Ass'n,* 6 F.3d at 1009–11 (reviewing case law and noting that "it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary"). Nevertheless, Denver's data indicates significant WBE underutilization such that the Ordinance's gender classification arises from "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions." *Mississippi Univ. of Women,* 458 U.S. at 726, 102 S.Ct. at 3337 (striking down, under the intermediate scrutiny standard, a state statute that excluded males from enrolling in a state-supported professional nursing school)." [157]

Minnesota courts have held that if a challenge implicates a suspect classification or a fundamental right, courts apply strict scrutiny, under which the classification must be "narrowly tailored and reasonably necessary to further a compelling governmental interest."[158] If the challenge instead implicates "quasi-suspect classifications such as gender," the courts apply intermediate scrutiny,[159] under which the classification must be "substantially related to an important governmental objective."[160]

The Fourth Circuit cites with approval the guidance from the Eleventh Circuit that has held "[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort …. Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market."[161]

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was "a product of analysis rather than a stereotyped reaction based on habit."[162] The Third Circuit found this standard required the City of Philadelphia to present probative evidence in support of its stated rationale for the gender preference, discrimination against woman-

[155] *Coral Constr. Co.*, 941 F.2d at 931-932; *See Eng'g Contractors Ass'n*, 122 F.3d at 910.

[156] 122 F.3d at 929 (internal citations omitted).

[157] *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1526-7, n.19 (1994).

[158] *Durand*, 859 N.W.2d at 784 (quotation omitted).

[159] *id.* at 784, 786 n.4; *State ex rel. Forslund v. Bronson*, 305 N.W.2d 748, 750 (Minn.1981).

[160] *State v. Craig*, 807 N.W.2d 453, 462 (Minn. App. 2011) (quotation omitted), *aff'd*, 826 N.W.2d 789 (Minn. 2013). *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553, 569 (Minn. Ct. App. 2020)

[161] 615 F.3d 233, 242; 122 F.3d at 929 (internal citations omitted).

[162] *Contractors Ass'n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

owned contractors.[163] The Court in *Contractors Ass'n of E. Pa. (CAEP I)* held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business, but the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in that case.[164]

The Third Circuit in *CAEP I* held the evidence offered by the City of Philadelphia regarding woman-owned construction businesses was insufficient to create an issue of fact. The study in *CAEP I* contained no disparity index for woman-owned construction businesses in City contracting, such as that presented for minority-owned businesses.[165] Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance.[166] But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.[167] The only other testimony on this subject, the Court found in *CAEP I*, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing.[168] This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard.

Intermediate scrutiny as applied to LGBTQ. There does not appear to be a landmark U.S. Supreme Court decision regarding application of a scrutiny standard to LGBQT discrimination. There is authority, including in the Eight Circuit, that provides the legal standard for gender classifications, gender stereotypes and gender-based affirmative action programs. Generally, these may be intermediate scrutiny.[169]

The Eighth Circuit in *Brandt by and through Brandt v. Rutledge*, addressed an action involving transgender minor patients, their parents and physicians who brought suit against state officials alleging an Arkansas statute that prohibited "gender transition procedures" for minors violated the Equal Protection Clause. The district court issued a preliminary injunction against enforcement of the statute and denied officials' motion to dismiss. The officials appealed to the Eight Circuit.

The Eighth Circuit in affirming the district court held that: (1) the statute was subject to heightened scrutiny; (2) the patients, parents and physicians demonstrated a likelihood of success on the merits; (3) the balance of equities favored issuance of the preliminary injunction; and (4) the scope of injunction was not overbroad. The court found statutes that discriminate based on sex must be supported by an "exceedingly persuasive justification," citing the U.S. Supreme Court decision in *United States v. Virginia*.[170] The court stated that the government meets

[163] *Contractors Ass'n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

[164] *Contractors Ass'n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

[165] *Contractors Ass'n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *See e.g.*, *Heckler v. Mathews*, 465 U.S. 728, 744, (1984). *Brandt by and through Brandt v. Rutledge,* 47 F.4th 661 (8th Cir. 2022); *Cf. Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (holding that where "the School District's policy cannot be stated without referencing sex, as the School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate," the policy "is inherently based upon a sex classification and heightened review applies") (abrogation on other grounds recognized by *Ill. Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020)).

[170] 518 U.S. 515, 531 (1996).

this burden if it can show that the statute is substantially related to a sufficiently important government interest.

In *Brown v. Department of Health & Human Services*[171] the Plaintiffs alleged that the defendants violated the Equal Protection Clause's prohibition against sex-based discrimination when the defendants treated her unfavorably because of her gender non-conformity. The district court in Nebraska stated that similar claims have been allowed to proceed under the Equal Protection Clause. The court cited *Whitaker v. Kenosha Unified School Dist. No. 1 Board of Educ.,*[172] which affirmed a grant of preliminary injunction prohibiting a school district from denying transgender male students' access to the boys' restroom. The student sufficiently demonstrated likelihood of success on the claim that school district policy is a classification based upon sex and that heightened scrutiny, not rational basis, applies to the student's equal protection claim. Additionally, the school district failed to demonstrate a genuine and "exceedingly persuasive" justification for its bathroom policy.

The court in *Brown* also cited *Glenn v. Brumby*[173] for its holding that discriminating against someone on the basis of gender non-conformity constituted sex-based discrimination under the Equal Protection Clause. The court noted there is a "congruence between discriminating against transgender and Transsexual individuals and discrimination on the basis of gender-based behavioral norms." The court also referenced *Smith v. City of Salem*,[174] which held discrimination against a transgender individual because of his or her gender non-conformity is gender stereotyping prohibited by the Equal Protection Clause.

The court in Brown stated that the level of scrutiny applicable to classifications based on transgender status has not been determined by the United States Supreme Court, and "[c]ourts in this circuit have reached differing conclusions as to the level of scrutiny to be applied."[175]

As discussed above, courts generally have held that classifications based on gender are analyzed under intermediate scrutiny, which requires the government to prove that the classification bears a fair and substantial relation to an important government interest. Courts have rejected gender classifications or stereotypes that treat women differently where, when applying the intermediate scrutiny standard, the court found the classifications are not substantially related to an important governmental interest.[176]

It appears the Supreme Court has not determined or ruled specifically on the validity of an LGBQT- or gender-conscious affirmative action contracting program based on applying intermediate scrutiny. However, as shown above, many circuit courts have applied intermediate, rather than strict scrutiny, to gender-based programs. Thereby, the

[171] 2017 WL 2414567 (D. Nebraska 2017).

[172] 2017 WL 2331751 (7th Cir. 2017)

[173] 663 F.3d 1312, 1316 (11th Cir. 2011).

[174] 378 F.3d 566 (6th Cir. 2004).

[175] *Adkins v. City of New York*, 143 F. Supp. 3d 134, 140 (S.D.N.Y. 2015) (concluding that "transgender people are a quasi-suspect class" and court "must apply intermediate scrutiny to defendants' treatment of plaintiff" action brought by transgender arrestee against city officials); *Fields v. Smith*, 712 F. Supp. 2d 830 (E.D. Wis. 2010), *aff'd*, 653 F.3d 550 (7th Cir. 2011) (applying rational basis review to equal protection claim brought by inmates with gender-identity disorder).

[176] *See e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690-1693 (2017); *U.S. v. Virginia,* 518 U.S. 515,(1996); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *D.M. by Bao Xiong v. Minn. State High Sch. League*, 917 F.3d 994, 1001–03 (8th Cir. 2019); *compare Free the Nipple v. City of Springfield, Mo.,* 923 F.3d 508, 510–12 (8th Cir. 2019). *See also*, 1 State and Local Government Civil Rights Liability § 1:16 Constitutional violations – Equal Protection (May 2024 Update).

requirement is that the preference be fairly and substantially related to the achievement of an important government interest.[177]

In connection with discrimination specifically based on sexual orientation and gender identity, the authors of State and Local Government Civil Rights Liability at Section 1:16 provide as follows:

> "The Supreme Court has never ruled (1) that discrimination based on sexual orientation or gender identity are simply forms of sex discrimination that trigger intermediate scrutiny analysis or (2) that LGBTQ persons should be recognized as a quasi-suspect class on their own. However, the Supreme Court has struck down laws targeting gays that are motivated by "irrational fear and prejudice" (rational basis with bite), and it has invalidated state and federal bans on same-sex marriage relying, in part, on the equal protection guarantee and asserting the immutability of sexual orientation. Further, a few federal appellate courts, invoking the Supreme Court decisions interpreting Title VII's ban on sex discrimination, have recognized claims of sexual orientation and gender identity bias as impermissible "sex stereotyping" prohibited by the Equal Protection Clause."[178]

It is noteworthy that the Supreme Court in *Romer v. Evans*[179] struck down a Colorado law that Colorado voters adopted by statewide referendum "Amendment 2" to the State Constitution. Amendment 2 precluded all legislative, executive or judicial action at any level of state or local government designed to protect the status of persons based on their " homosexual, lesbian or bisexual orientation, conduct, practices or relationships." Amendment 2 nullified specific legal protections for this targeted class (homosexuals) in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, public accommodation, and employment.

The Court in *Romer* stated that the "Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."[180] The Court pointed out that it has attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, "we will uphold the legislative classification so long as it bears a rational relation to some

[177] *See e.g.*, A*ssociated General Contractors of America, San Diego Chapter, Inc v. California Dept. of Transp.*, 713 F.3d 1187, 1195 (9th Cir. 2013); *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 971–991(10th Cir. 2003); *Engineering Contractors Ass'n of South Florida Inc. v. Metropolitan Dade County*, 122 F.3d 895, 907–929 (11th Cir. 1997); *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia,* 6 F.3d 990, 1001, (3d Cir. 1993). *See also*, 1 State and Local Government Civil Rights Liability § 1:16 Constitutional violations – Equal Protection (May 2024 Update).

[178] State and Local Government Civil Rights Liability § 1:16 Constitutional violations – Equal Protection (May 2024 Update), Ivan Bodensteiner and Rosalie Berger Levinson. The authors of State and Local Government Civil Rights Liability at Section 1:16, also note that "a few appellate courts have invoked the "gender stereotyping" analysis to support § 1983 equal protection claims alleging discrimination based on gender identity, including claims brought by transgender employees suffering adverse action in the workplace, and transgender students denied access to bathrooms that conform to their gender identity.[citations omitted] Others have used the sex-stereotyping theory to prohibit sexual orientation discrimination under the Equal Protection Clause. [Citations omitted]." And, they point out that "no appellate court has directly ruled that classifications based on sexual orientation or gender identity trigger heightened scrutiny under the equal protection guarantee in the absence of impermissible sex stereotyping …." But, "a few federal district courts, in adjudicating the ban on transgenders in the military, have held that strict or, at minimum, intermediate scrutiny should apply because transgender individuals are a suspect or quasi-suspect class." [Citations omitted].

[179] 517 U.S. 620 (1996)

[180] 517 U.S. at 631-632.

legitimate end."[181] The Court held that Amendment 2 failed even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group. Second, "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."[182]

The Court concluded that "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause …."[183] The Court, held Amendment 2 failed even the "conventional inquiry" that would uphold a legislative classification so long as it bears a rational relation to some legitimate end; and thus applied a rational basis test without specifically addressing whether LGBQT discrimination would require a heightened scrutiny such as intermediate scrutiny since the law even failed rational basis.

3. Rational basis analysis

Where a challenge to the constitutionality of a statute or a regulation does not involve a fundamental right or a suspect class, the appropriate level of scrutiny to apply is the rational basis standard.[184] When applying rational basis review under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, a court is required to inquire "whether the challenged classification has a legitimate purpose and whether it was reasonable [for the legislature] to believe that use of the challenged classification would promote that purpose."[185]

Courts in applying the rational basis test generally find that a challenged law is upheld "as long as there could be some rational basis for enacting [it]," that is, that "the law in question is rationally related to a legitimate government purpose."[186] As long as a government legislature had a

[181] *Id.*

[182] *Id*.

[183] *Id* at 635-636.

[184] *See, e.g., Heller v. Doe,* 509 U.S. 312, 320 (1993); *Doe, I v. Peterson*, 43 F.4th 838 (8th Cir. 2022); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9th Cir. 2019); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988); *see also Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008)(stating that federal courts review legislation regulating economic and business affairs under a 'highly deferential rational basis' standard of review."); see *N.H. v. Anoka-Hennepin School District No. 11, 950* N.W.2d 553 (Minn. Ct. App. 2020*); Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1 (Minn. 2020) *In re Guardianship, Conservatorship of Durand*, 859 N.W.2d 780 (Minn. 2015).

[185] *See, e.g., Heller v. Doe,* 509 U.S. 312, 320 (1993); *Doe, I v. Peterson*, 43 F.4th 838 (8th Cir. 2022); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988); *see, also, Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a 'highly deferential rational basis' standard of review."); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Contractors Ass'n of E. Pa.*, 6 F.3d at 1011 (3d Cir. 1993); *N.H. v. Anoka-Hennepin School District No. 11, 950 N.W.2d 553 (Minn. Ct. App. 2020); Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1 (Minn. 2020) *In re Guardianship, Conservatorship of Durand,* 859 N.W.2d 780 (Minn. 2015).

[186] *See e.g., Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *Doe, I v. Peterson*, 43 F.4th 838 (8th Cir. 2022); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998) *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, (1985) (citations omitted); *Heller*

reasonable basis for adopting the classification the law will pass constitutional muster.[187]

It should be noted, however, the Minnesota Supreme Court has, at least in some circumstances, applied what it called a "higher standard" when applying rational basis review under the Minnesota Constitution.[188] The Minnesota rational basis test has three requirements:

> (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.[189]

The Minnesota Supreme Court has stated: "The key distinction between the federal and Minnesota tests is that under the Minnesota test 'we have been unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires.'"[190] The Minnesota intermediate appellate court has previously held, and the Minnesota Supreme Court affirmed, that Minnesota's rational-basis test "applies when analyzing any case under the equal protection clause of the Minnesota Constitution."[191]

More recently in *Gluba*, the Minnesota Supreme Court "declined to infer from the language or structure of the Minnesota rational-basis test that a higher standard than the federal standard applies to matters concerning the regulation of economic activity and the distribution of economic benefits."[192] In *Gluba*, the Minnesota Supreme Court, in determining whether a challenged provision in the Minnesota Workers' Compensation Act violated the Equal Protection Clause of the Minnesota Constitution, "concluded that the analysis of the challenged provision under the second step of the Minnesota rational-basis test would focus on whether the legislature could reasonably have believed

v. Doe, 509 U.S. 312, 318-321 (1993) (Under rational basis standard, a legislative classification is accorded a strong presumption of validity); *see, N.H. v. Anoka-Hennepin School District No. 11, 950 N.W.2d 553 (Minn. Ct. App. 2020); Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1 (Minn. 2020) *In re Guardianship, Conservatorship of Durand, 859 N.W.2d 780 (Minn. 2015*).

[187] *Id.; Doe, I v. Peterson*, 43 F.4th 838 (8th Cir. 2022); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013), (*citing FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)); *see, e.g., N.H. v. Anoka-Hennepin School District No. 11, 950 N.W.2d 553 (Minn. Ct. App. 2020); Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1 (Minn. 2020) *In re Guardianship, Conservatorship of Durand, 859 N.W.2d 780 (Minn. 2015*).

[188] *Scott v. Minneapolis Police Relief Ass'n*, 615 N.W.2d 66, 74 (Minn. 2000) (noting that one test is the test articulated by federal courts and the other is "often characterized as the Minnesota rational basis test"); *see*, *N.H. v. Anoka-Hennepin School District No. 11,* 950 N.W.2d 553 (Minn. Ct. App. 2020); *Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1 (Minn. 2020) *In re Guardianship, Conservatorship of Durand,* 859 N.W.2d 780 (Minn. 2015).

[189] *State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991) (quoting *Wegan v. Vill. Of Lexington*, 309 N.W.2d 273, 280 (Minn. 1981).

[190] *State v. Garcia*, 683 N.W.2d 294, 299 (Minn. 2004) (quoting *Russell*, 477 N.W.2d at 889).

[191] *Mitchell v. Steffen*, 487 N.W.2d 896, 904 n.2 (Minn. App. 1992), *aff'd*, 504 N.W.2d 198 (Minn. 1993).

[192] *Healthstar Home Health, Inc. v. Jesson*, 827 N.W.2d 444, 450 (Minn. App. 2012) (citing *Gluba*, 735 N.W.2d at 723).

in any facts that would support the connection between the statutory classification and the purpose of the statute."[193]

Thus, there is authority that when applying rational basis review to matters concerning the regulation of economic activity, the Minnesota Supreme Court may apply the federal standard of review. Under the federal standard of review a court will presume the "legislation is valid and will sustain it if the classification drawn by the statute is rationally related to a legitimate [government] interest."[194]

The Eighth Circuit Court of Appeals and Minnesota courts have found that under a rational-basis review, the court presumes state legislation to be constitutionally valid.[195] A classification imposed by statute or law must merely be reasonable in the light of its purpose and must bear a rational relationship to the objectives of the legislation so that all similarly situated people will be treated similarly.[196] If evaluation of challenged legislation reveals any conceivable state purpose that can be considered as served by the legislation, then it must be upheld.[197]

Under a rational basis review standard, a legislative classification will be upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."[198] Because all legislation classifies its objects, differential treatment is justified by "any reasonably conceivable state of facts."[199] The courts hold that legislation need not pursue its permissible goal by using the least

[193] *Id.*

[194] *Chance Mgmt., Inc. v. S. Dakota*, 97 F.3d 1107, 1114 (8th Cir. 1996); *see also Lawrence v. Texas,* 539 U.S. 558, 580, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) ("Under our rational basis standard of review, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest . . . . Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster." (internal citations and quotations omitted)) (O'Connor, J., concurring); *Gallagher v. City of Clayton,* 699 F.3d 1013, 1019 (8th Cir. 2012) ("Under rational basis review, the classification must only be rationally related to a legitimate government interest.").

[195] *See, Heller v. Doe*, 509 U.S. 312, 320 (1993); *Doe, I v. Peterson*, 43 F.4th 838 (8th Cir. 2022); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988); *see also Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a 'highly deferential rational basis' standard of review."); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Contractors Ass'n of E. Pa.*, 6 F.3d at 1011 (3d Cir. 1993); *see, e.g N.H. v. Anoka-Hennepin School District No. 11, 950 N.W.2d 553 (Minn. Ct. App. 2020); Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1 (Minn. 2020) *In re Guardianship, Conservatorship of Durand, 859 N.W.2d 780 (Minn. 2015*)**.**

[196] *Id.*; *see*, *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, *reh'g denied*, 450 U.S. 960 (1981).

[197] *Id.*; *see*, *McGowan v. Maryland*, 366 U.S. (1961); *Lucas v. United States*, 807 F.2d 414, 422 (5th Cir.1986).

[198] *Heller v. Doe*, 509 U.S. 312, 320 (1993); *See, e.g., Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *Doe, I v. Peterson*, 43 F.4th 838 (8th Cir. 2022); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998) *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, (1985) (citations omitted); *Heller v. Doe*, 509 U.S. 312, 318-321 (1993) (Under rational basis standard, a legislative classification is accorded a strong presumption of validity); *see, e.g., N.H. v. Anoka-Hennepin School District No. 11, 950 N.W.2d 553 (Minn. Ct. App. 2020); Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1 (Minn. 2020) *In re Guardianship, Conservatorship of Durand, 859 N.W.2d 780 (Minn. 2015*).

[199] *Id*. *See, e.g., Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *Doe, I v. Peterson*, 43 F.4th 838 (8th Cir. 2022); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998) *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, (1985) (citations omitted); *Heller v. Doe*, 509 U.S. 312, 318-321 (1993) (Under rational basis standard, a legislative classification is accorded a strong presumption of validity); *see, e.g., N.H. v. Anoka-Hennepin School District No. 11, 950 N.W.2d 553 (Minn. Ct. App. 2020); Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1 (Minn. 2020) *In re Guardianship, Conservatorship of Durand, 859 N.W.2d 780 (Minn. 2015*).

restrictive means of classification; consequently, the Equal Protection Clause is not violated "merely because the classifications made…are imperfect."[200].

"[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record."[201] Moreover, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality."[202]

Under the federal standard of review a court will presume the "legislation is valid and will sustain it if the classification drawn by the statute is rationally related to a legitimate [government] interest."[203]

A federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States*, is instructive and analogous to some of the issues in a small business program. The case is informative as to the use, estimation and determination of goals (small business goals) in a procurement under the Federal Acquisition Regulations ("FAR").[204]

Firstline involved a solicitation that established a small business subcontracting goal requirement. In *Firstline*, the Transportation Security Administration ("TSA") issued a solicitation for security screening services at the Kansas City Airport. The solicitation stated that the: "Government anticipates an overall Small Business goal of 40 percent," and that "[w]ithin that goal, the government anticipates further small business goals of: Small, Disadvantaged business[:] 14.5%; Woman Owned[:] 5 percent: HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent."[205]

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[200] *Johnson v. Rodriguez*, 110 F.3d 299, 306 (5th Cir. 1997), *cert. denied*, 522 U.S. 995 (1997)(quotation omitted). *See. E.g., Heller v. Doe*, 509 U.S. 312, 321 (1993) *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *see, e.g., N.H. v. Anoka-Hennepin School District No. 11, 950 N.W.2d 553 (Minn. Ct. App. 2020); Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1 (Minn. 2020) *In re Guardianship, Conservatorship of Durand, 859 N.W.2d 780 (Minn. 2015*).

[201] *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *United States v. Timms*, 664 F.3d 436, 448-49 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 189 (2012) (*citing Heller v. Doe*, 509 U.S. 312, 320-21 (1993)) (quotation marks and citation omitted) *see, e.g., N.H. v. Anoka-Hennepin School District No. 11, 950 N.W.2d 553 (Minn. Ct. App. 2020); Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1 (Minn. 2020) *In re Guardianship, Conservatorship of Durand, 859 N.W.2d 780 (Minn. 2015*).

[202] *Heller v. Doe*, 509 U.S. 312, 321 (1993) *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *see, e.g., N.H. v. Anoka-Hennepin School District No. 11, 950 N.W.2d 553 (Minn. Ct. App. 2020); Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1 (Minn. 2020) *In re Guardianship, Conservatorship of Durand, 859 N.W.2d 780 (Minn. 2015*).

[203] *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Doe, I v. Peterson*, 43 F.4th 838 (8th Cir. 2022); *Chance Mgmt., Inc. v. S. Dakota*, 97 F.3d 1107, 1114 (8th Cir. 1996); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *see also Lawrence v. Texas,* 539 U.S. 558, 580, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) ("Under our rational basis standard of review, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest . . . . Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster." (internal citations and quotations omitted)) (O'Connor, J., concurring); *Gallagher v. City of Clayton,* 699 F.3d 1013, 1019 (8th Cir. 2012) ("Under rational basis review, the classification must only be rationally related to a legitimate government interest.").

[204] 2012 WL 5939228 (Fed. Cl. 2012).

[205] *Id*.

The court applied the rational basis test in construing the challenge to the establishment by the TSA of a 40 percent small business participation goal as unlawful and irrational.[206] The court stated it "cannot say that the agency's approach is clearly unlawful, or that the approach lacks a rational basis."[207]

The court found that "an agency may rationally establish aspirational small business subcontracting goals for prospective offerors…." Consequently, the court held one rational method by which the Government may attempt to maximize small business participation is to establish a rough subcontracting goal for a given contract, and then allow potential contractors to compete in designing innovate ways to structure and maximize small business subcontracting within their proposals.[208] The court, in an exercise of judicial restraint, found the "40 percent goal is a rational expression of the Government's policy of affording small business concerns … the maximum practicable opportunity to participate as subcontractors …"[209]

Rational basis as applied to disability. In connection with discrimination claims based on disability, the decision in *Contractors Association of Eastern Pennsylvania, Inc, et. al. v. City of Philadelphia*,[210] is instructive. In this case an association of construction contractors filed suit challenging, on equal protection grounds, a City of Philadelphia ordinance that established a "set-aside" program for "disadvantaged business enterprises" owned by minorities, women, and handicapped persons.[211] The District Court granted summary judgment for the contractors and denied the City's motion to stay the injunctive relief. The City appealed, and the Third Circuit Court of Appeals[212] affirmed in part and vacated in part the district court's decision.

On remand, the district court again granted summary judgment for the contractors. The City appealed again. The Third Circuit Court of Appeals held the preference for businesses owned by handicapped persons was rationally related to a legitimate government purpose and, thus, did not violate equal protection.[213]

The district court reviewed the preference for business owners with a disability under the rational basis test, which validates a classification if it is "rationally related to a legitimate governmental purpose."[214] The Third Circuit held the district court properly chose the rational basis standard in reviewing the Ordinance's preference for handicapped persons.[215]

The Court then addressed the 2 percent preference for businesses owned by people with a disability. The district court struck down this preference under the rational basis test based on the belief that, according to the Third Circuit, *Croson* required some evidence of discrimination against business enterprises owned by handicapped persons. Therefore, that the City could not rely on testimony of discrimination against handicapped individuals.[216]

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[206] *Id*.

[207] *Id*.

[208] *Id*.

[209] *Id*.

[210] *Contractors Association of Eastern Pennsylvania, Inc, et. al. v. City of Philadelphia,* 6 F. 3d 990 (3d Cir. 1993).

[211] 6 F.3d. at 993.

[212] 735 F.Supp. 1274 (E.D. Phila. 1990).

[213] 945 F.2d 1260 (3d. Cir. 1991)

[214] *Id*. at 1001, *citing 7*08_3257

[215] *Id*.

[216] *Id*., *citing* 345 F.Supp 1308

The Court stated that a classification will pass the rational basis test if it is "rationally related to a legitimate government purpose."[217] The Court pointed out that the Supreme Court had affirmed the permissiveness of the rational basis test in *Heller v. Doe*, indicating that "a [statutory] classification" subject to rational basis review "is accorded a strong presumption of validity," and that "a state ... has no obligation to produce evidence to sustain the rationality of [the] classification." Moreover, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record."[218] The City stated it sought to minimize discrimination against businesses owned by handicapped persons and encouraged them to seek City contracts. The Court agreed with the district court that these are legitimate goals, but unlike the district court, the Third Circuit held the 2-percent preference was rationally related to this goal.[219] The City offered anecdotal evidence of discrimination against handicapped persons.[220]

Prior to amending the Ordinance to include the preference, the City Council held a hearing where eight witnesses testified regarding employment discrimination against handicapped persons both nationally and in Philadelphia. Four witnesses spoke of discrimination against blind people, and three testified to discrimination against people with other disabilities. Two of the witnesses, who were physically disabled, spoke of discrimination they and others had faced in the workforce. One of these witnesses testified he was in the process of forming his own residential construction company. Additionally, two witnesses testified that the preference would encourage persons with disabilities to own and operate their own businesses.[221]

The Court held that under the rational basis standard, the contractors did not carry their burden of negating every basis which supported the legislative arrangement, and that City Council was entitled to infer discrimination against handicapped individuals from this evidence and was entitled to conclude the Ordinance would encourage handicapped individuals to form businesses to win City contracts.[222] Therefore, the Court reversed the district court's grant of summary judgment, invalidating this aspect of the Ordinance and remanding for entry of an order granting summary judgment to the City on this issue.[223]

Recently, the United States District Court for the District of Colorado stated, the court stated that individuals with disabilities are entitled to the full extent of rights bestowed upon all humankind and protected by our Constitution and laws.[224] However, the court noted that "census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally."[225]

> "[T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal

[217] *Id*.

[218] *Id*. at 1011.

[219] *Id.* at 1011.

[220] *Id*.

[221] *Id. a*t 1011-1012.

[222] *Id.* at 1012.

[223] *Id*.

[224] *Wolf v. Meadow Hills III Condominium Association*, 2022 WL 814275 (D. Col. 2022)

[225] *Id*.; 42 U.S.C. § 1201(a).

> basis and to pursue those opportunities for which our free society is justifiably famous."[226]

In addition, the Western District Court of Michigan that involved a claim that the defendant, while acting as a State contractor, engaged in a pattern of denying proper treatment and orthopedic aides to the plaintiff in violation of the Americans with Disabilities Act.[227]

The court stated that Section 12132 of the ADA provides in pertinent part that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." "To establish a prima facie case of intentional discrimination under Title II of the ADA, a plaintiff must show that: (1) she has a disability; (2) she is otherwise qualified; and (3) she was being excluded from participation in, denied the benefits of, or subjected to discrimination under the program because of her disability."[228]

The Supreme Court in *City of Cleburne, Texas v. Cleburne Living Center* did not find that a classification based on mental retardation required heightened scrutiny. The Court found that members of the group have distinguishing characteristics that may be relevant to interests the state can implement.[229]

The authors of State and Local Government Civil Rights Liability at Section 1:16 note regarding "rational basis with a bite," that the Supreme Court "has invalidated laws motivated by irrational prejudice toward a particular group, even if that group does not qualify as a suspect class because this animus cannot be a legitimate government interest. For example, a city's requirement of a special use permit for a group home for the mentally disabled, enacted in response to a community's irrational fears, was found invalid under the rational basis test."[230] The Court reasoned that laws "born of a bare desire to harm a politically unpopular group" violate the equal protection guarantee. This analysis, sometimes referred to as 'rational basis with bite,' has been used by the Court to invalidate laws targeting members of the gay community.[231]

4. Pending cases and recent instructive cases (at the time of this report)

There are pending cases and certain recent decisions of interest in the federal and state courts at the time of this report involving challenges to MBE/WBE/DBE type programs that are instructive to and may potentially impact the study, and key recent orders from cases that are informative to the study, including the following:

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[226] *Id*, *citing,* Americans With Disabilities Act, 42 U.S.C. § 12101 (establishing the statute's purpose as outlawing and enforcing the prohibition on disability-based discrimination).

[227] *White v. Corizon Inc.*, 2023 WL 2854298 (W.D. Mich. 2023).(ADA) 42 U.S.C. §§ 12101 and 12132 *et seq.*

[228] *Id., citing Anderson v. City of Blue Ash*, 798 F.3d 338, 357 (6th Cir. 2015).

[229] *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985). State and Local Government Civil Rights Liability § 1:16 Constitutional violations – Equal Protection (May 2024 Update) (In *Heller v. Doe*, the Supreme Court upheld the disparate treatment of the mentally disabled and the mentally ill, based on reasonable distinctions between the two groups. 1 State and Local Government Civil Rights Liability § 1:16 Constitutional violations – Equal Protection (May 2024 Update).

[230] State and Local Government Civil Rights Liability § 1:16 Constitutional violations – Equal Protection (May 2024 Update).

[231] *Id*.

(i) ***Christian Bruckner et al. v. Joseph R. Biden Jr et al***., 2023 WL 27744026, U.S. District Court for the Middle District of Florida, Case No. 8:22-cv-01582 (M.D. Fla. March 31, 2023)

(ii) ***Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the Small Business Administration***, 999 F.3d 353 (6th Cir. 2021), 2021 WL 2172181 (6th Cir. May 27, 2021)

(iii) ***Faust v. Vilsack, Secretary of U.S. Dep't of Agriculture***, 2021 WL 2409729, US District Court, E.D. Wisconsin (June 10, 2021)

(iv) ***Wynn v. Vilsack, Secretary of U.S. Dep't of Agriculture***, 2021 WL 2580678, (M.D. Fla. June 23, 2021),Case No. 3:21-cv-514-MMH-JRK, U.S. District Court for the Middle District of Fla.

(v) ***Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al.***, 2023 WL 4633481 (E.D. Tenn. July 19, 2023), U.S. District Court for the Eastern District of Tennessee, 2:20-cv-00041-DCLC-CRW

(vi) ***Nuziard, et al. v. MBDA, et al.***, 2024 WL 965299 (N.D. Tex. March 5, 2024), granting Plaintiffs' motion for summary judgment and ordering a permanent injunction; Order and Opinion issued on March 5, 2024; and 2023 WL 3869323 (N.D. Tex. June 5, 2023), granting Plaintiffs' motion for preliminary injunction; Order and Opinion issued on June 5, 2023; U.S. District Court for the N.D. of Texas, Fort Worth Division, Case No. 4:23-cv-00278.

(vii) ***Mid-America Milling Company LLC (MAMCO) and Bagshaw Trucking Inc. v. U.S. Department of Transportation, et. al***., U.S. District Court for the Eastern District of Kentucky, Frankfort Division; Case No: 3:23 -cv-00072-GFVT (Complaint filed on October 26, 2023)

(viii) ***Landscape Consultants of Texas, Inc. et. al. v. City of Houston, Texas, et. al***., U.S. District Court for the Southern District of Texas, Houston Division; Civil Action No. 4:23-cv-3516. Complaint filed September 19, 2023**.**

The following summarizes the above listed pending cases and informative recent decisions:

(i) ***Christian Bruckner et al. v. Joseph R. Biden Jr. et al.***, 2023 WL 2744026 (M.D. Fla. March 31, 2023), U.S. District Court for the Middle District of Florida, Case No. 8:22-cv-01582. filed July 13, 2022. Federal Defendants' Motion to Dismiss Granted and Plaintiffs' Motion for Preliminary Injunction Denied on March 31, 2023. Judgment entered on April 3, 2023.

The Complaint filed on July 13, 2022, alleges that on November 15, 2021, President Biden signed into law the "Infrastructure Investment and Jobs Act," a $1.2 trillion spending bill to improve America's infrastructure. As part of this bill, the Complaint alleges Congress authorized $370 billion in new spending for roads, bridges, and other surface transportation projects. The Complaint asserts that Congress also implemented a set aside, or quota, requiring that at least 10% of these funds be reserved for certain "disadvantaged" small businesses. According to the White House, the Complaint alleges, the law reserves more than $37 billion in contracts to be awarded to "small, disadvantaged business contractors."

The Complaint asserts that Plaintiff Bruckner cannot benefit from the program and compete for the projects because of his race and gender, that the $37 billion fund is reserved for small businesses owned by certain minorities and women, and that Bruckner is a white male.

The Complaint alleges the Infrastructure Act sets an unlawful quota based on race and gender because at least 10% of all contracts for

certain infrastructure projects must be awarded based on race and gender, that this quota is unconstitutional, that Defendants have no justification for the Act's $37 billion race-and-gender quota, and therefore the court should declare this alleged quota unconstitutional and enjoin its enforcement, "just as other courts have similarly enjoined other race-and-gender-based preferences in the American Rescue against $28.6 billion Restaurant Revitalization Fund priority period); Faust v. Vilsack, 519 F. Supp. 3d 470 (E.D. Wis. 2021)(injunction against $4 billion Farmer Loan Forgiveness program Plan Act. E.g., Vitolo v. Guzman, 999 F.3d 353 (6th Cir. 2021)(injunction)."

The Complaint alleges that Congress attempted to justify these race-and-gender classifications through findings of "race and gender discrimination" in the Infrastructure Act, "but none of these findings establish that Congress is attempting to remedy a specific and recent episode of intentional discrimination that it had a hand in." The Complaint alleges that "because he is a white male, Plaintiff Bruckner and his business, PMC, cannot compete on an equal footing for contracts under the Infrastructure Act with businesses that are owned by women and certain racial minorities preferred by federal law."

The Complaint alleges that the racial classifications under Section 11101(e)(2) & (3) of the Infrastructure Act are unconstitutional because they violate the equal protection guarantee in the United States Constitution, and that these racial classifications in the Infrastructure Act are not narrowly tailored to serve a compelling government interest. The Complaint alleges that the gender-based classification under Sections 11101(e)(2) & (3) of the Infrastructure Act is unconstitutional because it violates the equal protection guarantee in the United States Constitution. The Complaint asserts this gender-based classification is not supported by an exceedingly persuasive objective, and the discriminatory means employed are not substantially related to the achievement of that objective.

The Complaint requests the court: A. Enter a preliminary injunction removing all unconstitutional race and gender-based classification in Section 11101(e)(3) of the Infrastructure Act.; B. Enter a declaratory judgment that the race and gender-based classifications under Section 11101(e)(3) of the Infrastructure Act are unconstitutional; and, C. Enter an order permanently enjoining Defendants from applying race and gender-based classifications when awarding contracts under Section 11101(e)(3) of the Infrastructure Act.

The Plaintiffs filed in July 2022 an Amended Motion for Preliminary Injunction, which is pending. The federal Defendants filed a Reply in Opposition to the Motion for Preliminary Injunction on August 29, 2022. On September 27, 2022, the federal Defendants filed a Motion to Dismiss the Complaint.

November 21, 2022, Order regarding the Federal DBE Program. The court issued an Order on November 21, 2022, requesting the parties to address certain listed questions describing the administration and implementation process of the Federal DBE Program. In particular, the court requested the parties submit supplemental briefing describing the authorization of funds by Congress and explain how state and local recipients award federally funded contracts.

The court ordered the Plaintiffs may clarify whether the complaint challenges the Federal DBE Program as it applies to direct contracting with the federal government. And, the court ordered the Defendants may file a statement certifying whether there are localities or federal agencies receiving funding from the Infrastructure Act that have set a DBE goal of 0%.

The parties responded on December 2, 2022. Bruckner filed a statement asserting that his complaint "challenges a single sentence in federal law: Section 11101(e)(3) of the Infrastructure Investment and Jobs Act, P.L. 117-58" and that his "requested remedy is therefore narrow and

precise: an injunction preventing Defendants from enforcing and implementing this one sentence." Plaintiffs' Verified Complaint only challenges Section 11101(e)(3), which contains a $37 billion race-and-gender preference.

The Defendants submitted a supplemental briefing describing the administration and implementation process of the Federal DBE Program, and filed Declarations of DOT personnel attesting to the goals implemented by recipients. The Defendants also addressed: (a) how the DOT calculates and assesses whether recipients are fulfilling their DBE goals; (b) whether a recipient's DBE goal influences the amount of federal funds awarded under the Act; (c) the race neutral means used by recipients that employ only neutral means to award contracts; (d) whether recipients and prime contractors are aware of a bidder's DBE status when determining whether to award a contract where a jurisdiction exclusively uses neutral means; (e) whether a subcontractor knows before bidding if the recipient or prime contractor is employing race and gender conscious or neutral means to award subcontracts; and (f) the certification process.

March 31, 2023 Order. The district court on March 31, 2023 issued an Order that granted the Federal Defendants' Motion to Dismiss and denied the Plaintiffs' Motion for Preliminary Injunction without prejudice. Judgment was issued in favor of Defendants by the court on April 3, 2023.

Lack of standing. The court held that although the Plaintiffs "raise compelling merits arguments" based on the preliminary-injunction-stage record, they fail to demonstrate an injury-in-fact to satisfy Article III standing. The court found that some recipients of the Infrastructure Act's Funds do not employ race- and gender-conscious means when awarding contracts. Others, the court noted, employ discriminatory means only with respect to some contracts. Because the Plaintiffs do not identify which contracts they intend to bid on, the court held that Plaintiffs' alleged harm is speculative and they fail to allege facts demonstrating a "certainly impending" "direct exposure to unequal treatment.

In this case, because States and localities sometimes award contracts without considering the contractor's race or gender, the court said that Plaintiffs fail to allege an injury in fact. The court stated that a party does not suffer an injury if he is only ready and able to bid on contracts that do not use discriminatory means. And because the Plaintiffs fail to demonstrate that they are ready and able to bid on an identified contract, or set of contracts, that use discriminatory means, the court found they only allege the possibility of future harm, not an actual or imminent one, which will not suffice for purposes of Article III standing.

By refusing to identify which contracts that discriminate based on race and gender that Bruckner and PMC are ready and able to compete for, the court found that Plaintiffs fail to allege facts demonstrating that they will be denied equal treatment.

Conclusion. The court concluded that because the Plaintiffs fail to allege facts clearly demonstrating that they are able and ready to compete in a discriminatory scheme, the Plaintiffs fail to demonstrate standing. Accordingly, the court held Defendants' motion to dismiss is granted, and the action is dismissed without prejudice. The court then held that Plaintiffs' motion for a preliminary injunction is denied as moot.

(ii) ***Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the Small Business Administration***, 999 F.3d 353 (6th Cir. 2021), 2021 WL 2172181 (6th Cir. May 27, 2021), on appeal to Sixth Circuit Court of Appeals from decision by United States District Court, E.D. Tennessee, Northern Division, 2021 WL 2003552, which District Court issued an Order denying plaintiffs' motion for temporary restraining order on 5/19/21, and Order denying plaintiffs' motion for preliminary injunction

on 5/25/21. The appeal was filed in Sixth Circuit Court of Appeals on May 20, 2021. The Plaintiffs applied to the Sixth Circuit for an Emergency Motion for Injunction Pending Appeal and to Expedite Appeal. The Sixth Circuit, two of the three Judges on the three Judge panel, granted the motion to expedite the appeal and then decided and filed its Opinion on May 27, 2021. *Vitolo v. Guzman*, 2021 WL 2172181 (6th Cir. May 27, 2021).

Background and District Court Memorandum Opinion and Order. On March 27, 2020, § 1102 of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") created the Paycheck Protection Program ("PPP"), a $349 billion federally guaranteed loan program for businesses distressed by the pandemic. On April 24, 2020, the Paycheck Protection Program and Health Care Enhancement Act appropriated an additional $310 billion to the fund.

The district court in this case said that PPP loans were not administered equally to all kinds of businesses, however. Congressional investigation revealed that minority-owned and woman-owned businesses had more difficulty accessing PPP funds relative to other kinds of business (analysis noting that black-owned businesses were more likely to be denied PPP loans than white-owned businesses with similar application profiles due to outright lending discrimination, and that funds were more quickly disbursed to businesses in predominantly white neighborhoods). The court stated from the testimony to Congress that this was due in significant part to the lack of historical relationships between commercial lenders and minority-owned and woman-owned businesses. The historical lack of access to credit, the court noted from the testimony, also meant that minority-owned and woman-owned businesses tended to be in more financially precarious situations entering the pandemic, rendering them less able to weather an extended economic contraction of the sort COVID-19 unleashed.

Against this backdrop, on March 11, 2021, the President signed the American Rescue Plan Act of 2021 (the "ARPA"). H.R. 1319, 117th Cong. (2021). As part of the ARPA, Congress appropriated $28,600,000,000 to a "Restaurant Revitalization Fund" and tasked the Administrator of the Small Business Administration with disbursing funds to restaurants and other eligible entities that suffered COVID-19 pandemic-related revenue losses. See id. § 5003. Under the ARPA, the Administrator "shall award grants to eligible entities in the order in which applications are received by the Administrator," except that during the initial 21-day period in which the grants are awarded, the Administrator shall prioritize awarding grants to eligible entities that are small business concerns owned and controlled by women, veterans, or socially and economically disadvantaged small business concerns.

On April 27, 2021, the Small Business Administration announced that it would open the application period for the Restaurant Revitalization Fund on May 3, 2021. The Small Business Administration announcement also stated, consistent with the ARPA, that "[f]or the first 21 days that the program is open, the SBA will prioritize funding applications from businesses owned and controlled by women, veterans, and socially and economically disadvantaged individuals."

Antonio Vitolo is a white male who owns and operates Jake's Bar and Grill, LLC in Harriman, Tennessee. Vitolo applied for a grant from the Restaurant Revitalization Fund through the Small Business Administration on May 3, 2021, the first day of the application period. The Small Business Administration emailed Vitolo and notified him that "[a]pplicants who have submitted a non-priority application will find their application remain in a Review status while priority applications are processed during the first 21 days."

On May 12, 2021, Vitolo and Jake's Bar and Grill, LLC initiated the present action against Defendant Isabella Casillas Guzman, the

Administrator of the Small Business Administration. In their complaint, Vitolo and Jake's Bar and Grill assert that the ARPA's twenty-one-day priority period violates the United States Constitution's equal protection clause and due process clause because it impermissibly grants benefits and priority consideration based on race and gender classifications.

Based on allegations in the complaint and averments made in Vitolo's sworn declaration dated May 11, 2021, Vitolo and Jake's Bar and Grill request that the Court enter: (1) a temporary restraining order prohibiting the Small Business Administration from paying out grants from the Restaurant Revitalization Fund, unless it processes applications in the order they were received without regard to the race or gender of the applicant; (2) a temporary injunction requiring the Small Business Administration to process applications and pay grants in the order received regardless of race or gender; (3) a declaratory judgment that race-and gender-based classifications under § 5003 of the ARPA are unconstitutional; and (4) an order permanently enjoining the Small Business Administration from applying race- and gender-based classifications in determining eligibility and priority for grants under § 5003 of the ARPA.

Strict scrutiny. The parties agreed that this system is subject to strict scrutiny. Accordingly, the district court found that whether Plaintiffs are likely to succeed on the merits of their race-based equal-protection claims turns on whether Defendant has a compelling government interest in using a race-based classification, and whether that classification is narrowly tailored to that interest. Here, the Government asserts that it has a compelling interest in "remedying the effect of past or present racial discrimination" as related to the formation and stability of minority-owned businesses.

Compelling interest found by District Court. The court found that over the past year, Congress has gathered myriad evidence suggesting that small businesses owned by minorities (including restaurants, which have a disproportionately high rate of minority ownership) have suffered more severely than other kinds of businesses during the COVID-19 pandemic, and that the Government's early attempts at general economic stimulus—i.e., the Paycheck Protection Program ("PPP")—disproportionately failed to help those businesses directly because of historical discrimination patterns. To the extent that Plaintiffs argue that evidence racial disparity or disparate impact alone is not enough to support a compelling government interest, the court noted Congress also heard evidence that racial bias plays a direct role in these disparities.

At this preliminary stage, the court found that the Government has a compelling interest in remediating past racial discrimination against minority-owned restaurants through § 5003 the ARPA and in ensuring public relief funds are not perpetuating the legacy of that discrimination. At the very least, the court stated Congress had evidence before it suggesting that its initial COVID-relief program, the PPP, disproportionately failed to reach minority-owned businesses due (at least in part) to historical lack of relationships between banks and minority-owned businesses, itself a symptom of historical lending discrimination.

The court cited the Supreme Court decision in *Croson*, 488 U.S. at 492 ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars drawn from the tax contributions of all citizens do not serve to finance the evil of private prejudice."); and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1169 (10th Cir. 2000)("The government's evidence is particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied."); *DynaLantic Corp v. U.S. Dep't of Def.,* 885 F. Supp. 2d 237, 258–262 (D.D.C. 2012)(rejecting facial challenge to the Small Business

Administration's 8(a) program in part because "the government [had] presented significant evidence on race-based denial of access to capital and credit").

The court said that the PPP — a government-sponsored COVID-19 relief program — was stymied in reaching minority-owned businesses because historical patterns of discrimination are reflected in the present lack of relationships between minority-owned businesses and banks. This, according to the court, caused minority-owned businesses to enter the pandemic with more financial precarity, and therefore to falter at disproportionately higher rates as the pandemic has unfolded. The court found that Congress has a compelling interest in remediating the present effects of historical discrimination on these minority-owned businesses, especially to the extent that the PPP disproportionately failed those businesses because of factors clearly related to that history. Plaintiff, the court held, has not rebutted this initial showing of a compelling interest, and therefore has not shown a likelihood of success on the merits in this respect.

Narrow tailoring found by District Court. The court then addressed the "narrow tailoring" requirement under the strict scrutiny analysis, concluding that: "Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still 'constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.'"

Section 5003 of the ARPA is a one-time grant program with a finite amount of money that prioritizes small restaurants owned by women and socially and economically disadvantaged individuals because Congress, the court concluded, had evidence before it showing that those businesses were inadequately protected by earlier COVID-19 financial relief programs. While individuals from certain racial minorities are rebuttably presumed to be "socially and economically disadvantaged" for purposes of § 5003, the court found Defendant correctly points out that the presumption does not exclude individuals like Vitolo from being prioritized, and that the prioritization does not mean individuals like Vitolo cannot receive relief under this program. Section 5003 is therefore time-limited, fund-limited, not absolutely constrained by race during the priority period, and not constrained to the priority period.

And while Plaintiffs asserted during the TRO hearing that the SBA is using race as an absolute basis for identifying "socially and economically disadvantaged" individuals, the court pointed out that assertion relies essentially on speculation rather than competent evidence about the SBA's processing system. The court therefore held it cannot conclude on the record before it that Plaintiffs are likely to show that Defendant's implementation of § 5003 is not narrowly tailored to the compelling interest at hand.

In support of Plaintiffs' motion, they argue that the priority period is not narrowly tailored to achieving a compelling interest because it does not address "any alleged inequities or past discrimination." However, the court said it has already addressed the inequities that were present in the past relief programs. At the hearing, Plaintiffs argued that a better alternative would have been to prioritize applicants who did not receive PPP funds or applicants who had "a weaker income statement" or "a weaker balance sheet." But, the court noted, "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," only "serious, good faith consideration of workable race-neutral alternatives" to promote the stated interest. The Government received evidence that the race-neutral PPP was tainted by lingering effects of past discrimination and current racial bias.

Accordingly, the court stated the race-neutral approach that the Government found to be tainted did not further its compelling interest in ensuring that public funds were not disbursed in a manner that perpetuated racial discrimination. The court found the Government not only considered but actually used race-neutral alternatives during prior COVID-19 relief attempts. It was precisely the failure of those race-neutral programs to reach all small businesses equitably, that the court said appears to have motivated the priority period at issue here.

Plaintiffs argued that the priority period is simultaneously overinclusive and underinclusive based on the racial, ethnic, and cultural groups that are presumed to be "socially disadvantaged." However, the court stated the race-based presumption is just that: a presumption. Counsel for the Government explained at the hearing, consistent with other evidence before the court, that any individual who felt they met § 5003's broader definition of "socially and economically disadvantaged" was free to check that box on the application. ("[E]ssentially all that needs to be done is that you need to self-certify that you fit within that standard on the application, ... you check that box").) For the sake of prioritization, the court noted there is no distinction between those who were presumptively disadvantaged and those who self-certified as such. Accordingly, the court found the priority period is not underinclusive in a way that defeats narrow tailoring.

Further, according to the court, the priority period is not overinclusive. Prior to enacting the priority period, the Government considered evidence relative to minority-business owners generally as well as data pertaining to specific groups. It is also important to note, the court stated, that the Restaurant Revitalization Fund is a national relief program. As such, the court found it is distinguishable from other regional programs that the Supreme Court found to be overinclusive.

The inclusion in the presumption, the court pointed out for example, of Alaskan and Hawaiian natives is quite logical for a program that offers relief funds to restaurants in Alaska and Hawaii. This is not like the racial classification in *Croson*, the court said, which was premised on the interest of compensating Black contractors for past discrimination in Richmond, Virginia, but would have extended remedial relief to "an Aleut citizen who moves to Richmond tomorrow." Here, the court found any narrowly tailored racial classification must necessarily account for the national scale of prior and present COVID-19 programs.

The district court noted that the Supreme Court has historically declined to review sex-or gender-based classifications under strict scrutiny. The district court pointed out the Supreme Court held, "[t]o withstand constitutional challenge, ... classifications by gender must serve important governmental objective and must be substantially related to achievement of those [A] gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." However, remedying past discrimination cannot serve as an important governmental interest when there is no empirical evidence of discrimination within the field being legislated.

Intermediate scrutiny applied to woman-owned businesses found by District Court. As with the strict-scrutiny analysis, the court found that Congress had before it evidence showing that woman-owned businesses suffered historical discrimination that exposed them to greater risks from an economic shock like COVID-19, and that they received less benefit from earlier federal COVID-19 relief programs. Accordingly, the court held that Defendant has identified an important governmental interest in protecting woman-owned businesses from the disproportionately adverse effects of the pandemic and failure of earlier federal relief programs. The district court therefore stated it cannot

conclude that Plaintiffs are likely to succeed on their gender-based equal-protection challenge in this respect.

To be constitutional, the court concluded, a particular measure including a gender distinction must also be substantially related to the important interest it purports to advance. "The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."

Here, as above, the court found § 5003 of the ARPA is a one-time grant program with a finite amount of money that prioritizes small restaurants owned by veterans, women, and socially and economically disadvantaged individuals because Congress had evidence before it showing that those businesses were disproportionately exposed to harm from the COVID-19 pandemic and inadequately protected by earlier COVID-19 financial relief programs. The prioritization of woman-owned businesses under § 5003, the court found, is substantially related to the problem Congress sought to remedy because it is directly aimed at ameliorating the funding gap between woman-owned and man-owned businesses that has caused the former to suffer from the COVID-19 pandemic at disproportionately higher rates. Accordingly, on the record before it, the district court held it cannot conclude that Plaintiffs are likely to succeed on the merits of their gender-based equal-protection claim.

The court stated: "[W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." However, the district court did not conclude that Plaintiffs' constitutional rights are likely being violated. Therefore, the court held Plaintiffs are likely not suffering any legally impermissible irreparable harm.

The district court said that if it were to enjoin distributions under § 5003 of the ARPA, others would certainly suffer harm, as these COVID-19 relief grants — which are intended to benefit businesses that have suffered disproportionate harm—would be even further delayed. In the constitutional context, the court found that whether an injunction serves the public interest is inextricably intertwined with whether the plaintiff has shown a likelihood of success on the merits. Plaintiff, the court held, has not demonstrated a likelihood of success on the merits.

The district court found that therefore it cannot conclude the public interest would be served by enjoining disbursement of funds under § 5003 of the ARPA.

Denial by District Court of Plaintiffs' Motion for Preliminary Injunction. Subsequently, the court addressed the Plaintiffs' motion for a preliminary injunction. The court found its denial of Plaintiffs' motion for a TRO addresses the same factors that control the preliminary-injunction analysis, and the court incorporated that reasoning by reference to this motion.

The court received from the Defendant additional materials from the Congressional record that bear upon whether a compelling interest justifies the race-based priority period at issue and an important interest justifies the gender-based priority period at issue. Defendant's additional materials from the Congressional record the court found strengthen the prior conclusion that Plaintiffs are unlikely to succeed on the merits.

For example, a Congressional committee received the following testimony, which linked historical race and gender discrimination to the early failures of the Paycheck Protection Program (the "PPP"): "As noted by my fellow witnesses, closed financial networks, longstanding financial institutional biases, and underserved markets work against the efforts of women and minority entrepreneurs who need capital to start

up, operate, and grow their businesses. While the bipartisan CARES Act got money out the door quickly [through the PPP] and helped many small businesses, the distribution channels of the first tranche of the funding underscored how the traditional financial system leaves many small businesses behind, particularly women- and minority-owned businesses."

There was a written statement noting that "[m]inority and women-owned business owners who lack relationships with banks or other financial institutions participating in PPP lacked early access to the program"; testimony observing that historical lack of access to capital among minority- and woman-owned businesses contributed to significantly higher closure rates among those businesses during the COVID-19 pandemic, and that the PPP disproportionately failed to reach those businesses; and evidence that lending discrimination against people of color continues to the present and contemporary wealth distribution is linked to the intergenerational impact of historical disparities in credit access.

The court stated it could not conclude Plaintiffs are likely to succeed on the merits. The court held that the points raised in the parties' briefing on Plaintiff's motion for preliminary injunction have not impacted the court's analysis with respect to the remaining preliminary injunction factors. Accordingly, for the reasons stated in the court's memorandum opinion denying Plaintiff's motion for a temporary restraining order, a preliminary injunction the court held is not warranted and is denied.

Appeal by Plaintiff to Sixth Circuit Court of Appeals. The Plaintiffs appealed the court's decision to the Sixth Circuit Court of Appeals. Vitolo had asked for a temporary restraining order and ultimately a preliminary injunction that would prohibit the government from handing out grants based on the applicants' race or sex. Vitolo asked the district court to enjoin the race and sex preferences until his appeal was decided. The district court denied that motion too. Finally, the district court denied the motion for a preliminary injunction. Vitolo also appealed that order.

Emergency Motion for Injunction Pending Appeal and to Expedite Appeal. The Plaintiffs applied to the Sixth Circuit for an Emergency Motion for Injunction Pending Appeal and to Expedite Appeal. The Sixth Circuit, two of the three Judges on the three Judge panel, granted the motion to expedite the appeal and then decided and filed its Opinion on May 27, 2021. *Vitolo v. Guzman*, 2021 WL 2172181 (6th Cir. May 27, 2021). The Sixth Circuit stated that this case is about whether the government can allocate limited coronavirus relief funds based on the race and sex of the applicants. The Court held that it cannot, and thus enjoined the government from using "these unconstitutional criteria when processing" Vitolo's application.

Standing and mootness. The Sixth Circuit agreed with the district court that Plaintiffs had standing. The Court rejected the Defendant Government's argument that the Plaintiffs' claims were moot because the 21-day priority phase of the grant program ended.

Preliminary Injunction. **Application of Strict Scrutiny by Sixth Circuit**. Vitolo challenges the Small Business Administration's use of race and sex preferences when distributing Restaurant Revitalization Funds. The government concedes that it uses race and sex to prioritize applications, but it contends that its policy is still constitutional. The Court focused its strict scrutiny analysis under these factors in determining whether a preliminary injunction should be issued on the first factor which is typically dispositive: the factor of Plaintiffs' likelihood of success on the merits.

Compelling interest rejected by Sixth Circuit. The Court states that government has a compelling interest in remedying past discrimination only when three criteria are met: First, the policy must target a specific

episode of past discrimination. It cannot rest on a "generalized assertion that there has been past discrimination in an entire industry." Second, there must be evidence of intentional discrimination in the past. Third, the government must have had a hand in the past discrimination it now seeks to remedy. The Court said that if the government "show[s] that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of [a] local ... industry," then the government can act to undo the discrimination. But, the Court notes, if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal-protection principles.

The government's asserted compelling interest, the Court found, meets none of these requirements. First, the government points generally to societal discrimination against minority business owners. But it does not identify specific incidents of past discrimination. And, the Court said, since "an effort to alleviate the effects of societal discrimination is not a compelling interest," the government's policy is not permissible.

Second, the government offers little evidence of past intentional discrimination against the many groups to whom it grants preferences. Indeed, the schedule of racial preferences detailed in the government's regulation — preferences for Pakistanis but not Afghans; Japanese but not Iraqis; Hispanics but not Middle Easterners — is not supported by any record evidence at all.

When the government promulgates race-based policies, it must operate with a scalpel. And its cuts must be informed by data that suggest intentional discrimination. The broad statistical disparities cited by the government, according to the Court, are not nearly enough. But when it comes to general social disparities, the Court stated, there are too many variables to support inferences of intentional discrimination.

Third, the Court found the government has not shown that it participated in the discrimination it seeks to remedy. When opposing the plaintiffs' motions at the district court, the government identified statements by members of Congress as evidence that race- and sex-based grant funding would remedy past discrimination. But rather than telling the court what Congress learned and how that supports its remedial policy, the Court stated it said only that Congress identified a "theme" that "minority-and women-owned businesses" needed targeted relief from the pandemic because Congress's "prior relief programs had failed to reach" them. A vague reference to a "theme" of governmental discrimination, the Court said is not enough.

To satisfy equal protection, the Court said, government must identify "prior discrimination by the governmental unit involved" or "passive participa[tion] in a system of racial exclusion." An observation that prior, race-neutral relief efforts failed to reach minorities, the Court pointed out is no evidence at all that the government enacted or administered those policies in a discriminatory way. For these reasons, the Court concluded that the government lacks a compelling interest in awarding Restaurant Revitalization Funds based on the race of the applicants. And as a result, the policy's use of race violates equal protection.

Narrow tailoring rejected by Sixth Circuit. Even if the government had shown a compelling state interest in remedying some specific episode of discrimination, the discriminatory disbursement of Restaurant Revitalization Funds is not narrowly tailored to further that interest. For a policy to survive narrow-tailoring analysis, the government must show "serious, good faith consideration of workable race-neutral alternatives." This requires the government to engage in a genuine effort to determine whether alternative policies could address the alleged harm. And, in turn, a court must not uphold a race-conscious policy unless it is "satisfied that no workable race-neutral alternative"

would achieve the compelling interest. In addition, a policy is not narrowly tailored if it is either overbroad or underinclusive in its use of racial classifications.

Here, the Court found that the government could have used any number of alternative, nondiscriminatory policies, but it failed to do so. For example, the court noted the government contends that minority-owned businesses disproportionately struggled to obtain capital and credit during the pandemic. But, the Court stated an "obvious" race-neutral alternative exists: The government could grant priority consideration to all business owners who were unable to obtain needed capital or credit during the pandemic.

Or, the Court said, consider another of the government's arguments. It contends that earlier coronavirus relief programs "disproportionately failed to reach minority-owned businesses." But, the Court found a simple race-neutral alternative exists again: The government could simply grant priority consideration to all small business owners who have not yet received coronavirus relief funds.

Because these race-neutral alternatives exist, the Court held the government's use of race is unconstitutional. Aside from the existence of race-neutral alternatives, the government's use of racial preferences, according to the Court, is both overbroad and underinclusive. The Court held this is also fatal to the policy.

The government argues its program is not underinclusive because people of all colors can count as suffering "social disadvantage." But, the Court pointed out, there is a critical difference between the designated races and the non-designated races. The designated races get a presumption that others do not. The government argues its program is not underinclusive because people of all colors can count as suffering "social disadvantage." But, the Court said, there is a critical difference between the designated races and the non-designated races. The designated races get a presumption that others do not.

The government's policy, the Court found, is "plagued" with other forms of under inclusivity. The Court considered the requirement that a business must be at least 51% owned by women or minorities. How, the Court asked, does that help remedy past discrimination? Black investors may have small shares in lots of restaurants, none greater than 51%. But does that mean those owners did not suffer economic harms from racial discrimination? The Court noted that the restaurant at issue, Jake's Bar, is 50% owned by a Hispanic female. It is far from obvious, the Court stated, why that 1% difference in ownership is relevant, and the government failed to explain why that cutoff relates to its stated remedial purpose.

The dispositive presumption enjoyed by designated minorities, the Court found, bears strikingly little relation to the asserted problem the government is trying to fix. For example, the Court pointed out the government attempts to defend its policy by citing a study showing it was harder for black business owners to obtain loans from Washington, D.C., banks. Rather than designating those owners as the harmed group, the Court noted, the government relied on the Small Business Administration's 2016 regulation granting racial preferences to vast swaths of the population. For example, individuals who trace their ancestry to Pakistan and India qualify for special treatment. But those from Afghanistan, Iran, and Iraq do not. Those from China, Japan, and Hong Kong all qualify. But those from Tunisia, Libya, and Morocco do not. The Court held this "scattershot approach" does not conform to the narrow tailoring strict scrutiny requires.

Woman-Owned Businesses. Intermediate scrutiny applied by Sixth Circuit. The plaintiffs also challenge the government's prioritization of woman-owned restaurants. Like racial classifications, sex-based

discrimination is presumptively invalid. Government policies that discriminate based on sex cannot stand unless the government provides an "exceedingly persuasive justification." Government policies that discriminate based on sex cannot stand unless the government provides an "exceedingly persuasive justification." To meet this burden, the government must prove that (1) a sex-based classification serves "important governmental objectives," and (2) the classification is "substantially and directly related" to the government's objectives. The government, the Court held, fails to satisfy either prong. The Court found it failed to show that prioritizing woman-owned restaurants serves an important governmental interest. The government claims an interest in "assisting with the economic recovery of women-owned businesses, which were 'disproportionately affected' by the COVID-19 pandemic." But, the Court stated, while remedying specific instances of past sex discrimination can serve as a valid governmental objective, general claims of societal discrimination are not enough.

Instead, the Court said, to have a legitimate interest in remedying sex discrimination, the government first needs proof that discrimination occurred. Thus, the government must show that the sex being favored "actually suffer[ed] a disadvantage" as a result of discrimination in a specific industry or field. Without proof of intentional discrimination against women, the Court held, a policy that discriminates on the basis of sex cannot serve a valid governmental objective.

Additionally, the Court found, the government's prioritization system is not "substantially related to" its purported remedial objective. The priority system is designed to fast-track applicants hardest hit by the pandemic. Yet under the Act, the Court said, all woman-owned restaurants are prioritized—even if they are not "economically disadvantaged." For example, the Court noted, that whether a given restaurant did better or worse than a male-owned restaurant next door is of no matter—as long as the restaurant is at least 51% woman-owned and otherwise meets the statutory criteria, it receives priority status. Because the government made no effort to tailor its priority system, the Court concluded it cannot find that the sex-based distinction is "substantially related" to the objective of helping restaurants disproportionately affected by the pandemic.

Ruling by Sixth Circuit. The plaintiffs are entitled to an injunction pending appeal. Since the government failed to justify its discriminatory policy, the plaintiffs will win on the merits of their constitutional claim. And like in most constitutional cases, that is dispositive here.

The Court ordered the government to fund the Plaintiffs' grant application, if approved, before all later-filed applications, without regard to processing time or the applicants' race or sex. The government, however, may continue to give veteran-owned restaurants priority in accordance with the law. The Court held the preliminary injunction shall remain in place until this case is resolved on the merits and all appeals are exhausted. Dissenting Opinion. One of the three Judges filed a dissenting opinion.

Amended Complaint and Second Emergency Motion for a Temporary Restraining Order and Preliminary Injunction. The Plaintiffs on June 1, 2021, filed an Amended Complaint in the district court adding Additional Plaintiffs. Additional Plaintiffs' who were not involved in the initial Motion for Temporary Restraining Order, on June 2, 2021, filed a Second Emergency Motion For a Temporary Restraining Order and Preliminary Injunction. The court in its Order issued on June 10, 2021, found based on evidence submitted by Defendants that the allegedly wrongful behavior harming the Additional Plaintiffs cannot reasonably be expected to recur, and therefore the Additional Plaintiffs' claims are moot.

The court thus denied the Additional Plaintiffs' motion for temporary restraining order and preliminary injunction. The court also ordered the

Defendant Government to file a notice with the court if and/or when Additional Plaintiffs' applications have been funded, and SBA decides to resume processing of priority applications.

The Sixth Circuit issued a briefing schedule on June 4, 2021 to the parties that requires briefs on the merits of the appeal to be filed in July and August 2021. Subsequently on July 14, 2021, the Plaintiffs-Appellants filed a Motion to Dismiss the appeal voluntarily that was supported and jointly agreed to by the Defendant-Appellee stating that Plaintiffs-Appellants have received their grant from Defendant-Appellee. The Court granted the Motion and dismissed the appeal terminating the case.

(iii) ***Faust v. Vilsack*, 2021 WL 2409729, US District Court, E.D. Wisconsin (June 10, 2021)**. This is a federal district court decision that on June 10, 2021 granted Plaintiffs' motion for a temporary restraining order holding the federal government's use of racial classifications in awarding funds under the loan-forgiveness program violated the Equal Protection Clause of the US Constitution.

Background. Twelve white farmers, who resided in nine different states, including Wisconsin, brought this action against Secretary of Agriculture and Administrator of Farm Service Agency (FSA) seeking to enjoin United States Department of Agriculture (USDA) officials from implementing loan-forgiveness program for farmers and ranchers under Section 1005 of the American Rescue Plan Act of 2021 (ARPA) by asserting eligibility to participate in program based solely on racial classifications violated equal protection. Plaintiffs/Farmers filed a motion for temporary restraining order.

The district court granted the motion, and at the time of this report is considering the Plaintiffs' Motion for a Preliminary Injunction.

The USDA describes how the loan-forgiveness plan will be administered on its website. It explains, "Eligible Direct Loan borrowers will begin receiving debt relief letters from FSA in the mail on a rolling basis, beginning the week of May 24. After reviewing closely, eligible borrowers should sign the letter when they receive it and return to FSA." It advises that, in June 2021, the FSA will begin to process signed letters for payments, and "about three weeks after a signed letter is received, socially disadvantaged borrowers who qualify will have their eligible loan balances paid and receive a payment of 20% of their total qualified debt by direct deposit, which may be used for tax liabilities and other fees associated with payment of the debt."

Application of strict scrutiny standard. The court noted Defendants assert that the government has a compelling interest in remedying its

own past and present discrimination and in assuring that public dollars drawn from the tax contributions of all citizens do not serve to finance the evil of private prejudice. "The government has a compelling interest in remedying past discrimination only when three criteria are met." (*Citing, Vitolo*, 999 F.3d 353 (6th Cir. 2021), 2021 WL 2172181, at *4; *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, (1989)(plurality opinion).

The court stated the Sixth Circuit recently summarized the three requirements as follows:

"First, the policy must target a specific episode of past discrimination. It cannot rest on a "generalized assertion that there has been past discrimination in an entire industry." *J.A. Croson Co.*, 488 U.S. at 498, 109."

"Second, there must be evidence of intentional discrimination in the past. J.A. Croson Co., 488 U.S. at 503, 109 S.Ct. 706. Statistical disparities don't cut it, although they may be used as evidence to establish intentional discrimination ...."

"Third, the government must have had a hand in the past discrimination it now seeks to remedy. So if the government "shows that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of a local industry," then the government can act to undo the discrimination. *J.A. Croson Co.*, 488 U.S. at 492, 109 S.Ct. 706. But if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal protection principles."

The court found that "Defendants have not established that the loan-forgiveness program targets a specific episode of past or present discrimination. Defendants point to statistical and anecdotal evidence of a history of discrimination within the agricultural industry…. But Defendants cannot rely on a 'generalized assertion that there has been past discrimination in an entire industry' to establish a compelling interest." *Citing, J.A. Croson Co*., 488 U.S. at 498, ; *see also Parents Involved*, 551 U.S. at 731, (plurality opinion)("remedying past societal discrimination does not justify race-conscious government action"). The court pointed out "Defendants' evidence of more recent discrimination includes assertions that the vast majority of funding from more recent agriculture subsidies and pandemic relief efforts did not reach minority farmers and statistical disparities."

The court concluded that: "Aside from a summary of statistical disparities, Defendants have no evidence of intentional discrimination by the USDA in the implementation of the recent agriculture subsidies and pandemic relief efforts." "An observation that prior, race-neutral relief efforts failed to reach minorities is no evidence at all that the government enacted or administered those policies in a discriminatory way." *Citing, Vitolo*, 999 F.3d 353 (6th Cir. 2021), 2021 WL 2172181, at *5. The court held "Defendants have failed to establish that it has a compelling interest in remedying the effects of past and present discrimination through the distribution of benefits on the basis of racial classifications."

In addition, the court found "Defendants have not established that the remedy is narrowly tailored. To do so, the government must show "serious, good faith consideration of workable race-neutral alternatives." *Citing, Grutter v. Bollinger*, 539 U.S. 306, 339, (2003). Defendants contend that Congress has unsuccessfully implemented race-neutral alternatives for decades, but the court concluded, "they have not shown that Congress engaged "in a genuine effort to determine whether alternative policies could address the alleged harm" here. *Citing, Vitolo*, 999 F.3d 353 (6th Cir. 2021), 2021 WL 2172181, at *6.

The court stated: "The obvious response to a government agency that claims it continues to discriminate against farmers because of their race or national origin is to direct it to stop: it is not to direct it to intentionally discriminate against others on the basis of their race and national origin."

The court found "Congress can implement race-neutral programs to help farmers and ranchers in need of financial assistance, such as requiring individual determinations of disadvantaged status or giving priority to loans of farmers and ranchers that were left out of the previous pandemic relief funding. It can also provide better outreach, education, and other resources. But it cannot discriminate on the basis of race." On this record, the court held, "Defendants have not established that the loan forgiveness program under Section 1005 is narrowly tailored and furthers compelling government interests."

Conclusion. The court found a nationwide injunction is appropriate in this case. "To ensure that Plaintiffs receive complete relief and that similarly-situated nonparties are protected, a universal temporary restraining order in this case is proper."

The court on July 6, 2021, issued an Order that stayed the Plaintiffs' motion for a preliminary injunction, holding that the District Court in *Wynn v. Vilsack* (M.D. Fla. June 23, 2021), 2021 WL 2580678, Case No. 3:21-cv-514-MMH-JRK, U.S. District Court, Middle District of Fla. (see below), granted the Plaintiffs a nationwide injunction, which thus rendered the need for an injunction in this case as not necessary; but the court left open the possibility of reconsidering the motion depending on the results of the *Wynn* case. For the same reason, the court dissolved the temporary restraining order and stayed the motion for a preliminary injunction.

Subsequently, the Defendants filed a Motion to Stay Proceedings, and the court granted the motion on August 20, 2021, requiring the Defendants to file a status report every six months on the progress of the *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.) case, which is a class action.

As a result of the federal government's recent repeal of ARPA Section 1005 and the subsequent Dismissal of the related Class Action in *Miller v. Vilsack*, the parties filed a Stipulation of Dismissal, and the case in September 2022 was dismissed by the Court.

(iv) ***Wynn v. Vilsack* (M.D. Fla. June 23, 2021), 2021 WL 2580678, Case No. 3:21-cv-514, U.S. District Court, Middle District of Fla**. *Wynn v. Vilsack* (M.D. Fla. June 23, 2021), 2021 WL 2580678, Case No. 3:21-cv-514-MMH-JRK, U.S. District Court, Middle District of Fla., is virtually the same case as the *Faust v. Vilsack*, 2021 WL 2409729 (N.D. Wis. June 10, (2021) case pending in district court in Wisconsin. The court in *Faust* granted the Plaintiffs' Motion for Temporary Restraining Order and the court in *Wynn* granted the Plaintiff's Motion for Preliminary Injunction holding: "Defendants Thomas J. Vilsack, in his official capacity as U.S. Secretary of Agriculture and Zach Ducheneaux, in his official capacity as Administrator, Farm Service Agency, their agents, employees and all others acting in concert with them, who receive actual notice of this Order by personal service or otherwise, are immediately enjoined from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of the American Rescue Plan Act of 2021 until further order from the Court."

Background. In this action, Plaintiff challenges Section 1005 of the American Rescue Plan Act of 2021 (ARPA), which provides debt relief to "socially disadvantaged farmers and ranchers" (SDFRs). Specifically, Section 1005(a)(2) authorizes the Secretary of Agriculture to pay up to 120% of the indebtedness, as of January 1, 2021, of an SDFR's direct Farm Service Agency (FSA) loans and any farm loan guaranteed by the Secretary (collectively, farm loans). Section 1005 incorporates 7 U.S.C. § 2279's definition of an SDFR as "a farmer of rancher who is a member of

a socially disadvantaged group." 7 U.S.C. § 2279(a)(5). A "socially disadvantaged group" is defined as "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities." 7 U.S.C. § 2279(a)(6). Racial or ethnic groups that categorically qualify as socially disadvantaged are "Black, American Indian/Alaskan Native, Hispanic, Asian, and Pacific Islander." See also U.S. Dep't of Agric., American Rescue Plan Debt Payments, https://www.farmers.gov/americanrescueplan. White or Caucasian farmers and ranchers do not.

Plaintiff is a white farmer in Jennings, Florida who has qualifying farm loans but is ineligible for debt relief under Section 1005 solely because of his race. He sues Thomas J. Vilsack, the current Secretary of Agriculture, and Zach Ducheneaux, the administrator of the United States Department of Agriculture (USDA) and head of the FSA, in their official capacities. In his two-count Complaint, Plaintiff alleges Section 1005 violates the equal protection component of the Fifth Amendment's Due Process Clause (Count I) and, by extension, is not in accordance with the law such that its implementation should be prohibited by the Administrative Procedure Act (APA)(Count II). Plaintiff seeks (1) a declaratory judgment that Section 1005's provision limiting debt relief to SDFRs violates the law, (2) a preliminary and permanent injunction prohibiting the enforcement of Section 1005, either in whole or in part, (3) nominal damages, and (4) attorneys' fees and costs.

Application of strict scrutiny test: compelling interest. The court, similar to the court in *Faust,* applied the strict scrutiny test and held that on the record presented, the court expresses serious concerns over whether the Government will be able to establish a strong basis in evidence warranting the implementation of Section 1005's race-based remedial action. The statistical and anecdotal evidence presented, the court said, appears less substantial than that deemed insufficient in *Eng'g Contractors v. Metro-Dade County* case (11th Cir. 1997), which included detailed statistics regarding the governmental entity's hiring of minority-owned businesses for government construction projects; marketplace data on the financial performance of minority and nonminority contractors; and two studies by experts.

The Government states that its "compelling interest in relieving debt of [SDFRs] is two-fold: to remedy the well-documented history of discrimination against minority farmers in USDA loan (and other) programs and prevent public funds from being allocated in a way that perpetuates the effects of discrimination." In cases applying strict scrutiny, the court notes the Eleventh Circuit has instructed: "In practice, the interest that is alleged in support of racial preferences is almost always the same—remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government's interest, but rather the adequacy of the evidence of discrimination offered to show that interest." *Citing, Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1564 (11th Cir. 1994).

Thus, to survive strict scrutiny, the Government must show a strong basis in evidence for its conclusion that past racial discrimination warrants a race-based remedy. Id. at 1565. The law on how a governmental entity can establish the requisite need for a race-based remedial program has evolved over time. In *Eng'g Contractors Ass'n of S. Fla. v. Metro. Dade County*., the Eleventh Circuit summarized the kinds of evidence that would and would not be indicative of a need for remedial action in the local construction industry. 122 F.3d 895, 906-07 (11th Cir. 1997). The court explained:

"A strong basis in evidence cannot rest on an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national

economy. However, a governmental entity can justify affirmative action by demonstrating gross statistical disparities between the proportion of minorities hired and the proportion of minorities willing and able to do the work. Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence." Here, to establish the requisite evidence of discrimination, the court said the Government relies on substantial legislative history, testimony given by experts at various congressional committee meetings, reports prepared at Congress' request regarding discrimination in USDA programs, and floor statements made by supporters of Section 1005 in Congress. This evidence consists of substantial evidence of historical discrimination that predates remedial efforts made by Congress and, to a lesser extent, evidence the Government contends shows continued discrimination that permeates USDA programs.

The court pointed out that to the extent remedial action is warranted based on the current evidentiary showing, it would likely be directed to the need to address the barriers identified in the GAO Reports such as providing incentives or guarantees to commercial lenders to make loans to SDFRs, increasing outreach to SDFRs regarding the availability of USDA programs, ensuring SDFRs have equal access to the same financial tools as nonminority farmers, and efforts to standardize the way USDA services SDFR loans so that it comports with the level of service provided to white farmers.

The court decided that nevertheless, "at this stage of the proceedings, the Court need not determine whether the Government ultimately will be able to establish a compelling need for this broad, race-based remedial legislation. This is because, assuming the Government's evidence establishes the existence of a compelling governmental interest warranting some form of race-based relief, Plaintiff has convincingly shown that the relief provided by Section 1005 is not narrowly tailored to serve that interest."

Narrow tailoring. Even if the Government establishes a compelling governmental interest to enact Section 1005, the court holds that Plaintiff has shown a substantial likelihood of success on his claim that, as written, the law violates his right to equal protection because it is not narrowly tailored to serve that interest. The narrow tailoring requirement ensures that "the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493 (plurality opinion). "The essence of the 'narrowly tailored' inquiry is the notion that explicitly racial preferences ... must be only a 'last resort' option." *Eng'g Contractors*, 122 F.3d at 926.

In determining whether a race-conscious remedy is appropriate, the Supreme Court instructs courts to examine several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *U.S. v. Paradise*, 480 U.S. 149, 171 (1987).

Here, the court found, "little if anything about Section 1005 suggests that it is narrowly tailored." As an initial matter the court notes that the necessity for the specific relief provided in Section 1005—debt relief for all SDFRs with outstanding qualifying farm loans as of January 1, 2021—is unclear at best. The court states that as written, "Section 1005 is tailored to benefit only those SDFRs who succeeded in receiving qualifying farm loans from USDA, but the evidence of discrimination provided by the Government says little regarding how this particular group of SDFRs has been the subject of past or ongoing discrimination. … Thus, the necessity of debt relief to the group targeted by Section 1005, as opposed to a remedial program that more narrowly addresses the discrimination that has been documented by the Government, is anything but evident."

More importantly, the court found, "Section 1005's rigid, categorical, race-based qualification for relief is the antithesis of flexibility. The debt relief provision applies strictly on racial grounds irrespective of any other factor. Every person who identifies him or herself as falling within a socially disadvantaged group 11 who has a qualifying farm loan with an outstanding balance as of January 1, 2021, receives up to 120% debt relief—and no one else receives any debt relief." Although the Government argues that Section 1005 is narrowly tailored to reach small farmers or farmers on the brink of foreclosure, the court finds it is not. "Regardless of farm size, an SDFR receives up to 120% debt relief. And regardless of whether an SDFR is having the most profitable year ever and not remotely in danger of foreclosure, that SDFR receives up to 120% debt relief. Yet a small White farmer who is on the brink of foreclosure can do nothing to qualify for debt relief. Race or ethnicity is the sole, inflexible factor that determines the availability of relief provided by the Government under Section 1005."

The Government cited the Eleventh Circuit decision in *Cone Corp. v. Hillsborough County.*, 908 F.2d 908, 910 (11th Cir. 1990). The court in *Cone Corp* pointed to several critical factors that distinguished the county's MBE program in that case from that rejected in *Croson*:

"(1) the county had tried to implement a less restrictive MBE program for six years without success; (2) the MBE participation goals were flexible in part because they took into account project-specific data when setting goals; (3) the program was also flexible because it provided race-neutral means by which a low bidder who failed to meet a program goal could obtain a waiver; and (4) unlike the program rejected in Croson, the county's program did not benefit "groups against whom there may have been no discrimination," instead its MBE program "target[ed] its benefits to those MBEs most likely to have been discriminated against . . . ." *Id.* at 916-17.

The court found that "Section 1005's inflexible, automatic award of up to 120% debt relief only to SDFRs stands in stark contrast to the flexible, project by project Cone Corp. MBE program." The court noted that in *Cone Corp.*, although the MBE program included a minority participation goal, the county "would grant a waiver if qualified minority businesses were uninterested, unavailable, or significantly more expensive than non-minority businesses." In this way the Court in *Cone Corp.* observed the county's MBE program "had been carefully crafted to minimize the burden on innocent third parties." (*citing Cone Corp.*, 908 F.2d at 911).

The court concluded the "120% debt relief program is untethered to an attempt to remedy any specific instance of past discrimination. And unlike the Cone Corp. MBE program, Section 1005 is absolutely rigid in the relief it awards and the recipients of that relief and provides no waiver or exception by which an individual who is not a member of a socially disadvantaged group can qualify. In this way, Section 1005 is far more similar to the remedial schemes found not to be narrowly tailored in Croson and other similar cases."

Additionally, on this record, the court found it appears that Section 1005 simultaneously manages to be both overinclusive and underinclusive. "It appears to be overinclusive in that it will provide debt relief to SDFRs who may never have been discriminated against or faced any pandemic-related hardship." The court found "Section 1005 also appears to be underinclusive in that, as mentioned above, it fails to provide any relief to those who suffered the brunt of the discrimination identified by the Government. It provides no remedy at all for an SDFR who was unable to obtain a farm loan due to discriminatory practices or who no longer has qualifying farm loans as a result of prior discrimination."

Finally, the Court concluded there is little evidence that the Government gave serious consideration to, or tried, race-neutral

alternatives to Section 1005. "The Government recounts the remedial programs Congress previously implemented that allegedly have failed to remedy USDA's discrimination against SDFRs…. However, almost all of the programs identified by the Government were not race-neutral programs; they were race-based programs that targeted things like SDFR outreach efforts, improving SDFR representation on local USDA committees, and providing class-wide relief to SDFRs who were victims of discrimination. The main relevant race-neutral program the Government referenced was the first round of pandemic relief, which did go disproportionately to White farmers." However, the court stated, "the underlying cause of the statistical discrepancy may be disparities in farm size or crops grown, rather than race."

Thus, on the current record, the court held, in addition to showing that Section 1005 is inflexible and both overinclusive and underinclusive, Plaintiff is likely to show that Congress "failed to give serious good faith consideration to the use of race and ethnicity-neutral measures" to achieve the compelling interest supporting Section 1005. *Ensley Branch*, 122 F.3d at 927. Congress does not appear to have turned to the race-based remedy in Section 1005 as a "last resort," but instead appears to have chosen it as an expedient and overly simplistic, but not narrowly tailored, approach to addressing prior and ongoing discrimination at USDA.

Having considered all of the pertinent factors associated with the narrow tailoring analysis and the record presented by the parties, the court is not persuaded that the Government will be able to establish that Section 1005 is narrowly tailored to serve its compelling governmental interest.

The court holds "it appears to create an inflexible, race-based discriminatory program that is not tailored to make the individuals who experienced discrimination whole, increase participation among SDFRs in USDA programs, or eradicate the evils of discrimination that remain following Congress' prior efforts to remedy the same." Therefore, the court holds that Plaintiff has established a strong likelihood of showing that Section 1005 violates his right to equal protection under the law because it is not narrowly tailored to remedy a compelling governmental interest.

Conclusion. Defendants Thomas J. Vilsack, in his official capacity as U.S. Secretary of Agriculture and Zach Ducheneaux, in his official capacity as Administrator, Farm Service Agency, their agents, employees and all others acting in concert with them, who receive actual notice of this Order by personal service or otherwise, are immediately enjoined from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of the American Rescue Plan Act of 2021 until further order from the Court.

Subsequently, the Defendants filed a Motion to Stay Proceedings, and the court granted the motion on August 20, 2021, requiring the Defendants to file a status report every six months on the progress of the *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.) case, which is a class action.

As a result of the federal government's recent repeal of ARPA Section 1005 and the subsequent Dismissal of the related Class Action in *Miller v. Vilsack*, the parties filed a Stipulation of Dismissal, and the case in September 2022 was dismissed by the Court.

(v) ***Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al.***, 2023 WL 4633481 (E.D. Tenn. July 19, 2023), U.S. District Court, E.D. Tennessee, 2:20-cv-00041-DCLC-CRW.

Plaintiff, a small business contractor, recently filed this Complaint in federal district court in Tennessee against the US Dep't of Agriculture (USDA), US SBA, et. al. challenging the federal Section 8(a) program, and it appears as applied to a particular industry that provide administrative and/or technical support to USDA offices that implement the Natural Resources Conservation Service (NRCS), an agency of the USDA.

Plaintiff, a non-qualified Section 8(a) Program contractor, alleges the contracts it used to bid on have been set aside for a Section 8(a) contractor. Plaintiff thus claims it is not able to compete for contracts that it could in the past.

Plaintiff alleges that neither the SBA or the USDA has evidence that any racial or ethnic group is underrepresented in the administrative and/or technical support service industry in which it competes, and there is no evidence that any underrepresentation was a consequence of discrimination by the federal government or that the government was a passive participant in discrimination.

Plaintiff claims that the Section 8(a) Program discriminates on the basis of race, and that the SBA and USDA do not have a compelling governmental interest to support the discrimination in the operation of the Section 8(a) Program. In addition, Plaintiff asserts that even if Defendants had a compelling governmental interest, the Section 8(a) Program as operated by Defendants is not narrowly tailored to meet any such interest.

Thus, Plaintiffs allege Defendants' race discrimination in the Section 8(a) Program violates the Fifth Amendment to the U.S. Constitution. Plaintiff seeks a declaratory judgment that Defendants are violating the Fifth Amendment, 42 U.S.C. Section 1981, injunctive relief precluding Defendants from reserving certain NRCS contracts for the Section 8(a) Program, monetary damages, and other relief.

The Defendants filed a Motion to Dismiss asserting inter alia that the court does not have jurisdiction. Plaintiff filed written discovery, which was stayed pending the outcome of the Motion to Dismiss.

The court on March 31, 2021, issued a Memorandum Opinion and Order granting in part and denying in part the Motion to Dismiss. The court held that plaintiffs had standing to challenge the constitutionality of the Section 8(a) Program as violating the Fifth Amendment, and held plaintiff's claim that the Section 8(a) Program is unconstitutional because it discriminates on the basis of race is sufficient to state a claim. The court also granted in part Defendants' Motion to Dismiss holding that plaintiff's 42 U.S.C. Section 1981 claims are dismissed as that section does not apply to federal agencies. Thus, the case proceeds on the merits of the constitutionality of the Section 8 (a) Program.

The court on April 9, 2021, entered a Scheduling Order providing that Defendants shall file an Answer by April 28, 2021 and set a Bench Trial for October 11, 2022, with Dispositive Motions due by June 6, 2022. Defendants filed their Answer to the Complaint on April 28, 2021. Plaintiffs on May 20, 2021, filed a Motion to Amend/Revise Complaint, Defendants filed their Response to Motion to Amend on June 4, 2021, and Plaintiffs filed on June 8, 2021, their Reply to the Response. The court denied the motion to Amend/Revise. The parties conducted discovery, and filed motions to exclude testimony and opinions of Experts. The parties have filed their motions for summary judgment.

December 8, 2022, Order. requesting parties to address whether Supreme Court's decision expected in June 2023 would impact this case. The Court conducted a status conference in the instant case on

August 3, 2022, at the parties' request. During that conference, the parties explained that they did not believe a trial necessary because the Court could resolve all disputed issues based on the parties' pending motions. Therefore, the court ordered that the case is stayed pending the resolution of the parties' motions for summary judgment.

The court on December 8, 2022, issued an Order requesting the parties address whether a potential decision by the Supreme Court overruling the Grutter v. Bollinger, 539 U.S. 306 (2003) case in the pending Harvard and University of North Carolina (UNC) admission cases would impact the issues in this case and, if so, whether this matter should remain stayed until the Supreme Court releases its decision in the Harvard and UNC (SFFA) cases challenging the use of race-conscious admissions processes.

The parties filed on December 22, 2022, their responses to the court's Order both agreeing that the court should not stay its decision in this case, but differing on the impact of the SFFA cases: The Federal Defendants stating a decision by the Supreme Court overruling *Grutter* in the SFFA cases would not impact this case because they involve fundamentally different issues and legal bases for the challenged actions. The Plaintiffs responded by saying it may or may not impact this case depending on the nature of the decision by the Supreme Court.

The court on May 2, 2023, issued an Order denying both parties' motions to exclude expert testimony and reports by their experts.

July 19, 2023, Opinion and Order on Motions for Summary Judgment. On July 19, 2023, the district court issued its Order that granted in part and denied in part Plaintiffs' Motion for Summary Judgment, and denied Defendants' Motion for Summary Judgment.

The court stated the case concerns whether, under the Fifth Amendment's guarantee of equal protection, Defendants the United States' Department of Agriculture ("USDA") and the Small Business Administration ("SBA") may use a "rebuttable presumption" of social disadvantage for certain minority groups to qualify them for inclusion in a federal program that awards government contracts on a preferred basis to businesses owned by individuals in those minority groups.

Defendant SBA also applied a rebuttable presumption of social disadvantage to individuals of certain minority groups applying to the 8(a) program. The rebuttable presumption treated certain minority groups as socially disadvantaged, and it applies to Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans, "and members of other groups designated from time to time by [Defendant] SBA." *Id.* To qualify for the presumption, members of those groups must hold themselves out as members of their group. Individuals who qualify for the rebuttable presumption do not have to submit evidence of social disadvantage through an individual process for those who are not members of these groups.

The court citing Supreme Court precedent stated that certain classifications are subject to strict scrutiny — meaning they are constitutional "only if they are [(1)] narrowly tailored measures that further [(2)] compelling governmental interests." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). When examining racial classifications, courts apply strict scrutiny. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2162 (2023); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989)(applying strict scrutiny to the city of Richmond's racial classification); *Adarand Constructors, Inc.*, 515 U.S. at 224 (plurality holding that racial classifications are subject to strict scrutiny).

Ultima argued that the rebuttable presumption in the Section 8(a) program cannot survive strict scrutiny because Defendants cannot show

that the rebuttable presumption is narrowly tailored to achieve a compelling governmental interest. The court addressed each prong of the strict scrutiny test, beginning with the compelling-interest prong.

Lack of a compelling governmental interest. To satisfy the compelling interest prong, the court held the government "must both identify a compelling interest and provide evidentiary support concerning the need for the proposed remedial action. *See Croson*, 488 U.S. at 498–504; *see also Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000)(citing *Croson* for the proposition that the government must establish either that it "discriminated in the past" or "was a passive participant in private industry's discriminatory practices"). The Supreme Court has held that the government has a compelling interest in "remediating specific, identified instances of past discrimination that violated the Constitution or a statute." *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2162). Additionally, the government must present goals that are "sufficiently coherent for purposes of strict scrutiny." *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2166."

Defendants assert that their use of the rebuttable presumption in the 8(a) program is to remedy the effects of past racial discrimination in federal contracting. But, the court stated Defendant USDA admits it does not maintain goals for the 8(a) program. And Defendant SBA admits that it does not require agencies to have goals for the 8(a) program. Defendants also do not examine whether any racial group is underrepresented in a particular industry relevant to a specific contract in the 8(a) program. The court found that without stated goals for the 8(a) program or an understanding of whether certain minorities are underrepresented in a particular industry, Defendants cannot measure the utility of the rebuttable presumption in remedying the effects of past racial discrimination. In such circumstances, the court said, Defendants' use of the rebuttable presumption "cannot be subjected to meaningful judicial review." The lack of any stated goals for Defendants' continued use of the rebuttable presumption, the court concluded does not support Defendants' stated interest in "remediating specific, identified instances of past discrimination[.]" (*Citing Students for Fair Admissions, Inc.*, 143 S. Ct. at 2162.). If the rebuttable presumption were a tool to remediate specific instances of past discrimination, the court noted, Defendants should be able to tie the use of that presumption to a goal within the 8(a) program.

The court stated the Sixth Circuit addressed a challenge similar to the one Ultima raises here in *Vitolo*, 999 F.3d at 361 (6th Cir. 2021). The court said: "The Sixth Circuit held that "[t]he government has a compelling interest in remedying past discrimination only when three criteria are met." *Id.* at 361. First, the government's policy must "target a specific episode of past discrimination [and] ... cannot rest on a generalized assertion that there has been past discrimination in an entire industry." *Id.* (quoting *J.A. Croson Co.*, 488 U.S. at 498–99)."

The court found that: "Defendants do not identify a specific instance of discrimination which they seek to address with the use of the rebuttable presumption. Defendants instead rely on the disparities faced by MBEs nationally as sufficient to justify the use of a presumption that certain minorities are socially disadvantaged …"[A]n effort to alleviate the effects of societal discrimination is not a compelling interest," and the court concluded Defendants' reliance on national statistics shows societal discrimination rather than a specific instance.

Second, the court pointed out that the Sixth Circuit explained that the government must support its asserted compelling interest with "evidence of *intentional* discrimination in the past." *Vitolo*, 999 F.3d at 361 (quoting *J.A. Croson Co.*, 488 U.S. at 503)(emphasis in original). According to the Sixth Circuit, the court noted, "statistical disparities alone are insufficient but can be used with other evidence to establish

intentional discrimination. “The Sixth Circuit, the court said, reasoned that when the government uses a race-based policy, it must operate with precision and support the policy with “data that suggest intentional discrimination.” *Id.* The court also stated that the Sixth Circuit further reasoned that evidence of general social disparities are insufficient because “there are too many variables to support inferences of intentional discrimination” when there are multiple decision makers “behind the disparity.” *Id.* at 362.

Here, the court concluded, Defendants primarily offer evidence of national disparities across different industries. They do not offer further evidence to show that those disparities are tied to specific actions, decisions, or programs that would support an inference of intentional discrimination that the use of the rebuttable presumption allegedly addresses. Moreover, the court said that Plaintiffs’ expert noted that Defendants' evidence did not eliminate other variables that could explain the disparities on which they rely. Defendants cannot affirmatively link those disparities to intentional discrimination because they also cannot eliminate all variables that could account for the disparities. The court stated that the Sixth Circuit in *Vitolo* did not equivocate, cautioning that “broad statistical disparities ... are not nearly enough” to show intentional discrimination. *Id.*

Third, the court pointed out, the Sixth Circuit reasoned that the government must show that it participated in the past discrimination it seeks to remedy, such as by demonstrating it acted as a “passive participant in a system of racial exclusion practiced by elements of [a] local ... industry[.] *Id.* (quoting *J.A. Croson Co.*, 488 U.S. at 492)(internal quotations omitted).” The Sixth Circuit explained that the government must identify “prior discrimination by the governmental unit involved” or “passive participation in a system of racial exclusion.” *Id.* (quoting *J.A. Croson Co.*, 488 U.S. at 492) “(alteration adopted).”

The court noted that additionally, in her opinion in *J.A. Croson Co.*, Justice O'Connor reasoned that the government could show passive participation in discrimination by compiling evidence of marketplace discrimination and then linking its spending practices to private discrimination. *J.A. Croson Co.*, 488 U.S. at 492 (O'Connor, J., joined by Rehnquist, C.J., and White, J).

The court stated that although it does not doubt the persistence of racial barriers to the formation and success of MBEs, Defendants' evidence does not show that the government was a passive participant in such discrimination in the relevant industries in which Ultima operates. As evidence of passive participation, Defendants note that Congress found MBEs lacked access to “capital, bonding, and business opportunities” because of discrimination . Defendants further note that Congress found that MBEs faced “outright blatant discrimination directed at disadvantaged and minority business people by majority companies, financial institutions, and government at every level.” Those examples, however, the court said, relate broadly to the federal government's actions in different areas of the national economy. They do not show, the court found, that the federal government allowed discrimination to occur in the industries relevant to Ultima.

The court held that because the court must determine whether the use of racial classifications is supported with precise evidence, “examples of the federal government's passive participation in areas other than the relevant industries do not support Defendants’ use of the rebuttable presumption here. *See Vitolo*, 999 F.3d at 361.” Accordingly, the court held that Defendants have failed to show a compelling interest for their use of the rebuttable presumption as applied to Ultima. Even if Defendants could establish a compelling interest, the court found the rebuttable presumption is not narrowly tailored to serve the asserted interest.

Rebuttable presumption is not narrowly tailored. To determine whether the government's use of a racial classification is narrowly tailored, the court examines several factors, including the necessity for the race-based relief, the efficacy of alternative remedies, the flexibility and duration of the relief, the relationship of the numerical goals to the relevant labor market, and the impact of the relief on the rights of third parties. The court noted the Supreme Court in *Croson* held that courts also should consider whether the governmental entity considered race-neutral alternatives prior to adopting a program that uses racial classifications, the program does not presume discrimination against certain minority groups and, if the program involves a set-aside plan, the plan is based on the number of qualified minorities in the area capable of performing the scope of work identified.

a. Whether the 8(a) program is flexible and limited in duration. The court states that the Sixth Circuit in *Vitolo* noted, "'[because] proving someone else has *never* experienced racial or ethnic discrimination is virtually impossible, this 'presumption' is dispositive.'" *Vitolo*, 999 F.3d at 363 (emphasis in original). Individuals who do not receive the presumption must show both economic disadvantage *and* discrimination that have negatively impacted their advancement in the business world and caused them to suffer chronic and substantial social disadvantage. In effect, the court said, individuals who do not receive the presumption must put forth double the effort to qualify for the 8(a) program.

The court cites to the decision in *Drabik*, in which the Sixth Circuit held that as an aspect of narrow tailoring, a race-conscious government program "must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate." *Drabik*, 214 F.3d at 737–38 (quoting *Adarand*, 515 U.S. at 238. The court then points out that recently, the Supreme Court reaffirmed that racially conscious government programs must have a "'logical end point.'" Students for Fair Admissions, Inc., 143 S. Ct. at 2170 (quoting *Grutter*, 539 U.S. at 342).

It is noteworthy that the court in footnote 8 states the following: "The facts in *Students for Fair Admissions, Inc.* concerned college admissions programs, but its reasoning is not limited to just those programs. *See Adarand Constructors, Inc.*, 515 U.S. at 215 (applying the reasoning in *Bolling*, 347 U.S. at 497, which discussed school desegregation, to a federal program designed to provide highway contracts to disadvantaged business enterprises)."

Defendants concede, the court stated, that "the 8(a) program has no termination date," necessarily meaning there is no temporal limit on the use of the rebuttable presumption. The court found that such a "boundless use of a racial classification exceeds the concept of narrow tailoring as explained by Sixth Circuit and Supreme Court precedents."

b. Whether the 8(a) program is necessary. Defendants acknowledge that the program lacks a remedial objective. Th court found that the lack of a specific objective shows that Defendants are not using the rebuttable presumption in a narrow or precise manner. And the Sixth Circuit has held, according to the court, that Defendants must present "the most exact connection between justification and classification. Here, the court said, Defendants admit that they do not have any specific objectives linked to their use of the rebuttable presumption, and such unbridled discretion counsels against a racial classification being narrowly tailored.

c. Whether the 8(a) program is both over and underinclusive. Defendant SBA determines which groups receive the rebuttable presumption of social disadvantage. Some of those groups match the groups listed in the statute enacting the 8(a) program. But, the court found that Defendant SBA has added more groups since that time that

appear underinclusive when compared with groups that do not receive the rebuttable presumption.

The court stated that Defendant's "arbitrary line drawing for who qualifies for the rebuttable presumption shows that the "'categories are themselves imprecise in many ways.'" *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2167. Thus, the court held that the determination of which groups of Americans are presumptively disadvantaged compared with others "necessarily leads to such a determination being underinclusive because certain groups that could qualify will be left out of the presumption."

Conversely, the court found the rebuttable presumption "sweeps broadly by including anyone from the specified minority groups, regardless of the industry in which they operate." The court said that Defendant SBA is not making specific determinations as to whether certain groups in certain industries have faced discrimination. The court noted that it instead applies Congress's nationwide findings to all members of the designated minority groups. Thus, the court held that such "an application of the presumption proves overinclusive by failing to consider the individual applicant to the 8(a) program and the industries in which they operate."

d. Whether Defendants considered race-neutral alternatives to the rebuttable presumption. For a policy to survive narrow-tailoring analysis, the court stated the government must show "serious, good faith consideration of workable race-neutral alternatives" to promote the stated interest but need not exhaust every conceivable race neutral alternative. *Grutter*, 539 U.S. at 333, 339 (citing *Croson*, 488 U.S. at 507). But, the court said that in *Vitolo*, "the Sixth Circuit reasoned that 'a court must not uphold a race-conscious policy unless it is 'satisfied that no workable race-neutral alternative' would achieve the compelling interest.'" *Vitolo*, 999 F.3d at 362 (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013)).

The court found that Defendant SBA has not revisited the use of the rebuttable presumption since 1986 and insists that the presumption remains workable under the Supreme Court's precedents. The court held that because of Defendant SBA's "failure to review race-neutral alternatives in the wake of the Supreme Court's precedents, the Court cannot conclude that "'no workable race-neutral alternative would achieve the compelling interest.'" *Vitolo*, 999 F.3d at 362.

e. Whether the rebuttable presumption impacts third parties. The court rejected Defendants' assertion that the rebuttable presumption presents only a slight burden on third parties and Ultima because a minor amount of all national federal contracting dollars is eligible for small businesses. Ultima operates within a specific set of industries and the Mississippi contract, as well as others like it, represent a substantial amount of revenue. The court found that national statistics do not lessen the burden that the rebuttable presumption places on Ultima. Defendants, the court held, have failed to show that the use of the rebuttable presumption in the 8(a) program is narrowly tailored.

Conclusion. The court held as follows: Ultima's Motion for Summary Judgment is granted in part and denied in part, and Defendants' Motion for Summary Judgment is denied. The Court declared that

Defendants' use of the rebuttable presumption violates Ultima's Fifth Amendment right to equal protection of the law. The court ordered that Defendants are enjoined from using the rebuttable presumption of social disadvantage in administering Defendant SBA's 8(a) program. The court reserved ruling on any further remedy subject to a hearing on that issue. The court held a hearing on the issue of any potential further remedies on August 31, 2023.

The court issued the following Order on September 1, 2023: "Pursuant to the Court's July 19, 2023, Memorandum Opinion and Order, the Court held a videoconference to discuss what, if any, further remedies Plaintiff was pursuing based on its prayers for relief in its complaint. Based on those discussions, the only pending issues are: (1) Plaintiff's request for an injunction precluding Defendants from reserving Natural Resources Conservation Service contracts for administrative and technical support; and (2) Defendants' compliance with the injunction issued in the Memorandum Opinion and Order. The parties agreed to a final round of briefing to address these issues."

Subsequently, Plaintiff Ultima filed its Motion for Permanent Injunction and Additional Equitable Relief and the Federal Defendants filed their Response to Ultima's Motion. Ultima's Motion is pending at the time of this report.

(vi) ***Nuziard, et al. v. MBDA, et al.*, 2024 WL 965299 (N.D. Tex. March 5, 2024),** granting Plaintiffs' motion for summary judgment and ordering a permanent injunction; Order and Opinion issued on March 5, 2024; and 2023 WL 3869323 (N.D. Tex. June 5, 2023), granting Plaintiffs' motion for preliminary injunction; Order and Opinion issued on June 5, 2023; U.S. District Court for the N.D. of Texas, Fort Worth Division, Case No. 4:23-cv-00278.

On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act ("Infrastructure Act"), creating the newest federal agency: the Minority Business Development Agency ("MBDA"). Plaintiffs allege this agency is dedicated to helping only certain businesses based on race or ethnicity.

Plaintiffs assert that because it relies on racial and ethnic classifications to help some individuals, but not others, the MBDA violates the Constitution's core requirement of equal treatment under the law.

Plaintiffs allege they are small businesses interested in finding new ways to grow their business and would value the advice, grants, consulting services, access to programs and other benefits offered by the MBDA. However, Plaintiffs assert that agency will not help them because of their race.

Plaintiffs state that MBDA's statutes, regulations, and website all speak a clear message of discrimination: Defendants refuse to help white business owners like Plaintiffs, as well as many other businesses owned by other non-favored ethnicities.

Plaintiffs claim that they seek an order declaring the MBDA to be unconstitutional and an injunction prohibiting Defendants from discriminating against business owners based on race or ethnicity.

Plaintiffs seek the following relief:

A. Enter a judgment declaring that the Minority Business Development Agency is unconstitutional and in violation of 5 U.S.C. § 706(2)(B) to the extent it provides Business Center Program services or other benefits and services based on race or ethnicity; and

B. Enter a preliminary and then permanent injunction prohibiting Defendants from imposing the racial and ethnic classifications defined in 15 U.S.C. §9501 and implemented in 15 U.S.C. §§ 9511, 9512, 9522, 9523, 9524, and 15 C.F.R. §1400.1 and/or as otherwise applied to the MBDA Business Center Program and other MBDA programs and services, and additionally enjoining Defendants from using the term "minority" to advertise or reference their statutorily authorized programs and services.

Plaintiffs filed a Motion for Preliminary Injunction. The court issued an Order and Opinion on June 5, 2023, as follows:

The Constitution demands equal treatment under the law. Any racial classification subjecting a person to unequal treatment is subject to strict scrutiny. To withstand such scrutiny, the government must show that the racial classification is narrowly tailored to a compelling government interest. In this case, the Minority Business Development Agency's business center program provides services to certain races and ethnicities but not to others. The court held that "because the Government has not shown that doing so is narrowly tailored to a compelling government interest, it is preliminary enjoined from providing unequal treatment to Plaintiffs."

Subsequently, the court noted the Agency took steps to comply with the preliminary injunction last October by clarifying the pathway to benefits for applicants not on the Agency's racial listing. See MINORITY BUS. DEV. AGENCY, GUIDANCE TO MBDA BUSINESS CENTER OPERATORS 2 (Oct. 23, 2023) ("An individual does not need to identify as a member of one of [the listed groups] to be a socially or economically disadvantaged individual eligible to receive Business Center services under the MBDA Act. An individual may meet the definition if their membership in a group has resulted in their subjection to racial or ethnic prejudice or cultural bias or impaired their ability to compete in the free enterprise system."). As discussed later, the court indicated this post-suit policy change has no bearing on the present dispute.

The Parties moved for summary judgment in October 2023. Plaintiffs argued the Agency's race-based programming is unlawful under the Constitution and the Administrative Procedure Act ("APA"). For their constitutional claim, Plaintiffs apply the Supreme Court's holding in *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harv. Coll.*, 600 U.S. 181 (2023) ("SFFA"), arguing the Agency's racial presumption violates the equal protection guarantees of the Fifth Amendment's Due Process Clause. Their APA claim does not articulate an independent theory. Rather, it asked the Court to "hold unlawful and set aside" any unconstitutional agency actions under 5 U.S.C. § 706(2)(B). Defendants "leaning on" *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), argued the MBDA is constitutional because it remedies past discrimination in which the government "passively participated." Defendants further contend summary judgment is warranted because, merits aside, Plaintiffs lack standing to bring this lawsuit.

As explained below, the court on March 5, 2024, holds in favor of Plaintiffs and denied the Agency's Motion. But only Nuziard and Bruckner conclusively established standing. Because reasonable jurors could doubt Piper's standing, the Court granted summary judgment for Nuziard and Bruckner but denied it for Piper. The Court granted summary judgment on Plaintiffs' equal protection claim. The Court denied summary judgment on Plaintiffs' APA claim, favoring remedies more clearly established than vacatur. Finally, the Court entered a permanent injunction prohibiting further implementation of the MBDA's unconstitutional statutory presumption.

The discussion below begins with the court's June 5, 2023 opinion and order granting a preliminary injunction. The discussion then follows that Order and Opinion with the court's Order and Opinion issued on March 5, 2024 granting plaintiffs' motion for summary judgment and entering a permanent injunction.

June 5, 2023 Order and Opinion

A. Defendants lack a compelling interest. Defendants contend that it has a compelling interest in remedying the effects of past discrimination faced by minority-owned businesses.

The court stated that the government may establish a compelling interest in remedying racial discrimination if three criteria are met:

"(1) the policy must target a specific episode of past discrimination, not simply relying on generalized assertions of past discrimination in an industry; (2) there must be evidence of past intentional discrimination, not simply statistical disparities; and (3) the government must have participated in the past discrimination it now seeks to remedy." *Miller v. Vilsack*, No. 4:21-CV-0595-O, 2021 WL 11115194, at *8 (N.D. Tex. July 1, 2021)(O'Connor, J.) (*citing Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021)(summarizing U.S. Supreme Court precedents). The court found the Government's asserted compelling interest meets none of these requirements.

First, the court said that the Government "points generally to societal discrimination against minority business owners." *Vitolo,* 999 F.3d at 361. Defendants, the court stated, point to congressional testimony on the effects of redlining, the G.I. Bill, and Jim Crow laws on black wealth accumulation as evidence of a specific episode of discrimination. But, the court noted the Program does not target black wealth accumulation. It targets some minority business owners. The court found Defendants also identify no specific episode of discrimination for any of the other preferred races or ethnicities. The court concluded instead that they point to the effects of societal discrimination on minority business owners. But ''an effort to alleviate the effects of societal discrimination is not a compelling interest." *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996).

Second, the court held the "Government fails to offer evidence of past intentional discrimination. The Government offers no evidence of discrimination faced by some preferred races and ethnicities. And for those it does, the Government relies on studies showing broad statistical disparities with business loans, supply chain networks and contracting among some minorities. "These studies, according to the court, do not involve all of Defendants' preferred minorities or every type of business. But even if they did, the court said: "statistical disparities don't cut it."(*quoting Vitolo*, 999 F.3d at 361).

Because the court concluded: "when it comes to general social disparities, there are simply too many variables to support inferences of intentional discrimination." (*quoting Vitolo,* 999 F.3d at 362. "While the Court is mindful of these statistical disparities and expert conclusions based on those disparities, '[d]efining these sorts of injuries as 'identified discrimination' would give . . . governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.'" (*quoting Greer's Ranch Café*, 540 F. Supp. 3d at 650 (*quoting City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 499 (1989)).

Third, the court found the Government "has not shown that it participated in the discrimination it seeks to remedy." (*quoting Vitolo*, 999 F.3d at 361). The court pointed out that the government can show that it participated in the discrimination it seeks to remedy either actively or passively. However, Defendants provide no argument on how they participated in the discrimination it seeks to remedy.

The court noted that "perhaps the argument could be made that the Government passively discriminated by failing to address the economic inequities among minority business owners. But to be a passive participant, it must be a participant." See *Croson*, 488 U.S. at 492 (government awarding contracts to those who engaged in private discrimination). But, the court held there "is no evidence that the Government passively participated advanc[ing] the evil of private prejudice" faced by minority-owned businesses.

In sum, the court found: "the Government has failed to show that the Program targets a specific episode of discrimination, offer evidence of past intentional discrimination, or explain how it participated in discrimination against minority business owners. The Government thus

lacks a compelling interest in remedying the effects of past discrimination faced by some minority-owned businesses."

B. The Program is not narrowly tailored. Even if the Government had shown a compelling state interest in remedying some specific episode of discrimination, the court held the Program is not narrowly tailored to further that interest for at least two reasons.

First, the court stated the Government has not shown "that 'less sweeping alternatives—particularly race neutral-ones—have been considered and tried.'" *Walker*, 169 F.3d at 983. This requires the government to show that "'no workable race-neutral alternative' would achieve the compelling interest." *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013).

Defendants contend that "absent race-based remedies, 'the needle did not move' in efforts to remedy the effects of discrimination on the success outcomes of minority business owners." To support this statement, the court said, "defendants rely on a single review of various disparity studies. See U.S. Dep't of Commerce, Minority Business Development Agency, Contracting Barriers and Factors Affecting Minority Business Enterprise: A Review of Existing Disparity Studies (Dec. 2016)."

The court found this review, "cuts against the Government. It 'emphasize[s] the need for both race-neutral and race-conscious remedial efforts' to move the needle and states that the disparity studies 'fail to detail the extent to which agencies have actually implemented and measured the success or failure of these recommendations.' … Thus, the review of contracting disparities Defendants rely on does not show that race-neutral alternatives 'have been considered and tried.'" *See Walker*, 169 F.3d at 983. "Nor has the Government shown a 'serious, good faith consideration of workable race-neutral alternatives' in any other business context." *See Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

Second, the court concluded, the Program is not narrowly tailored "because it is underinclusive and overinclusive in its use of racial and ethnic classification." *See Croson*, 488 U.S. at 507–08; Gratz, 539 U.S. at 273–75. It is underinclusive because it arbitrarily excludes many minority-owned business owners — such as those from the Middle East, North Africa, and North Asia. For example, the court noted the Program excludes those who trace their ancestry to Afghanistan, Iran, Iraq, and Libya. But it includes those from China, Japan, Pakistan and India. The court found the Program is also underinclusive because it "excludes every minority business owner who owns less than 51% of their business. 'This scattershot approach does not conform to the narrow tailoring strict scrutiny requires.'" (*quoting Vitolo*, 999 F.3d at 364).

The Program, the court stated, is also overinclusive. "It helps individuals who may have never been discriminated against. *See Croson*, 488 U.S.at 506–08 (holding that a minority business plan is overinclusive because it includes ethnicities in which there is no evidence of discrimination)." And, the court said that it "also helps all business owners, not just those in which disparities have been shown."

The Program, the court found, is thus not narrowly tailored to the Government's asserted interest.

Because the Government has not shown a compelling interest or a narrowly tailored remedy under strict scrutiny, the court held that Plaintiffs are likely to succeed on the merits.

Conclusion of June 2023 Order. The Court granted Plaintiffs' Motion for Preliminary Injunction and enjoined Defendants, the Wisconsin MDBA Business Center, the Orlando MBDA Business Center, the Dallas-Fort Worth MBDA Business Center and the officers, agents, servants and

employees and anyone acting in active concert or participation with them from imposing the racial and ethnic classifications defined in 15 U.S.C. § 9501 and implemented in 15 U.S.C.§§ 9511, 9512, 9522, 9523, 9524, and 15 C.F.R. § 1400.1 against Plaintiffs or otherwise considering or using Plaintiffs' race or ethnicity in determining whether they can receive access to the Center's services and benefits.

March 5, 2024 Order and Opinion

The Parties moved for summary judgment in October 2023. The following discussion summarizes the court's Opinion and Order issued on March 5, 2024.

A. Nuziard and Bruckner establish Article III Standing. The analysis differs for each Plaintiff. Nuziard met all posted criteria for the Agency's services except for race/ethnicity. Bruckner is more challenging because he did not meet all the criteria. The court said at issue for both is whether any race-neutral criteria came from the MBDA or from third-party operators. Piper's largest challenge was establishing standing, as he never contacted his local Business Center. For Piper, the issue is whether he sufficiently manifested intent to apply or if a "futility exception" excuses his inaction. Importantly, the court found the record contained no evidence suggesting race-neutral criteria are enforced with equally demanding rigor for MBEs. As Plaintiffs observed, the court noted: "Defendants have offered no evidence even suggesting that minority applicants for MBDA Programming are subjected to such an inflexible, rigorous, post hoc application of non-statutory requirements."

The court found that Dr. Nuziard and Mr. Bruckner established standing when they suffered injuries-in-fact when they were denied an equal shot at MBDA benefits because of their race. The Agency caused their injuries. A favorable ruling would redress them.

Accordingly, the court held Nuziard and Bruckner have Article III standing, and the Court denied the Agency's Motion on this point. The court did not find that Piper had standing.

B. The MBDA Statute is Unconstitutional. The court stated that this is a case about presumptions. The court found that Plaintiffs all encountered the same obstacle when they sought MBDA programming. Because they are not on the Agency's list, the court pointed out the Agency presumes they are not disadvantaged. *See* 15 U.S.C. § 9501(15)(B); 15 C.F.R. 1400.1.

The court, citing the recent Supreme Court decision in *SFFA v. Harvard, et al*., holds that any exceptions to the Equal Protection Clause "must survive a daunting two-step examination known as strict scrutiny." *SFFA*, 600 U.S. at 206; *see Adarand*, 515 U.S. at 227 (noting "all racial classifications" must pass "strict scrutiny" by being "narrowly tailored measures that further compelling governmental interests"). As noted in *Adarand*, the court stated the rubric has two parts. First, the Court asks if the racial classification "further[s] compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Second, the Court asks if the classification is "narrowly tailored" to achieve those interests. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311–12 (2013). The burden to establish both rests with the government. *Id.*

The court concluded it is hornbook law that strict scrutiny applies to race-based classifications. A compelling governmental interest is essential. An action is narrowly tailored if its "necessary" to achieve the interest. The court cites to the *SFFA* case determining that for racial classifications to be narrowly tailored, they must be "sufficiently focused" on obtaining "measurable objectives warranting the use of race." (*quoting SFFA*, 600 U.S. at 230). And the "twin commands of the Equal Protection Clause" dictate that "race may never be used as a 'negative' and . . . may not operate as a stereotype."(*quoting SFFA.* at

218.) Finally, the contested classification must have a "logical endpoint."(*quoting SFFA* at 212 (*quoting Grutter*, 539 U.S. at 342)).

The court, following the *SFFA* case, pointed out that courts "have identified only two compelling interests that permit [a] resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute [and] [t]he second is avoiding imminent and serious risks to human safety in prisons, such as a race riot."(*quoting SFFA*, 600 U.S. at 207.)

The Parties in this case agree strict scrutiny applies. The MBDA Statute lists certain races that are presumptively entitled to benefits. *See* 15 U.S.C. § 9501(15)(B). Those not on the list can make an "adequate showing" of disadvantage. 15 C.F.R. § 1400.1(b). Those on the list don't have to. Thus, in presuming listed groups are "socially or economically disadvantaged," the MBDA Statute presumes *un*listed groups are *not* "socially or economically disadvantaged." While they can take steps to show they are, that is their burden to bear. Yet, the Agency assumes otherwise.

The Agency says this presumption helps "remedy[] '[t]he unhappy persistence . . . of racial discrimination against minority groups in this country.'" (quoting *Adarand*, 515 U.S. at 237). Plaintiffs say the presumption is too vague, applying considerations from *SFFA*. Plaintiffs further argue the presumption is "*not tailored at all*." The Agency disagrees, arguing the presumption is narrowly tailored because it is (1) necessary, (2) flexible, (3) neither over- nor under-inclusive and (4) minimally impactful to third parties.

The court stated that racial presumptions are a disfavored solution. As such, the Agency's presumption must pass strict scrutiny. (*citing SFFA*, 600 U.S. at 206; *Adarand*, 515 U.S. at 227). A failure on either prong is terminal.

1. The Agency's only compelling interest concerns discrimination in government contracting. The Agency argues its presumption remedies myriad effects of discrimination. But, the court said, "an effort to alleviate the effects of societal discrimination is not a compelling interest." *(quoting Shaw v. Hunt*, 517 U.S. 899, 909 (1996)). Thus, the Agency's brief posits two specific examples: 1) discrimination in access to credit and 2) discrimination in private contracting markets. To determine if either is compelling, the court pointed out the Supreme Court asks two questions. First, did specific acts of historic discrimination cause these problems? (*citing SFFA*, 600 U.S. at 207). Second, if the problems arise in private-sector contexts and are not tied to discrete incidents of historic discrimination, did the government "passively participate" in causing them? (*citing Croson*, 488 U.S. at 492).

The court stated that both inquiries call for specifics. The Agency cannot refer to general social ills and rely on these conclusions. Rather, it must identify the "who, what, when, where, why, and how" of relevant discrimination. (*citing Croson and Greer's Ranch Café v. Guzman*, 540 F. Supp. 3d 638, 650 (N.D. Tex. 2021) (O'Connor, J.) (noting an "industry-specific inquiry [is] needed to support a compelling interest for a government-imposed racial classification")). Otherwise, the court noted, any race-based program could be justified considering the country's history of race-based discrimination. "[S]uch a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality." (*quoting Croson*, 488 U.S. at 506.

However, the court states that discrimination is "good at hiding." Accordingly, "significant statistical disparit[ies]" can support "an inference of discrimination." (*quoting Croson*, at 509; collecting cases). Yet, without more evidence, "statistical disparities don't cut it." *(quoting Vitolo*, 999 F.3d at 361; and *Croson*, 488 U.S. at 499, 500–02). Moreover, not all disparity studies are created equal. The court addressed the Plaintiffs argument that "[s]tatistical studies that do not

control for . . . capacity factors . . . do not prove intentional discrimination." The court also stated that even the best empirics can only prove so much. Statistical disparities support an *inference* of discrimination. (*citing Croson*, 488 U.S. at 509). Without concrete examples, the court concluded, an inference alone will not pass strict scrutiny.

The court noted the Supreme Court's discussion of *Wygant* in *Croson* demonstrates when a party must show government participation. (*citing Croson,* 488 U.S. at 485–88, 491–92). The court stated that the Supreme Court rejected two extremes. On one hand, it rejected the Fourth Circuit's reading of *Wygant* that required "prior discrimination by the government" for a program to pass strict scrutiny. (*quoting Croson* at 485). Conversely, the court rejected the appellant's argument that the City of Richmond could "define and attack the effects of prior discrimination" wherever they exist. (*quoting Croson* at 486.) Rather, *Croson* framed the analysis around specificity. If the government actively participated in past discrimination, it can use race to remedy the effects. (*citing Croson* at 486, 491–92). Interpreting *Croson*, the court concluded that to remedy private sector disparities, the government must identify discrimination with pinpoint accuracy. The court holds this is satisfied by showing government participation in the relevant discrimination. (*citing Croson*, 488 F.3d at 492).

Therefore, the court noted, government participation is not always necessary, but it is sufficient. The court found that if the Agency identifies specific historic incidents it seeks to redress, it need not show government participation. But, without evidence of government participation, the Agency cannot use race to remedy broad statistical disparities in private-sector contexts. The court said the common theme is clear: "a generalized assertion of past discrimination" won't suffice "because it 'provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.'" (*quoting Hunt*, 517 U.S. at 909 (quoting *Croson*, 488 U.S. at 498)). While the government need not furnish formal findings of discrimination at the start, it must "when a remedial program is challenged." (*quoting Dean*, 438 F.3d at 455).

The MBDA has been challenged, so the Agency must now establish a "strong basis in evidence" for its presumption. If it also seeks to remedy private sector structural disparities rather than particular historic discrimination, the court holds that it must furnish evidence of government participation. (*citing Croson*, 488 U.S. at 492, 503; *Wygant*, 476 U.S. at 274; *SFFA*, 600 U.S. at 260 (Thomas, J., concurring); *Dean*, 438 F.3d at 455; *Vitolo*, 999 F.3d at 361). Anything less fails strict scrutiny.

a. Discrimination in credit access. The court stated that for its first interest, the Agency observed that "evidence before Congress" shows MBEs "have far less access to capital and credit" than white-owned business "due to racial discrimination in lending markets." The court noted that the record validates the Agency's observation, but the question is not whether it is difficult for MBEs to get credit. Rather, the court pointed out the question is 1) did specific incidents of historic discrimination cause this problem, and 2) if the problem is instead rooted in private sector disparities, did the government participate in causing it? Based on these questions, the court holds the Agency's first interest is not compelling.

i. Specific, identified instances of past discrimination. To show a compelling interest, the Agency must identify "specific, identified instances of past discrimination that violated the Constitution or a statute." *(quoting SFFA*, 600 U.S. at 207). The court found the Agency failed to do so. The evidence shows "[n]ationwide, 'minority businesses are two to three times more likely to be denied a loan'" and "'receive less funding and pay higher interest rates on loans they do receive.'"

The court stated this practice is undeniably problematic, but it cannot be a compelling government interest unless the Agency identifies concrete acts of past discrimination that caused it. (*citing SFFA*, 600 U.S. at 207). The court also found the Agency's cited studies speak only to the phenomenon itself, not contributing factors. The court stated that none of the studies address causal factors, much less "specific, identified instances of past discrimination that violated the Constitution or a statute." (*quoting SFFA*, 600 U.S. at 207).

Without more granularity, the court concluded the Agency cannot establish a compelling interest. Further, the Agency extrapolates too much from the data, as nothing shows the studies controlled for other variables that stymie MBEs seeking credit. One of the Agency's reports noted that "identifiable indicators of capacity are themselves impacted by and reflect discrimination." However, the court found that does not give the Agency carte blanche to justify its presumption from generalized findings without explaining the causal nexus.

While the Agency identified a few concrete examples of past discrimination, most of the cited studies do not. The court noted the record also failed to trace those few examples to specific disparities *today*. The court stated that past discrimination may cause modern disparities without longitudinal studies to reflect causation. However, according to the court, the Agency must accomplish that task to justify its presumption, and it cannot rely on "various decades-old sources or rationale[s] for supporting a compelling interest *today*" (emphasis added). The court stated the cited evidence is overall insufficient to pass strict scrutiny. Further, the Agency's first interest is not compelling because it concerns private-sector credit disparities, and the record does not show government participation contributed to such disparities.

ii. Government participation. The court holds that the government must identify relevant government participation to use race in remedying private sector disparities. According to the court, the record does not establish this element for the Agency's first interest. The court noted that in many respects, the Agency conflates quantitative and qualitative merit. The record shows evidence of MBEs' credit struggles, but it contains no evidence tying this problem to specified government participation. The court found that the Agency's reports do not identify government participation in the discrimination detailed.

The court stated that to be a passive participant, the government must *be* a participant. Precedent requires specifics to prove even passive participation. The court concluded the record contains no concrete evidence of government "induction, encouragement, or promotion" of credit discrimination. Not only does the record fail to reflect government participation for this interest, it affirmatively suggests other causal factors are relevant.

The court stated the issue is not that non-government players were involved. As explained in Croson, the government can use race if it was "a 'passive participant' in a system of racial exclusion practices" in the private sector. The problem, the court found, is that the record identifies other causes and fails to show government participation. Additionally, the evidence that purports to show passive participation concerns failed federal policy, not actual participation in discrimination.

The court stated there is a big difference between participating in discrimination and simply taking actions that increase difficulty for MBEs. Remedying "what the Federal Government is not doing" is not a compelling interest. Rather to pass strict scrutiny, the Agency must show government participation "with the particularity required by the Fourteenth Amendment."

The court concluded that if the Agency cannot show participation, it lacks "a strong basis in evidence for its conclusion that [race-based] remedial action was necessary." While the government may have a role in remedying MBEs' credit problems, the court found the evidence does not show it had a role in causing them — at least not as a participant. The court holds that any policies aimed at fixing these issues may not use race-based classifications, and the government's first interest is not compelling.

b. Discrimination in private contracting markets. The Agency's second interest concerns discrimination in private contracting markets. Asking the same two inquiries as discussed above, the court found the Agency's second interest is not compelling. However, the court concluded evidence specific to government contracting reveals that a "subinterest" is.

i. Specific, identified instances of past discrimination. The court initially set aside government contracting to examine the Government's other evidence and found it failed to support a compelling interest because the cited sources were either: 1) too generalized or 2) too limited in temporal or geographic scope. To the extent the sources contained specifics, those specifics concern government contracting. The court discusses the three expert reports presented by the government and concluded they illustrate this issue.

The court found the Agency takes evidence probative for a specific context and uses it to over-justify certain actions. The reports touch on other contexts, but they do so generally. The court addressed the Plaintiffs note: "The reports simply claim discrimination in an 'entire industry,' and that 'the government' participates in this 'industry.'" The court stated the Plaintiffs note here is correct, and rejects the Agency's "simplistic syllogism" that "discrimination exists in the American economy, and the government participates in the American economy, therefore, the government participates in discrimination."

The court said that these problems only implicate "ill-defined," "exclusionary networks." The court noted many private contracting sectors operate under the "good ol' boys club." Good ol' boys clubs place importance on social connections and closed networks over a business's merit. The record shows MBEs underperform in these situations due to biases of those in the "ingroup." The court stated this is a prime example of a compelling societal interest that is not, as a matter of law, a compelling *governmental* interest. But, the court found, many such exclusionary networks arise in government contracting. If constrained to that context, the Agency's evidence supports a compelling interest. The court concluded the record contains "evidence of disparities in federal contracting consistent with discrimination."

The Agency said these findings "justify the use of race-conscious remedial measures through the MBDA Act." The court holds the reports identify instances of discrimination in this context, and so does the record as a whole. Thus, the court said, carving away the Agency's broader interest, the record shows remedying historic discrimination in public procurement/prime contracting is a compelling government interest.

ii. Government participation. The court noted the Agency pointed to three categories of empirical evidence to support an inference of government-linked discrimination: 1) utilization indices, 2) regression analyses, and 3) aggregations of anecdotal evidence. The court stated "[i]t is well established that disparities between a locality's utilization of ... MBEs and their availability in the relevant marketplace [can] provide evidence for the consideration of race-conscious remedies." Plaintiffs critique the Agency's evidence but do not explain how it is critically deficient.

The court found the cited studies show significant disparity ratios for MBEs in prime contracting, and that such disparities support an "inference of discriminatory exclusion." Because the government itself is the bidder on such contracts, that inference also implicates government participation.

The court noted that through regression analysis, studies show whether race is a statistically significant predictor of the disparate outcome at a 95 percent confidence level, and thus indicate "whether the disparate outcomes between racial/ethnic minorities and white male business owners could have occurred by chance." Pooling data from various sources, the studies of record produced logit models showing MBE exclusion in prime contracting nationwide. The court stated the numbers are unexplainable without considering race. The court found Agency's regression analyses support an "inference of discriminatory exclusion" in government procurement/prime contracting, which necessarily suggests government participation.

In sum, the court stated the record showed several examples of historic discrimination in which the government participated. Alone, historic discrimination is insufficient. The record also showed statistical analyses and disparity studies that raise an inference of government-linked discrimination. Alone, studies and analyses are also insufficient. However, the court concluded that combining the concrete examples with the robust empirics, the court found remedying past discrimination in government contracting is a compelling governmental interest.

2. The MBDA's racial presumption is not narrowly tailored. Having established a compelling sub-interest, the Agency must show its race-based presumption is narrowly tailored to further that interest. To do so, the Agency must show a "close fit" between the means (its presumption) and the end (remedying historic discrimination in government contracting). This fit must be so close that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. The court examined the several factors that determine the narrow tailoring inquiry, and holds the MBDA statute failed under these considerations.

a. Under- and over-inclusivity. The court found the MBDA's race-based presumption is both under- and over-inclusive. An under-inclusive presumption excludes necessary groups to further the identified interest; an over-inclusive presumption includes unnecessary groups for that interest.

The court stated the Agency's presumption is under-inclusive because it "arbitrarily excludes" many MBEs, including those owned by individuals from "the Middle East, North Africa, and North Asia." Such inconsistencies come with the territory of "racial taxonomies in a multiracial nation." The court found inconsistencies in which groups from certain countries are included or excluded. Further, nothing in the government's history provided a rationale for which countries are included or excluded. The court concluded the absence of a clear regulatory framework for including or excluding certain groups means the MBDA Statute is immune from meaningful judicial review.

The court holds the MBDA's inclusion and exclusion approach does not conform to the narrow tailoring strict scrutiny requires.

The court found the Agency failed to explain why its presumption is necessary to remedy the effects of discrimination in public, and the record contained no evidence of systemic exclusion from public contracting for many groups entitled to presumptive disability under the MBDA Statute. Without clear evidence tracing each of the groups in 15 U.S.C. § 9501(15)(B) to concrete discrimination in this context, the Agency's presumption is not narrowly tailored

The court concluded the Agency seeks to justify a ramshackle presumption without concrete evidence establishing why certain groups make the list and others do not.

The court determined the Agency's over-inclusive presumption is akin to many other federal statutes without any empirical justification and without close scrutiny. According to the court, because the Agency includes many individuals without inquiring into individual applicants belonging to those groups have experienced discrimination, it is facially over-inclusive and thus fails strict scrutiny. The court holds the MBDA's presumption in 15 U.S.C. § 9501(15)(B) is both under- and over-inclusive, and thus it is not narrowly tailored and does not pass strict scrutiny.

b. Stereotyping. The court stated that most of the above issues stem from stereotypes underlying the Agency's presumption. There is not anything inherently race-conscious about serving "socially or economically disadvantaged individual[s]." 15 U.S.C. § 9501(15). But the MBDA Statute defines "social or economic disadvantage" in racial terms. Nor does a business owner's race inherently suggest anything about disadvantage. Yet, the MBDA Statute defines "minority owned business enterprise" in terms of "social or economic disadvantage."

The court stated that the Agency uses race as a reliable proxy for disadvantage, at least with respect to the listed groups. If a business owner belongs to an enumerated group, he or she is entitled to services without regard to their life circumstances, financial performance or any social or economic metrics of "disadvantage." The inverse is also true. No matter how disadvantaged an entrepreneur may be, the Agency presumes otherwise if they are not on the list. The court states the federal courts have rejected "such illogical stereotypes."

As far as the Agency is concerned, the court found that race presumptively determines disadvantage — but only for those listed in 15 U.S.C. § 9501(15)(B). The court holds the MBDA's presumption in 15 U.S.C. § 9501(15)(B) is based on racial stereotypes. As such, it is not narrowly tailored and does not pass strict scrutiny.

c. Logical endpoint. The court found the MBDA's presumption in 15 U.S.C. § 9501(15)(B) has no logical endpoint. Thus, the court holds, it is not narrowly tailored and does not pass strict scrutiny.

d. Other relevant factors. The court addressed the main factors applied in the *SFFA v. Harvard* case, and held the Agency's presumption does not satisfy the narrow tailoring requirement. It addresses other relevant factors in its decision**.**

i. Necessity and available alternatives. The court found the MBDA's racial presumption is unnecessary for the stated interest and was not crafted after first considering alternatives. The only surviving interest is remedying past discrimination in government procurement/prime contracting. According to the court, the record does not show the Agency's presumption is necessary for that interest. But even if the Agency's broader interests were compelling, the court stated nothing suggests the race-based presumption in 15 U.S.C. § 9501(15)(B) is necessary to fix the credit struggles and exclusionary networks documented in the record.

The court found that nothing in the record indicated the MBDA considered race-neutral alternatives before endorsing the presumption in 15 U.S.C. § 9501(15)(B). The Agency attempted to avoid this inquiry, noting that the federal government has operated race-neutral business-assistance programs for decades, and still racial disparities exist. However, the court stated although there is evidence that other agencies applied other solutions to different issues does not carry the Agency's burden. Additionally, the court said the Agency alone bears the burden of showing race-neutral alternatives were considered.

The court noted the Agency's problem is not merely that race-neutral alternatives would suffice. Rather, the court holds MBDA's fatal flaw is that no evidence suggests it considered such alternatives before resorting to its race-based presumption. Without such evidence, the Agency failed to show the meticulous "connection between justification and classification" required for its presumption to survive. MBDA's presumption in 15 U.S.C. § 9501(15)(B), the court concluded, is unnecessary and was created without first considering race-neutral alternatives. Thus, it is not narrowly tailored and does not pass strict scrutiny.

ii. Flexibility and duration. Second, a narrowly tailored program is flexible and durationally limited. The court discussed the primary inquiry when analyzing a remedy's flexibility is whether its requirements may be waived. The court found nothing in the MBDA Statute says its presumption is waivable or otherwise elastic. While applicants not on the Agency's list can attempt to demonstrate disadvantage, the underlying presumption cannot be waived. The racial presumption, the court noted, is baked into countless facets of MBDA programming. The Agency cannot relax its preferences in granting a finite good (MBDA benefits) because: 1) the statute itself contains no waiver provision and thus precludes that option, and 2) the "applicant pool" is not geographically constrained and is thus effectively limitless.

The Agency's presumption is also unlimited in duration. It continues to grow, the court stated, and offers increasingly expansive programming pursuant to its racial presumption. If the current trend continues, the court determined the MBDA's presumption appears to never expire. The court holds the MBDA's presumption in 15 U.S.C. § 9501(15)(B) is neither flexible nor durationally limited. Thus, it is not narrowly tailored and does not pass strict scrutiny.

iii. Impact on third parties. Third, a narrowly tailored program minimally impacts third parties. The court pointed out the MBDA presumes certain races are entitled to benefits, giving them an effective monopoly on its services. The court noted that precedent has long recognized that "[t]he badge of inequality and stigmatization conferred by racial discrimination" is itself an impactful harm. Those not covered by 15 U.S.C. § 9501(15)(B) are not invited to participate, unless they make an "adequate showing" that they should be. The court found that even if those not covered can access business-development services from other programs, that presumption is per se impactful to third parties. The court holds the Agency's presumption in 15 U.S.C. § 9501(15)(B) failed the other narrow tailoring factors and thus failed strict scrutiny.

Holding. The MBDA's statutory presumption, codified at 15 U.S.C. § 9501, is unconstitutional. The Agency grants or withholds programming based upon a threshold satisfaction of 15 U.S.C. § 9501(15)(B), or alternatively, an "adequate showing" that an unlisted group is "socially or economically disadvantaged" under 15 C.F.R. § 1400.1(b). Any provision of the MBDA Statute that is contingent on the presumption in 15 U.S.C. §9501(15)(B) is also unconstitutional. Accordingly, the court granted summary judgment on Plaintiffs' equal protection claim and found the following provisions of the MBDA Statute unconstitutional: 15 U.S.C. §§9501, 9511, 9512, 9522, 9523, 9524.

Plaintiffs satisfy the requirements for injunctive relief, though not for the broader injunction sought. Accordingly, the Court ordered that the MBDA, along with its officers, agents, servants and employees and/or anyone acting in active concert therewith, be permanently enjoined from imposing the racial and ethnic classifications defined in 15 U.S.C. § 9501 and implemented in 15 U.S.C. §§ 9511, 9512, 9522, 9523, 9524, and 15 C.F.R. §1400.1, or otherwise considering or using an applicant's

race or ethnicity in determining whether they can receive Business Center programming.

(vii) ***Mid-America Milling Company LLC (MAMCO) and Bagshaw Trucking Inc. v. U.S. Department of Transportation, et. al***., U.S. District Court for the Eastern District of Kentucky, Frankfort Division; Case No: 3:23 -cv-00072-GFVT (Complaint filed on October 26, 2023).

On October 26, 2023, Plaintiffs filed a suit challenging the Federal DBE Program. Plaintiffs seek a preliminary and permanent injunction, and a declaratory judgment, that the Federal DBE Program, including Sections 11101€(2) and (3) of the Infrastructure Act and corresponding federal regulations are unconstitutional because they violate the Equal Protection Clause of the U.S. Constitution.

Specifically, the request for relief provides the court:

A. Enter a preliminary injunction enjoining Defendants from applying all unconstitutional and illegal race and gender-based classifications in the federal DBE program, including those set out in Sections 11101(e)(2)–(3) of the Infrastructure Act, the Small Business Act, 49 C.F.R. pt. 26, and 13 C.F.R. pt. 124.

B. Enter a declaratory judgment that the race and gender-based classifications in the federal DBE program, including those set out in Sections 17 11101(e)(2)–(3) of the Infrastructure Act, the Small Business Act, 49 C.F.R. pt. 26, and 13 C.F.R. pt. 124, are unconstitutional and otherwise violate the APA.

C. Enter an order permanently enjoining Defendants from applying race and gender-based classifications in the federal DBE program.

D. Set aside the race and gender classifications in 49 C.F.R. pt. 26 and 13 C.F.R. pt. 124.

Plaintiffs have filed a Motion for Preliminary Injunction, and Defendants have filed a Motion to Dismiss. The Motions are pending at the time of this report.

(viii) ***Landscape Consultants of Texas, Inc. et. al. v. City of Houston, Texas, et. al.*, U.S. District Court for the Southern District of Texas, Houston Division; Civil Action No. 4:23-cv-3516. Complaint filed September 19, 2023.**

Plaintiffs allege that this is an Equal Protection Clause challenge to the City of Houston and Midtown Management District's (MMD's) "requirements for awarding public contracts based on the race of the bidding company's owner." Plaintiffs allege that the City's MSWBE program and MMD's MWDBE program violate the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 1983, and 42 U.S.C. § 1981.

Plaintiffs' Prayer for Relief requests the court:

1. Declare the City of Houston's MWSBE program unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981 & 1983;

2. Permanently enjoin the City of Houston from operating its MWSBE program or using similar racial preferences in the award of public contracts;

3. Declare Midtown Management District's MWDBE policy unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

4. Permanently enjoin Midtown Management District from operating its MWDBE policy or using similar racial preferences in the award of public contracts;

5. Issue an award of attorneys' fees and costs in this action pursuant to Federal Rule of Civil Procedure 54(d) and 42 U.S.C. § 1988.

The court issued an Order for the Initial Pretrial and Scheduling Conference and Order to Disclose Interested Persons. The first Scheduling order was issued on December 14, 2023. Defendants filed their Motions to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6).

Defendant the City of Houston filed its Answer on January 12, 2024. The court entered an Order on January 12, 2024 denying both Defendants' Motions to Dismiss. The parties filed on January 24, 2024, a Joint Motion for entry of an Amended Scheduling Order, which the court granted by Order on February 1, 2024. The Defendant Midtown filed its Answer on January 28, 2024.

This list of pending cases and informative recent decisions is not exhaustive, but in addition to the cases cited previously and discussed *infra* may potentially have an impact on the study and implementation of MBE/WBE/DBE Programs, related legislation, implementation of the Federal DBE Program by state and local governments and public authorities and agencies, and other types of programs impacting participation of MBE/WBE/DBEs.

For example, there are other recent cases similar to *Faust v. Vilsack*, 21-cv.-548 (E.D. Wis.) and *Wynn v. Vilsack*, 3:21-cv-514 (M.D. Fla.) cited and discussed above, including a class action filed in *Miller v. Vilsack*, 2021 WL 11115194, 4:21-cv-595 (N.D. Tex. 2021), and separate lawsuits seeking to enjoin United States Department of Agriculture (USDA) officials from implementing loan-forgiveness program for farmers and ranchers under Section 1005 of the American Rescue Plan Act of 2021 (ARPA) by asserting eligibility to participate in program based solely on racial classifications violated equal protection. *Carpenter v. Vilsack*, 21-cv-103-F (D. Wyo.); *Holman v. Vilsack*, 1:21-cv-1085 (W.D. Tenn.); *Kent v. Vilsack*, 3:21-cv-540 (S.D. Ill.); *McKinney v. Vilsack*, 2:21-cv-212 (E.D. Tex.); *Joyner v. Vilsack*, 1:21-cv-1089 (W.D. Tenn.); *Dunlap v. Vilsack*, 2:21-cv-942 (D. Or.); *Rogers v. Vilsack*, 1:21-cv-1779 (D. Colo.); *Tiegs v. Vilsack*, 3:21-cv-147 (D.N.D.); *Nuest v. Vilsack*, 21-cv-1572 (D. Minn.).

Many of these cases had granted the federal Defendants Motions to Stay pending resolution of the class action challenge to Section 1005 of the American Rescue Plan Act of 2021 in the *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.) class action litigation.

As a result of the federal government's later repeal of ARPA Section 1005 and the subsequent Dismissal of the related Class Action in *Miller v. Vilsack*, the parties in many of these cases filed Stipulations of Dismissal, and the cases in September 2022 have been dismissed by the Courts.

Note: *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 143 S. Ct. 2141 (June 29, 2023)

In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 143 S. Ct. 2141 (June 29, 2023) ("*SFFA*"), the Supreme Court held unconstitutional under the Equal Protection Clause of the Fourteenth Amendment the admissions systems used by Harvard College and the University of North Carolina. The Court referenced, cited and applied the Supreme Court decisions in *Croson* and *Adarand,* including the strict scrutiny standard, to the university admissions systems in these cases.

It is noteworthy that subsequent to the Supreme Court decision in *SFFA v. Harvard et al.,* Attorney Generals from 13 states sent a letter, dated July 13, 2023, to "Fortune 100 CEOs" in which, among other statements, they urged businesses, to "immediately cease any unlawful race-based

quotas or preferences your company has adopted for its employment and contracting practices."

On July 19, 2023, Attorneys General from 20 states sent a letter to "Fortune 100 CEOs" in which they responded to and opposed the statements in the July 13, 2023 letter sent by the Attorneys General from the 13 states. The letter provides support for corporate efforts to recruit diverse workforces and create inclusive work environments, and states that these efforts and corporate diversity programs are legal and reduce corporate risk for claims of discrimination. Among the state Attorneys General signing the July 19, 2023 letter was the State of Minnesota Attorney General.

Ongoing review. The above represents a summary of the legal framework pertinent to the study and implementation of DBE/MBE/WBE programs, or race-, ethnicity-, or gender-neutral programs, and the implementation of the Federal DBE and ACDBE Programs by state and local government recipients of federal funds, including public agencies, commissions, and authorities. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.

D. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs and Implementation of the Federal DBE Program by State and Local Governments in the Eighth Circuit

1. *Mark One Electric Company, Inc. v. City of Kansas City, Missouri*, 2022 WL 3350525 (8th Cir. 2022)

In 2020, The court stated that Kansas City began restricting participation in its Minority Business Enterprises and Women's Business Enterprises Program to those entities whose owners satisfied a personal net worth limitation. Mark One Electric Co., a woman-owned business whose owner's personal net worth exceeded the limit, appealed the dismissal of its lawsuit challenging the Kansas City Program as unconstitutional because of the personal net worth limitation. The court held that under its precedent, the Program's personal net worth limitation is a valid narrow tailoring measure, and therefore the court affirmed the district court's dismissal.

In 2016, the court pointed out that the City conducted a disparity study to determine whether the MBE/WBE Program followed best practices for affirmative action programs and whether the Program would survive constitutional scrutiny. The 2016 Disparity Study analyzed data from 2008 to 2013 and provided quantitative and qualitative evidence of race and gender discrimination. The court said the study concluded that the City had a compelling interest in continuing the program because "minorities and women continue to suffer discriminatory barriers to full and fair access to [Kansas City] and private sector contracts."

The study also provided recommendations to ensure the program would be narrowly tailored, including: adding a personal net worth limitation like the net worth cap in the United States Department of Transportation (USDOT) Disadvantaged Business Enterprise (DBE) program.

The court stated the City enacted a new version of the MBE/WBE Program based on the 2016 Disparity Study on October 25, 2018. The amended Program incorporated a personal net worth limitation, as recommended by the study, which would require an entity to establish that its "owner's or, for businesses with multiple owners, each individual owner's personal net worth is equal to or less than the permissible personal net worth amount determined by the U.S. Department of Transportation to be applicable to its DBE program." See Kan. City, Mo. Code of General Ordinances ch. 3, art. IV, § 3-421(a)(34), (47)(2021).

On the day after the personal net worth limitation took effect, the court said, that Mark One Electric initiated an action against the City under 42 U.S.C. § 1983, challenging the personal net worth limitation. Mark One had been certified as a WBE since 1996, but based on the new personal net worth threshold, it would lose its certification despite otherwise meeting the requirements of the WBE Program.

Mark One, the court noted, acknowledged that, based on the 2016 Disparity Study, there was a strong basis in evidence for the City to take remedial action, but alleged the study's recommendation that the City consider adding a personal net worth limitation was not supported by either qualitative or quantitative analysis. Mark One, the court stated, claimed that the personal net worth limitation is not narrowly tailored to remedy past discrimination and that the program as a whole is not narrowly tailored because of the personal net worth limitation.

The court pointed out that Mark One asserted, "[T]he City has adopted an arbitrary and capricious re-definition of who qualifies as a women [sic] or minority and seeks to remedy a discrimination of which there is no evidence." According to Mark One, the personal net worth limitation

is “not specifically and narrowly framed to accomplish the city's purpose,” and therefore the program is unconstitutional.

The City moved to dismiss the complaint, arguing that the personal net worth limitation is a valid measure to narrowly tailor the MBE/WBE program. The district court granted the City's motion, finding that the personal net worth Limitation was permissible as a matter of law.

The court found that race-based affirmative action programs designed to remediate the effects of discrimination toward minority-owned subcontractors, such as Kansas City's, are subject to strict scrutiny, meaning that the program is constitutional “only if [it is] narrowly tailored to further compelling governmental interests.” (*Citing: Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.,* 345 F.3d 964, 968–69 (8th Cir. 2003)(*quoting Grutter v. Bollinger*, 539 U.S. 306, 326,(2003). The court pointed out that although Mark One is a woman-owned business and not a minority-owned business, neither party contests review of the Program under the strictest scrutiny.

The court stated the legal standard: “To survive strict scrutiny, the government must first articulate a legislative goal that is properly considered a compelling government interest,” such as stopping perpetuation of racial discrimination and remediating the effects of past discrimination in government contracting. (*citing Sherbrooke Turf,* 345 F.3d at 969. The City must “demonstrate a ‘strong basis in the evidence’ supporting its conclusion that race-based remedial action [is] necessary to further that interest.” *Id*. (*citing City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 500, (1989)). The court found that Mark One does not dispute that the City has a compelling interest in remedying the effects of race and gender discrimination on City contract opportunities for minority- and woman-owned businesses. And Mark One, the court said, has conceded the 2016 Disparity Study provides a strong basis in evidence for the MBE/WBE Program to further that interest.

Second, the City's program must be narrowly tailored, which requires that “the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose.” *Id. citing Sherbrooke*, at 971. The plaintiff, according to the court, has the burden to establish that an affirmative action program is not narrowly tailored. In determining whether a race-conscious remedy is narrowly tailored, the court held it looks at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties.” (*citing Sherbrook, at 971, and United States v. Paradise*, 480 U.S. 149, 171, 187, (1987)).

The court stated that Mark One attacked the personal net worth limitation from two angles. Mark One first argued that the personal net worth limitation in the City's Program should be independently assessed under strict scrutiny, separately from the Program as a whole, and asks the court to find the provision unenforceable through the Program's severability clause. Under strict scrutiny, Mark One argued, the personal net worth limitation is unconstitutional in its own right because it was implemented by the City without a strong basis in evidence and excludes a subset of women and minorities based on a classification unrelated to the discrimination MBEs and WBEs face.

The court found that Mark One offered no authority for the premise that an individual narrow tailoring measure which differentiates between individuals or businesses based on a nonsuspect classification, such as net worth, is subject to strict scrutiny in isolation. The court pointed out the MBE/WBE Program as a whole must be premised on a strong basis in evidence under strict scrutiny review. But, the court held the City is not required to provide a separate individual strong basis in evidence for the personal net worth limitation because this limitation, on its own, is subject only to rational basis review.

Mark One also challenged the overall narrow tailoring of the MBE/WBE Program, claiming that the personal net worth limitation makes the Program unconstitutional because it excludes MBEs and WBEs that have experienced discrimination. The court held that under its precedent, this argument is unavailing. The court said that it has previously found the USDOT DBE personal net worth limitation—the limitation the City adopted for the Program—to be a valid narrow tailoring measure that ensures flexibility in an affirmative action program and reduces the impact on third parties by introducing a race- and gender-neutral requirement for eligibility. *See Sherbrooke Turf,* 345 F.3d at 972–73 (finding the federal DBE program narrowly tailored on its face in part because "wealthy minority owners and wealthy minority-owned firms are excluded" through the personal net worth limitation, so "race is made relevant in the program, but it is not a determinative factor").

The court found that Mark One had not plausibly alleged that the $1.32 million personal net worth limitation in the City's MBE/WBE Program is different, or serves a distinguishable purpose, from the personal net worth limitation in the federal program such that it is not likewise a valid narrow tailoring measure here.

Mark One claimed that its exclusion from the Program despite its status as a woman-owned business shows that the Program is unlawful. The court noted that it did not minimize the fact that individuals and businesses may experience race- and gender-based discrimination in the marketplace regardless of wealth, and that a minority- or woman-owned enterprise may be excluded from the Program based solely on the owner's personal net worth, despite having experienced discrimination in its trade or industry and regardless of the revenue of the enterprise itself or the financial status of any of its minority and women employees.

But, the court found that the City does not have a constitutional obligation to make its Program as broad as may be legally permissible, so long as it directs its resources in a rational manner not motivated by a discriminatory purpose.

Though Mark One argued that the personal net worth limitation is "arbitrary and capricious because the city *chose to discriminate against* the very minorities and women its [MBE]/WBE Program was designed to help," the court stated there was no allegation in the operative complaint that the City was motivated by a discriminatory purpose when it implemented the personal net worth limitation.

The court concluded that under *Sherbrooke Turf,* 345 F.3d at 972-73, the City may choose to add this limitation in its Program as a rational, race and gender-neutral narrow tailoring measure.

2. *Sherbrooke Turf, Inc. v. Minnesota DOT*, and *Gross Seed Company v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004)

This case is instructive in its analysis of state DOT DBE-type programs and their evidentiary basis and implementation. This case is also instructive in its analysis of the narrowly tailored requirement for state DBE programs. In upholding the challenged Federal DBE Program at issue in this case the Eighth Circuit emphasized the race-, ethnicity- and gender-neutral elements, the ultimate flexibility of the Program, and the fact the Program was tied closely only to labor markets with identified discrimination.

In *Sherbrooke Turf, Inc. v. Minnesota DOT*, and *Gross Seed Company v. Nebraska Department of Roads,* the U.S. Court of Appeals for the Eighth Circuit upheld the constitutionality of the Federal DBE Program (49 CFR Part 26). The court held the Federal Program was narrowly tailored to remedy a compelling governmental interest. The court also held the

federal regulations governing the states' implementation of the Federal DBE Program were narrowly tailored, and the state DOT's implementation of the Federal DBE Program was narrowly tailored to serve a compelling government interest.

Sherbrooke and Gross Seed both contended that the Federal DBE Program on its face and as applied in Minnesota and Nebraska violated the Equal Protection component of the Fifth Amendment's Due Process Clause. The Eighth Circuit engaged in a review of the Federal DBE Program and the implementation of the Program by the Minnesota DOT and the Nebraska Department of Roads ("Nebraska DOR") under a strict scrutiny analysis and held that the Federal DBE Program was valid and constitutional and that the Minnesota DOT's and Nebraska DOR's implementation of the Program also was constitutional and valid. Applying the strict scrutiny analysis, the court first considered whether the Federal DBE Program established a compelling governmental interest, and found that it did. It concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand*, 228 F.3d at 1167-76. Although the contractors presented evidence that challenged the data, they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to participation in highway contracts. Thus, the court held they failed to meet their ultimate burden to prove that the DBE Program is unconstitutional on this ground.

Finally, Sherbrooke and Gross Seed argued that the Minnesota DOT and Nebraska DOR must independently satisfy the compelling governmental interest test aspect of strict scrutiny review. The government argued, and the district courts below agreed, that participating states need not independently meet the strict scrutiny standard because under the DBE Program the state must still comply with the DOT regulations. The Eighth Circuit held that this issue was not addressed by the Tenth Circuit in *Adarand*. The Eighth Circuit concluded that neither side's position is entirely sound.

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state's implementation becomes relevant to a reviewing court's strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

The court held that a reviewing court applying strict scrutiny must determine if the race-based measure is narrowly tailored. That is, whether the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. The contractors have the ultimate burden of establishing that the DBE Program is not narrowly tailored. *Id*. The compelling interest analysis focused on the record before Congress; the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies.

For determining whether a race-conscious remedy is narrowly tailored, the court looked at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. *Id*. Under the DBE Program, a state receiving federal highway funds must, on an annual basis, submit to USDOT an overall goal for DBE participation in its federally-funded highway contracts. *See*, 49 CFR § 26.45(f)(1). The overall goal "must be

based on demonstrable evidence" as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. 49 CFR § 26.45(b). The number may be adjusted upward to reflect the state's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *See*, 49 CFR § 26.45(d).

The state must meet the "maximum feasible portion" of its overall goal by race-neutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *See*, 49 CFR § 26.45(a), (c). If race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas. 49 CFR § 26.45(b). During the course of the year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods "[t]o ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination." 49 CFR § 26.51(f).

Absent bad faith administration of the program, a state's failure to achieve its overall goal will not be penalized. *See*, 49 CFR § 26.47. If the state meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual goal until it does not meet its prior overall goal for a year. *See*, 49 CFR § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. *See*, 49 CFR § 26.15(b).

Like the district courts below, the Eighth Circuit concluded that the USDOT regulations, on their face, satisfy the Supreme Court's narrowing tailoring requirements. First, the regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting. 345 F.3d at 972. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require serious good faith consideration of workable race-neutral alternatives. 345 F.3d at 971, *citing Grutter v. Bollinger*, 539 U.S. 306.

Second, the revised DBE program has substantial flexibility. A state may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds $750,000.00 cannot qualify as economically disadvantaged. *See*, 49 CFR § 26.67(b). Likewise, the DBE program contains built-in durational limits. 345 F.3d at 972. A state may terminate its DBE program if it meets or exceeds its annual overall goal through race-neutral means for two consecutive years. *Id*.; 49 CFR § 26.51(f)(3).

Third, the court found, the USDOT has tied the goals for DBE participation to the relevant labor markets. The regulations require states to set overall goals based upon the likely number of minority contractors that would have received federal assisted highway contracts but for the effects of past discrimination. *See*, 49 CFR § 26.45(c)-(d)(Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires states to focus on establishing realistic goals for DBE participation in the relevant contacting markets. *Id*. at 972.

Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in

the Program, but it is not a determinative factor. 345 F.3d at 973. For these reasons, the court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

Sherbrooke and Gross Seed also argued that the DBE Program as applied in Minnesota and Nebraska is not narrowly tailored. Under the Federal Program, states set their own goals, based on local market conditions; their goals are not imposed by the federal government; nor do recipients have to tie them to any uniform national percentage. 345 F.3d at 973, *citing* 64 Fed. Reg. at 5102.

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in a highway construction market. Of this number, 0.6 percent were minority-owned and 10.8 percent woman-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would be 34 percent higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11.4 percent to 11.6 percent. Based on the study, Minnesota DOT adopted an overall goal of 11.6 percent DBE participation for federally-assisted highway projects. Minnesota DOT predicted that it would need to meet 9 percent of that overall goal through race and gender-conscious means, based on the fact that DBE participation in State highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999 when its previous DBE Program was suspended by the injunction by the district court in an earlier decision in *Sherbrooke*. Minnesota DOT required each prime contract bidder to make a good faith effort to subcontract a prescribed portion of the project to DBEs, and determined that portion based on several individualized factors, including the availability of DBEs in the extent of subcontracting opportunities on the project.

The contractor presented evidence attacking the reliability of the data in the study, but it failed to establish that better data were available or that Minnesota DOT was otherwise unreasonable in undertaking this thorough analysis and relying on its results. *Id*. The precipitous drop in DBE participation when no race-conscious methods were employed, the court concluded, supports Minnesota DOT's conclusion that a substantial portion of its overall goal could not be met with race-neutral measures. *Id*. On that record, the court agreed with the district court that the revised DBE Program serves a compelling government interest and is narrowly tailored on its face and as applied in Minnesota.

In Nebraska, the Nebraska DOR commissioned a disparity study also to review availability and capability of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the mandatory 10 percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.7 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, Nebraska DOR set an overall goal of 9.95 percent DBE participation and predicted that 4.82 percent of this overall goal would have to be achieved by race-and-gender conscious means. The Nebraska DOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors. The Eighth Circuit concluded that Gross Seed, like Sherbrooke, failed to prove that the DBE Program is not narrowly tailored as applied in Nebraska. Therefore, the court affirmed the district courts' decisions in *Gross Seed* and *Sherbrooke* (*See* district court opinions discussed *infra*.).

3. *Geyer Signal, Inc. v. Minnesota, DOT*, 2014 WL 1309092 (D. Minn. March 31, 2014)

In *Geyer Signal, Inc., et al. v. Minnesota DOT, USDOT, Federal Highway Administration, et al.*, Case No. 11-CV-321, United States District Court for the District Court of Minnesota, the plaintiffs Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT (MnDOT) seeking a permanent injunction against enforcement and a declaration of unconstitutionality of the Federal DBE Program and Minnesota DOT's implementation of the DBE Program on its face and as applied. Geyer Signal sought an injunction against the Minnesota DOT prohibiting it from enforcing the DBE Program or, alternatively, from implementing the Program improperly; a declaratory judgment declaring that the DBE Program violates the Equal protection element of the Fifth Amendment of the United States Constitution and/or the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and is unconstitutional, or, in the alternative that Minnesota DOT's implementation of the Program is an unconstitutional violation of the Equal Protection Clause, and/or that the Program is void for vagueness; and other relief.

Procedural background. Plaintiff Geyer Signal is a small, family-owned business that performs traffic control work generally on road construction projects. Geyer Signal is a firm owned by a Caucasian male, who also is a named plaintiff.

Subsequent to the lawsuit filed by Geyer Signal, the USDOT and the Federal Highway Administration filed their Motion to permit them to intervene as defendants in this case. The Federal Defendant-Interveners requested intervention on the case in order to defend the constitutionality of the Federal DBE Program and the federal regulations at issue. The Federal Defendant-Interveners and the plaintiffs filed a Stipulation that the Federal Defendant-Interveners have the right to intervene and should be permitted to intervene in the matter, and consequently the plaintiffs did not contest the Federal Defendant-Intervener's Motion for Intervention. The Court issued an Order that the Stipulation of Intervention, agreeing that the Federal Defendant-Interveners may intervene in this lawsuit, be approved and that the Federal Defendant-Interveners are permitted to intervene in this case.

The Federal Defendants moved for summary judgment and the State defendants moved to dismiss, or in the alternative for summary judgment, arguing that the DBE Program on its face and as implemented by MnDOT is constitutional. The Court concluded that the plaintiffs, Geyer Signal and its white male owner, Kevin Kissner, raised no genuine issue of material fact with respect to the constitutionality of the DBE Program facially or as applied. Therefore, the Court granted the Federal Defendants and the State defendants' motions for summary judgment in their entirety.

Plaintiffs alleged that there is insufficient evidence of a compelling governmental interest to support a race based program for DBE use in the fields of traffic control or landscaping. (2014 WL 1309092 at *10) Additionally, plaintiffs alleged that the DBE Program is not narrowly tailored because it (1) treats the construction industry as monolithic, leading to an overconcentration of DBE participation in the areas of traffic signal and landscaping work; (2) allows recipients to set contract goals; and (3) sets goals based on the number of DBEs there are, not the amount of work those DBEs can actually perform. *Id.* *10. Plaintiffs also alleged that the DBE Program is unconstitutionally vague because it allows prime contractors to use bids from DBEs that are higher than the bids of non-DBEs, provided the increase in price is not unreasonable, without defining what increased costs are "reasonable." *Id*.

Constitutional claims. The Court states that the "heart of plaintiffs' claims is that the DBE Program and MnDOT's implementation of it are unconstitutional because the impact of curing discrimination in the

construction industry is overconcentrated in particular sub-categories of work." *Id.* at *11. The Court noted that because DBEs are, by definition, small businesses, plaintiffs contend they "simply cannot perform the vast majority of the types of work required for federally-funded MnDOT projects because they lack the financial resources and equipment necessary to conduct such work. *Id*.

As a result, plaintiffs claimed that DBEs only compete in certain small areas of MnDOT work, such as traffic control, trucking, and supply, but the DBE goals that prime contractors must meet are spread out over the entire contract. *Id*. Plaintiffs asserted that prime contractors are forced to disproportionately use DBEs in those small areas of work, and that non–DBEs in those areas of work are forced to bear the entire burden of "correcting discrimination," while the vast majority of non-DBEs in MnDOT contracting have essentially no DBE competition. *Id*.

Plaintiffs therefore argued that the DBE Program is not narrowly tailored because it means that any DBE goals are only being met through a few areas of work on construction projects, which burden non-DBEs in those sectors and do not alleviate any problems in other sectors. *Id.* at #11.

Plaintiffs brought two facial challenges to the Federal DBE Program. *Id*. Plaintiffs allege that the DBE Program is facially unconstitutional because it is "fatally prone to overconcentration" where DBE goals are met disproportionately in areas of work that require little overhead and capital. *Id*. at 11. Second, plaintiffs alleged that the DBE Program is unconstitutionally vague because it requires prime contractors to accept DBE bids even if the DBE bids are higher than those from non-DBEs, provided the increased cost is "reasonable" without defining a reasonable increase in cost. *Id*.

Plaintiffs also brought three as-applied challenges based on MnDOT's implementation of the DBE Program. *Id*. at 12. First, plaintiffs contended that MnDOT has unconstitutionally applied the DBE Program to its contracting because there is no evidence of discrimination against DBEs in government contracting in Minnesota. *Id*. Second, they contended that MnDOT has set impermissibly high goals for DBE participation. Finally, plaintiffs argued that to the extent the DBE Federal Program allows MnDOT to correct for overconcentration, it has failed to do so, rendering its implementation of the Program unconstitutional. *Id*.

Strict scrutiny. It is undisputed that strict scrutiny applied to the Court's evaluation of the Federal DBE Program, whether the challenge is facial or as - applied. *Id*. at *12. Under strict scrutiny, a "statute's race-based measures 'are constitutional only if they are narrowly tailored to further compelling governmental interests.'" *Id*. at *12, *quoting Grutter v. Bollinger,* 539 U.S. 306, 326 (2003).

The Court notes that the DBE Program also contains a gender conscious provision, a classification the Court says that would be subject to intermediate scrutiny. *Id*. at *12, at n.4. Because race is also used by the Federal DBE Program, however, the Program must ultimately meet strict scrutiny, and the Court therefore analyzes the entire Program for its compliance with strict scrutiny. *Id*.

Facial challenge based on overconcentration. The Court says that in order to prevail on a facial challenge, the plaintiff must establish that no set of circumstances exist under which the Federal DBE Program would be valid. *Id.* at *12. The Court states that plaintiffs bear the ultimate burden to prove that the DBE Program is unconstitutional. *Id* at *.

Compelling governmental interest. The Court points out that the Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government

contracting markets created by its disbursements. *Id*. *13, *quoting Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000). The plaintiffs did not dispute that remedying discrimination in federal transportation contracting is a compelling governmental interest. *Id*. at *13. In accessing the evidence offered in support of a finding of discrimination, the Court concluded that defendants have articulated a compelling interest underlying enactment of the DBE Program. *Id*.

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id*. at *13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id*. The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination. *Id*.

Congressional evidence of discrimination: disparity studies and barriers. Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. *Id*. at *13. But, the Court found that plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id*. *14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the Federal Defendants and find all of the flaws. *Id*. *14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id*. at *14. Based on these studies, the Federal Defendants' consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id*. at *6.

The Federal Defendants' consultant also described studies supporting the conclusion that there is credit discrimination against minority- and woman-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and woman-owned businesses in public contracting, and specifically found that discrimination existed in MnDOT contracting when no race-conscious efforts were utilized. *Id*. *6. The Court notes that Congress had considered a plethora of evidence documenting the continued presence of discrimination in transportation projects utilizing Federal dollars. *Id*. at *5.

The Court concluded that neither of the plaintiffs' contentions established that Congress lacked a substantial basis in the evidence to support its conclusion that race-based remedial action was necessary to address discrimination in public construction contracting. *Id*. at *14. The Court rejected plaintiffs' argument that because Congress found multiple forms of discrimination against minority- and woman-owned business, that evidence showed Congress failed to also find that such businesses specifically face discrimination in public contracting, or that such discrimination is not relevant to the effect that discrimination has on public contracting. *Id.*

The Court referenced the decision in *Adarand Constructors, Inc*. 228 F.3d at 1175-1176. In *Adarand*, the Court found evidence relevant to Congressional enactment of the DBE Program to include that both race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id*. at *14.

The Court, citing again with approval the decision in *Adarand Constructors, Inc.*, found the evidence presented by the federal government demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id*. at *14, *quoting, Adarand Constructors, Inc.* 228 F.3d at 1167-68. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination. *Id.* The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination. *Id*. Both kinds of discriminatory barriers preclude existing minority firms from effectively competing for public construction contracts. *Id*.

Accordingly, the Court found that Congress' consideration of discriminatory barriers to entry for DBEs as well as discrimination in existing public contracting establish a strong basis in the evidence for reauthorization of the Federal DBE Program. *Id*. at *14.

The court rejects Plaintiffs' general critique of evidence as failing to meet their burden of proof. The court held that plaintiffs' general critique of the methodology of the studies relied upon by the Federal Defendants is similarly insufficient to demonstrate that Congress lacked a substantial basis in the evidence. *Id*. at *14. The Court stated that the Eighth Circuit Court of Appeals has already rejected plaintiffs' argument that Congress was required to find specific evidence of discrimination in Minnesota in order to enact the national Program. *Id*. at *14.

Finally, the Court pointed out that plaintiffs have failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. *Id*. at *15. Thus, the Court concluded that plaintiffs failed to meet their ultimate burden to prove that the Federal DBE Program is unconstitutional on this ground. *Id*. at *15, *quoting Sherbrooke Turf, Inc.*, 345 F.3d at 971–73.

Therefore, the Court held that plaintiffs did not meet their burden of raising a genuine issue of material fact as to whether the government met its evidentiary burden in reauthorizing the DBE Federal Program, and granted summary judgment in favor of the Federal Defendants with respect to the government's compelling interest. *Id*. at *15.

Narrowly tailored. The Court states that several factors are examined in determining whether race-conscious remedies are narrowly tailored, and that numerous Federal Courts have already concluded that the DBE Federal Program is narrowly tailored. *Id*. at *15. Plaintiffs in this case did not dispute the various aspects of the Federal DBE Program that courts have previously found to demonstrate narrowly tailoring. *Id*. Instead, plaintiffs argue only that the Federal DBE Program is not narrowly tailored on its face because of overconcentration.

Overconcentration. Plaintiffs argued that if the recipients of federal funds use overall industry participation of minorities to set goals, yet limit actual DBE participation to only defined small businesses that are limited in the work they can perform, there is no way to avoid overconcentration of DBE participation in a few, limited areas of MnDOT work. *Id*. at *15. Plaintiffs asserted that small businesses cannot perform most of the types of work needed or necessary for large highway projects, and if they had the capital to do it, they would not be small businesses. *Id*. at *16. Therefore, plaintiffs argued the DBE Program will always be overconcentrated. *Id*.

The Court states that in order for plaintiffs to prevail on this facial challenge, plaintiffs must establish that the overconcentration it identifies is unconstitutional, and that there are no circumstances under

which the Federal DBE Program could be operated without overconcentration. *Id*. The Court concludes that plaintiffs' claim fails on the basis that there are circumstances under which the Federal DBE Program could be operated without overconcentration. *Id*.

First, the Court found that plaintiffs fail to establish that the DBE Program goals will always be fulfilled in a manner that creates overconcentration, because they misapprehend the nature of the goal setting mandated by the DBE Program. *Id*. at *16. The Court states that recipients set goals for DBE participation based on evidence of the availability of ready, willing and able DBEs to participate on DOT-assisted contracts. *Id*. The DBE Program, according to the Court, necessarily takes into account, when determining goals, that there are certain types of work that DBEs may never be able to perform because of the capital requirements. *Id*. In other words, if there is a type of work that no DBE can perform, there will be no demonstrable evidence of the availability of ready, willing and able DBEs in that type of work, and those non-existent DBEs will not be factored into the level of DBE participation that a locality would expect absent the effects of discrimination. *Id*.

Second, the Court found that even if the DBE Program could have the incidental effect of overconcentration in particular areas, the DBE Program facially provides ample mechanisms for a recipient of federal funds to address such a problem. *Id*. at *16. The Court notes that a recipient retains substantial flexibility in setting individual contract goals and specifically may consider the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. *Id*. If overconcentration presents itself as a problem, the Court points out that a recipient can alter contract goals to focus less on contracts that require work in an already overconcentrated area and instead involve other types of work where overconcentration of DBEs is not present. *Id*.

The federal regulations also require contractors to engage in good faith efforts that require breaking out the contract work items into economically feasible units to facilitate DBE participation. *Id*. Therefore, the Court found, the regulations anticipate the possible issue identified by plaintiffs and require prime contractors to subdivide projects that would otherwise typically require more capital or equipment than a single DBE can acquire. *Id.* Also, the Court, states that recipients may obtain waivers of the DBE Program's provisions pertaining to overall goals, contract goals, or good faith efforts, if, for example, local conditions of overconcentration threaten operation of the DBE Program. *Id*.

The Court also rejects plaintiffs claim that 49 CFR § 26.45(h), which provides that recipients are not allowed to subdivide their annual goals into "group-specific goals", but rather must provide for participation by all certified DBEs, as evidence that the DBE Program leads to overconcentration. *Id*. at *16. The Court notes that other courts have interpreted this provision to mean that recipients cannot apportion its DBE goal among different minority groups, and therefore the provision does not appear to prohibit recipients from identifying particular overconcentrated areas and remedying overconcentration in those areas. *Id*. at *16. And, even if the provision operated as plaintiffs suggested, that provision is subject to waiver and does not affect a recipient's ability to tailor specific contract goals to combat overconcentration. *Id*. at *16, n. 5.

The Court states with respect to overconcentration specifically, the federal regulations provide that recipients 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 field in which the recipient has determined that non-DBEs are unduly burdened. *Id*. at *17. All of these measures

could be used by recipients to shift DBEs from areas in which they are overconcentrated to other areas of work. *Id*. at *17.

Therefore, the Court held that because the DBE Program provides numerous avenues for recipients of federal funds to combat overconcentration, the Court concluded that plaintiffs' facial challenge to the Program fails, and granted the Federal Defendants' motion for summary judgment. *Id*.

Facial challenged based on vagueness. The Court held that plaintiffs could not maintain a facial challenge against the Federal DBE Program for vagueness, as their constitutional challenges to the Program are not based in the First Amendment. *Id*. at *17. The Court states that the Eighth Circuit Court of Appeals has held that courts need not consider facial vagueness challenges based upon constitutional grounds other than the First Amendment. *Id*.

The Court thus granted Federal Defendants' motion for summary judgment with respect to plaintiffs' facial claim for vagueness based on the allegation that the Federal DBE Program does not define "reasonable" for purposes of when a prime contractor is entitled to reject a DBEs' bid on the basis of price alone. *Id*.

As-applied challenges to MnDOT's DBE Program: MnDOT's program held narrowly tailored. Plaintiffs brought three as-applied challenges against MnDOT's implementation of the Federal DBE Program, alleging that MnDOT has failed to support its implementation of the Program with evidence of discrimination in its contracting, sets inappropriate goals for DBE participation, and has failed to respond to overconcentration in the traffic control industry. *Id*. at *17.

Alleged failure to find evidence of discrimination. The Court held that a state's implementation of the Federal DBE Program must be narrowly tailored. *Id*. at *18. To show that a state has violated the narrow tailoring requirement of the Federal DBE Program, the Court says a challenger must demonstrate that "better data was available" and the recipient of federal funds "was otherwise unreasonable in undertaking [its] thorough analysis and in relying on its results." *Id., quoting Sherbrook Turf, Inc.* at 973.

Plaintiffs' expert critiqued the statistical methods used and conclusions drawn by the consultant for MnDOT in finding that discrimination against DBEs exists in MnDOT contracting sufficient to support operation of the DBE Program. *Id*. at *18. Plaintiffs' expert also critiqued the measures of DBE availability employed by the MnDOT consultant and the fact he measured discrimination in both prime and subcontracting markets, instead of solely in subcontracting markets. *Id*.

Plaintiffs present no affirmative evidence that discrimination does not exist. The Court held that plaintiffs' disputes with MnDOT's conclusion that discrimination exists in public contracting are insufficient to establish that MnDOT's implementation of the Federal DBE Program is not narrowly tailored. *Id*. at *18. First, the Court found that it is insufficient to show that "data was susceptible to multiple interpretations," instead, plaintiffs must "present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts." *Id*. at *18, *quoting Sherbrooke Turf, Inc.*, 345 F.3d at 970. Here, the Court found, plaintiffs' expert has not presented affirmative evidence upon which the Court could conclude that no discrimination exists in Minnesota's public contracting. *Id*. at *18.

As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the mechanisms for goal setting. *Id*. at *18. The Court found that it would make little sense to separate prime contractor and subcontractor availability when DBEs will

also compete for prime contracts and any success will be reflected in the recipient's calculation of success in meeting the overall goal. *Id*. at *18, *quoting Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007). Because these factors are part of the federal regulations defining state goal setting that the Eighth Circuit Court of Appeals has already approved in assessing MnDOT's compliance with narrow tailoring in *Sherbrooke Turf*, the Court concluded these criticisms do not establish that MnDOT has violated the narrow tailoring requirement. *Id*. at *18.

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of narrow tailoring. *Id*. at *18. Accordingly, the Court granted the State defendants' motion for summary judgment with respect to this claim.

Alleged inappropriate goal setting. Plaintiffs second challenge was to the aspirational goals MnDOT has set for DBE performance between 2009 and 2015. *Id*. at *19. The Court found that the goal setting violations the plaintiffs alleged are not the types of violations that could reasonably be expected to recur. *Id*. Plaintiffs raised numerous arguments regarding the data and methodology used by MnDOT in setting its earlier goals. *Id*. But, plaintiffs did not dispute that every three years MnDOT conducts an entirely new analysis of discrimination in the relevant market and establishes new goals. *Id*. Therefore, disputes over the data collection and calculations used to support goals that are no longer in effect are moot. *Id*. Thus, the Court only considered plaintiffs' challenges to the 2013–2015 goals. *Id*.

Plaintiffs raised the same challenges to the 2013–2015 goals as it did to MnDOT's finding of discrimination, namely that the goals rely on multiple approaches to ascertain the availability of DBEs and rely on a measurement of discrimination that accounts for both prime and subcontracting markets. *Id*. at *19. Because these challenges identify only a different interpretation of the data and do not establish that MnDOT was unreasonable in relying on the outcome of the consultants' studies, plaintiffs have failed to demonstrate a material issue of fact related to MnDOT's narrow tailoring as it relates to goal setting. *Id*.

Alleged overconcentration in the traffic control market. Plaintiffs' final argument was that MnDOT's implementation of the DBE Program violates the Equal Protection Clause because MnDOT has failed to find overconcentration in the traffic control market and correct for such overconcentration. *Id*. at *20. MnDOT presented an expert report that reviewed four different industries into which plaintiffs' work falls based on NAICs codes that firms conducting traffic control-type work identify themselves by. *Id*. After conducting a disproportionality comparison, the consultant concluded that there was not statistically significant overconcentration of DBEs in plaintiffs' type of work.

Plaintiffs' expert found that there is overconcentration, but relied upon six other contractors that have previously bid on MnDOT contracts, which plaintiffs believe perform the same type of work as plaintiff. *Id*. at *20. But, the Court found plaintiffs have provided no authority for the proposition that the government must conform its implementation of the DBE Program to every individual business' self-assessment of what industry group they fall into and what other businesses are similar. *Id*.

The Court held that to require the State to respond to and adjust its calculations on account of such a challenge by a single business would place an impossible burden on the government because an individual business could always make an argument that some of the other entities in the work area the government has grouped it into are not alike. *Id*. at *20. This, the Court states, would require the government to run endless iterations of overconcentration analyses to satisfy each

business that non-DBEs are not being unduly burdened in its self-defined group, which would be quite burdensome. *Id*.

Because plaintiffs did not show that MnDOT's reliance on its overconcentration analysis using NAICs codes was unreasonable or that overconcentration exists in its type of work as defined by MnDOT, it has not established that MnDOT has violated narrow tailoring by failing to identify overconcentration or failing to address it. *Id*. at *20. Therefore, the Court granted the State defendants' motion for summary judgment with respect to this claim.

Claims Under 42 U.S.C. § 1981 and 42 U.S.C. § 2000. Because the Court concluded that MnDOT's actions are in compliance with the Federal DBE Program, its adherence to that Program cannot constitute a basis for a violation of § 1981. *Id*. at *21. In addition, because the Court concluded that plaintiffs failed to establish a violation of the Equal Protection Clause, it granted the defendants' motions for summary judgment on the 42 U.S.C. § 2000d claim.

Holding. Therefore, the Court granted the Federal Defendants' motion for summary judgment and the States' defendants' motion to dismiss/motion for summary judgment, and dismissed all the claims asserted by the plaintiffs.

4. *Thomas v. City of Saint Paul*, 526 F. Supp.2d 959 (D. Minn 2007), *affirmed*, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009)(unpublished opinion), *cert. denied*, 130 S.Ct. 408 (2009)

In *Thomas v. City of Saint Paul*, the plaintiffs are African American business owners who brought this lawsuit claiming that the City of Saint Paul, Minnesota discriminated against them in awarding publicly-funded contracts. The City moved for summary judgment, which the United States District Court granted and issued an order dismissing the plaintiff's lawsuit in December 2007.

The background of the case involves the adoption by the City of Saint Paul of a Vendor Outreach Program ("VOP") that was designed to assist minority and other small business owners in competing for City contracts. Plaintiffs were VOP-certified minority business owners. Plaintiffs contended that the City engaged in racially discriminatory illegal conduct in awarding City contracts for publicly-funded projects. Plaintiff Thomas claimed that the City denied him opportunities to work on projects because of his race arguing that the City failed to invite him to bid on certain projects, the City failed to award him contracts and the fact independent developers had not contracted with his company. 526 F. Supp.2d at 962. The City contended that Thomas was provided opportunities to bid for the City's work.

Plaintiff Brian Conover owned a trucking firm, and he claimed that none of his bids as a subcontractor on 22 different projects to various independent developers were accepted. 526 F. Supp.2d at 962. The court found that after years of discovery, plaintiff Conover offered no admissible evidence to support his claim, had not identified the subcontractors whose bids were accepted, and did not offer any comparison showing the accepted bid and the bid he submitted. *Id*. Plaintiff Conover also complained that he received bidding invitations only a few days before a bid was due, which did not allow him adequate time to prepare a competitive bid. *Id*. The court found, however, he failed to identify any particular project for which he had only a single day of bid, and did not identify any similarly situated person of any race who was afforded a longer period of time in which to submit a bid. *Id*. at 963. Plaintiff Newell claimed he submitted numerous bids on the City's projects all of which were rejected. *Id*. The court found, however, that he provided no specifics about why he did not receive the work. *Id*.

The VOP. Under the VOP, the City sets annual benchmarks or levels of participation for the targeted minorities groups. *Id*. at 963. The VOP prohibits quotas and imposes various "good faith" requirements on prime contractors who bid for City projects. *Id*. at 964. In particular, the VOP requires that when a prime contractor rejects a bid from a VOP-certified business, the contractor must give the City its basis for the rejection, and evidence that the rejection was justified. *Id*. The VOP further imposes obligations on the City with respect to vendor contracts. *Id*. The court found the City must seek where possible and lawful to award a portion of vendor contracts to VOP-certified businesses. *Id*. The City contract manager must solicit these bids by phone, advertisement in a local newspaper or other means. Where applicable, the contract manager may assist interested VOP participants in obtaining bonds, lines of credit or insurance required to perform under the contract. *Id*. The VOP ordinance provides that when the contract manager engages in one or more possible outreach efforts, he or she is in compliance with the ordinance. *Id*.

Analysis and Order of the Court. The district court found that the City is entitled to summary judgment because plaintiffs lack standing to bring these claims and that no genuine issue of material fact remains. *Id*. at 965. The court held that the plaintiffs had no standing to challenge the VOP because they failed to show they were deprived of an opportunity to compete, or that their inability to obtain any contract resulted from an act of discrimination. *Id*. The court found they failed to show any instance in which their race was a determinant in the denial of any contract. *Id*. at 966. As a result, the court held plaintiffs failed to demonstrate the City engaged in discriminatory conduct or policy which prevented plaintiffs from competing. *Id*. at 965-966.

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. *Id*. at 966. The court held the law does not require the City to voluntarily adopt "aggressive race-based affirmative action programs" in order to award specific groups publicly-funded contracts. *Id*. at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id*.

The court stated that the plaintiffs must identify a discriminatory policy in effect. *Id*. at 966. The court noted, for example, even assuming the City failed to give plaintiffs more than one day's notice to enter a bid, such a failure is not, per se, illegal. *Id*. The court found the plaintiffs offered no evidence that anyone else of any other race received an earlier notice, or that he was given this allegedly tardy notice as a result of his race. *Id*.

The court concluded that even if plaintiffs may not have been hired as a subcontractor to work for prime contractors receiving City contracts, these were independent developers and the City is not required to defend the alleged bad acts of others. *Id*. Therefore, the court held plaintiffs had no standing to challenge the VOP. *Id*. at 966.

Plaintiff's claims. The court found that even assuming plaintiffs possessed standing, they failed to establish facts which demonstrated a need for a trial, primarily because each theory of recovery is viable only if the City "intentionally" treated plaintiffs unfavorably because of their race. *Id*. at 967. The court held to establish a prima facie violation of the equal protection clause, there must be state action. *Id*. Plaintiffs must offer facts and evidence that constitute proof of "racially discriminatory intent or purpose." *Id*. at 967. Here, the court found that plaintiff failed to allege any single instance showing the City "intentionally" rejected VOP bids based on their race. *Id*.

The court also found that plaintiffs offered no evidence of a specific time when any one of them submitted the lowest bid for a contract or a

subcontract, or showed any case where their bids were rejected on the basis of race. *Id*. The court held the alleged failure to place minority contractors in a preferred position, without more, is insufficient to support a finding that the City failed to treat them equally based upon their race. *Id*.

The City rejected the plaintiff's claims of discrimination because the plaintiffs did not establish by evidence that the City "intentionally" rejected their bid due to race or that the City "intentionally" discriminated against these plaintiffs. *Id*. at 967-968. The court held that the plaintiffs did not establish a single instance showing the City deprived them of their rights, and the plaintiffs did not produce evidence of a "discriminatory motive." *Id*. at 968. The court concluded that plaintiffs had failed to show that the City's actions were "racially motivated." *Id*.

The Eighth Circuit Court of Appeals affirmed the ruling of the district court. *Thomas v. City of Saint Paul*, 2009 WL 777932 (8th Cir. 2009)(unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

5. *Sherbrooke Turf, Inc. v. Minnesota DOT*, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001)(unpublished opinion), affirmed 345 F.3d 964 (8th Cir. 2003)

Sherbrooke involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. *Sherbrooke* challenged the "federal affirmative action programs," the USDOT implementing regulations, and the Minnesota DOT's participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at *1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of "random inclusion" of various groups as being within the Program in connection with whether the Federal DBE Program is "narrowly tailored." The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the "potentially invidious effects of providing blanket benefits to minorities" in part, by restricting a state's DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota's DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota's overall DBE contracting goal.

Sherbrooke, 2001 WL 1502841 at *10 (D. Minn.). The court rejected plaintiff's claim that the Minnesota DOT must independently demonstrate how its program comports with *Croson's* strict scrutiny standard. The court held that the "Constitution calls out for different requirements when a state implements a federal affirmative action program, as opposed to those occasions when a state or locality initiates the Program." *Id*. at *11 (emphasis added). The court in a footnote ruled that TEA-21, being a federal program, "relieves the state of any burden to independently carry the strict scrutiny burden." *Id*. at

*11 n. 3. The court held states that establish DBE programs under TEA-21 and 49 CFR Part 26 are implementing a Congressionally-required program and not establishing a local one. As such, the court concluded that the state need not independently prove its DBE program meets the strict scrutiny standard. *Id*.

6. *Gross Seed Co. v. Nebraska Department of Roads*, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), *affirmed* 345 F.3d 964 (8th Cir. 2003)

The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 CFR Part 26) is constitutional. The court also held that the Nebraska Department of Roads ("Nebraska DOR") DBE Program adopted and implemented solely to comply with the Federal DBE Program is "approved" by the court because the court found that 49 CFR Part 26 and TEA-21 were constitutional.

The court concluded, similar to the court in *Sherbrooke Turf*, that the State of Nebraska did not need to independently establish that its program met the strict scrutiny requirement because the Federal DBE Program satisfied that requirement, and was therefore constitutional. The court did not engage in a thorough analysis or evaluation of the Nebraska DOR Program or its implementation of the Federal DBE Program. The court points out that the Nebraska DOR Program is adopted in compliance with the Federal DBE Program, and that the USDOT approved the use of Nebraska DOR's proposed DBE goals for fiscal year 2001, pending completion of USDOT's review of those goals. Significantly, however, the court in its findings does note that the Nebraska DOR established its overall goals for fiscal year 2001 based upon an independent availability/disparity study.

The court upheld the constitutionality of the Federal DBE Program by finding the evidence presented by the federal government and the history of the federal legislation are sufficient to demonstrate that past discrimination does exist "in the construction industry" and that racial and gender discrimination "within the construction industry" is sufficient to demonstrate a compelling interest in individual areas, such as highway construction. The court held that the Federal DBE Program was sufficiently "narrowly tailored" to satisfy a strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

7. *CCI Environmental, Inc., D.W. Mertzke Excavating & Trucking, Inc., Global Environmental, Inc., Premier Demolition, Inc., v. City of St. Louis, St. Louis Airport Authority, et al.*; U.S. District Court for the Eastern District of Missouri, Eastern Division; Case No: 4:19-cv-03099 (Complaint filed on November 14, 2019).

Plaintiffs allege this case arises from Defendant's MWBE Program Certification and Compliance Rules that require Native Americans to show at least one-quarter descent from a tribe recognized by the Federal Bureau of Indian Affairs. Plaintiffs claim that African Americans, Hispanic Americans, and Asian Americans are only required to "have origins" in any groups or peoples from certain parts of the world. This action alleges violations of Title VI of the Civil Rights Act of 1964, and the denial of equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution based on these definitions constituting per se discrimination. Plaintiffs seek injunctive relief and damages.

Plaintiffs are businesses that are certified as MBEs through the City of St. Louis. Plaintiffs allege they are a Minority Group Members because their owners are members of the American Indian tribe known as Northern Cherokee Nation. Plaintiffs allege the City defines Minority Group Members differently depending on one's racial classification. The

City's rules allow African Americans, Hispanic Americans and Asian Americans to meet the definition of a Minority Group Member by simply having "origins" within a group of peoples, whereas Native Americans are restricted to those persons who have cultural identification and can demonstrate membership in a tribe recognized by the Federal Bureau of Indian Affairs.

In 2019 Plaintiffs sought to renew their MBE certification with the City, which was denied. Plaintiffs allege the City decided to decertify the MBE status for each Plaintiff because their membership in the Northern Cherokee Nation disqualifies each company from Minority Group Membership because the Northern Cherokee Nation is not a federally recognized tribe by the Bureau of Indian Affairs. The Plaintiffs filed an administrative appeal, and the Administrative Review Officer upheld the decision to decertify Plaintiffs firms.

Plaintiffs allege the City's policy, on its face, treats Native Americans differently than African Americans, Hispanic Americans and Asian Americans on the basis of race because it allows those groups to simply claim an origin from one of those groups of people to qualify as a Minority Group Member, but does not allow Native Americans to qualify in the same way. Plaintiffs claim this is per se intentional discrimination by the City in violation of Title VI and the Fourteenth Amendment.

Plaintiffs also allege that Defendants subjected Plaintiffs to violations of their rights as other minority contractors in the determination of their minority status by using a different standard to determine whether they should qualify as a Minority Group Member under the City's MBE Certification Rules. Plaintiffs claim the City's policy and practice constitute disparate treatment of Native Americans.

Plaintiffs request judgment against the City and other Defendants for compensatory damages for business losses, loss of standing in their community, and damage to their reputation. Plaintiffs also seek punitive damages and injunctive relief requiring the City to strike its definition of a Minority Group Member and rewrite it in a non-discriminatory manner, reinstate the MBE certification of each Plaintiff, and for attorney fees under Title VI and 42 U.S.C Section 1988.

The Complaint was filed on November 14, 2019, followed by a First Amended Complaint. Plaintiffs filed on February 11, 2020, a Motion for Preliminary Injunction seeking to have a hearing on their Complaint, and to order the City to reinstate the application or MBE certification of the Plaintiffs.

The court issued a Memorandum and Order, dated July 27, 2020, which provides the Motion for Preliminary Injunction is denied as withdrawn by the Plaintiff and the Joint Motion to Amend a Case Management Order is Granted.

The parties filed cross-motions for summary judgment in August 2020 and reply briefs are due in September 2020. Plaintiffs and Defendants filed their Motions for Summary Judgment on August 5, 2020. The court on September 14, 2020 issued an order over the opposition of the parties referring the case to mediation "immediately," with mediation to be concluded by January 11, 2021. The court also held that the pending cross-motions for summary judgment will be denied without prejudice to being refiled only upon conclusion of mediation if the case has not settled.

The court in April 2021 issued an Order dismissing this case based on a settlement and consent judgment. The City adopted new rules pertaining to MBE/WBE certification. The City also agreed for this case only to a rebuttable presumption that the plaintiffs in the case are members of a tribe that are Native Americans and socially and economically disadvantaged subject to the City reserving the right to rebut the presumption.

In addition, the City agreed that it will pay plaintiffs $15000 in attorney's fees, and related orders. The City agreed that it will use best efforts to process Plaintiffs' certification applications and will provide a decision on each application by August 2, 2021. If the Plaintiffs are not certified as an MBE under the revised October 2020 rules, Plaintiffs reserved their right to pursue all claims relating to the decision.

E. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs in Other Jurisdictions

a. Recent Decisions in Federal Circuit Courts of Appeal

1. *H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al.*, 615 F.3d 233 (4th Cir. 2010)

The State of North Carolina enacted statutory legislation that required prime contractors to engage in good faith efforts to satisfy participation goals for minority and women subcontractors on state-funded projects (See facts as detailed in the decision of the United States District Court for the Eastern District of North Carolina discussed below.). The plaintiff, a prime contractor, brought this action after being denied a contract because of its failure to demonstrate good faith efforts to meet the participation goals set on a particular contract that it was seeking an award to perform work with the North Carolina Department of Transportation ("NCDOT"). Plaintiff asserted that the participation goals violated the Equal Protection Clause and sought injunctive relief and money damages.

After a bench trial, the district court held the challenged statutory scheme constitutional both on its face and as applied, and the plaintiff prime contractor appealed. 615 F.3d 233 at 236. The Court of Appeals held that the State did not meet its burden of proof in all respects to uphold the validity of the state legislation. But, the Court agreed with the district court that the State produced a strong basis in evidence justifying the statutory scheme on its face, and as applied to African American and Native American subcontractors, and that the State demonstrated that the legislative scheme is narrowly tailored to serve its compelling interest in remedying discrimination against these racial groups. The Court thus affirmed the decision of the district court in part, reversed it in part and remanded for further proceedings consistent with the opinion. *Id*.

The Court found that the North Carolina statutory scheme "largely mirrored the federal Disadvantaged Business Enterprise ("DBE") program, with which every state must comply in awarding highway construction contracts that utilize federal funds." 615 F.3d 233 at 236. The Court also noted that federal courts of appeal "have uniformly upheld the Federal DBE Program against equal-protection challenges." *Id*., at footnote 1, *citing*, *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina's highway construction industry. The study, according to the Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F.3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4 and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. *Id*.

First, the amended statute expressly conditions implementation of any participation goals on the findings of the 2004 study. Second, the amended statute eliminates the 5 and 10 percent annual goals that were set in the predecessor statute. 615 F.3d 233 at 238-239. Instead, as amended, the statute requires the NCDOT to "establish annual aspirational goals, not mandatory goals, … for the overall participation in contracts by disadvantaged minority-owned and woman-owned businesses … [that] shall not be applied rigidly on specific contracts or projects." *Id*. at 239, *quoting*, N.C. Gen.Stat. § 136-28.4(b)(2010). The

statute further mandates that the NCDOT set "contract-specific goals or project-specific goals … for each disadvantaged minority-owned and women-owned business category that has demonstrated significant disparity in contract utilization" based on availability, as determined by the study. *Id*.

Third, the amended statute narrowed the definition of "minority" to encompass only those groups that have suffered discrimination. *Id*. at 239. The amended statute replaced a list of defined minorities to any certain groups by defining "minority" as "only those racial or ethnicity classifications identified by [the study] … that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department." *Id*. at 239 *quoting* section 136-28.4(c)(2)(2010).

Fourth, the amended statute required the NCDOT to reevaluate the Program over time and respond to changing conditions. 615 F.3d 233 at 239. Accordingly, the NCDOT must conduct a study similar to the 2004 study at least every five years. *Id*. § 136-28.4(b). Finally, the amended statute contained a sunset provision which was set to expire on August 31, 2009, but the General Assembly subsequently extended the sunset provision to August 31, 2010. *Id*. Section 136-28.4(e)(2010).

The Court also noted that the statute required only good faith efforts by the prime contractors to utilize subcontractors, and that the good faith requirement, the Court found, proved permissive in practice: prime contractors satisfied the requirement in 98.5 percent of cases, failing to do so in only 13 of 878 attempts. 615 F.3d 233 at 239.

Strict scrutiny. The Court stated the strict scrutiny standard was applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically "fatal in fact." 615 F.3d 233 at 241. The Court pointed out that "[t]he 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." *Id*. at 241 *quoting Alexander v. Estepp*, 95 F.3d 312, 315 (4th Cir. 1996). In so acting, a governmental entity must demonstrate it had a compelling interest in "remedying the effects of past or present racial discrimination." *Id*., *quoting Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

Thus, the Court found that to justify a race-conscious measure, a state must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary. 615 F.3d 233 at 241 *quoting*, *Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion).

The Court significantly noted that: "There is no 'precise mathematical formula to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark.'" 615 F.3d 233 at 241, *quoting Rothe Dev. Corp. v. Department of Defense,* 545 F.3d 1023, 1049 (Fed.Cir. 2008). The Court stated that the sufficiency of the State's evidence of discrimination "must be evaluated on a case-by-case basis." *Id*. at 241. (internal quotation marks omitted).

The Court held that a state "need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary. 615 F.3d 233 at 241, *citing Concrete Works*, 321 F.3d at 958. "Instead, a state may meet its burden by relying on "a significant statistical disparity" between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors. *Id*. at 241, *citing Croson*, 488 U.S. at 509 (plurality opinion). The Court stated that we "further require that such evidence be 'corroborated by significant anecdotal

evidence of racial discrimination.'" *Id*. at 241, *quoting Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993).

The Court pointed out that those challenging race-based remedial measures must "introduce credible, particularized evidence to rebut" the state's showing of a strong basis in evidence for the necessity for remedial action. *Id*. at 241-242, *citing Concrete Works*, 321 F.3d at 959. Challengers may offer a neutral explanation for the state's evidence, present contrasting statistical data, or demonstrate that the evidence is flawed, insignificant, or not actionable. *Id*. at 242 (citations omitted). However, the Court stated "that mere speculation that the state's evidence is insufficient or methodologically flawed does not suffice to rebut a state's showing. *Id*. at 242, *citing Concrete Works*, 321 F.3d at 991.

The Court held that to satisfy strict scrutiny, the state's statutory scheme must also be "narrowly tailored" to serve the state's compelling interest in not financing private discrimination with public funds. 615 F.3d 233 at 242, *citing Alexander*, 95 F.3d at 315 (*citing Adarand*, 515 U.S. at 227).

Intermediate scrutiny. The Court held that courts apply "intermediate scrutiny" to statutes that classify on the basis of gender. *Id*. at 242. The Court found that a defender of a statute that classifies on the basis of gender meets this intermediate scrutiny burden "by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id*., *quoting Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). The Court noted that intermediate scrutiny requires less of a showing than does "the most exacting" strict scrutiny standard of review. *Id*. at 242. The Court found that its "sister circuits" provide guidance in formulating a governing evidentiary standard for intermediate scrutiny. These courts agree that such a measure "can rest safely on something less than the 'strong basis in evidence' required to bear the weight of a race- or ethnicity-conscious program." *Id*. at 242, *quoting Engineering Contractors*, 122 F.3d at 909 (other citations omitted).

In defining what constitutes "something less" than a 'strong basis in evidence,' the courts, … also agree that the party defending the statute must 'present [ ] sufficient probative evidence in support of its stated rationale for enacting a gender preference, *i.e.*,…the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations." 615 F.3d 233 at 242 *quoting Engineering Contractors*, 122 F.3d at 910 and *Concrete Works*, 321 F.3d at 959. The gender-based measures must be based on "reasoned analysis rather than on the mechanical application of traditional, often inaccurate, assumptions." *Id*. at 242 *quoting Hogan*, 458 U.S. at 726.

Plaintiff's burden. The Court found that when a plaintiff alleges that a statute violates the Equal Protection Clause as applied and on its face, the plaintiff bears a heavy burden. In its facial challenge, the Court held that a plaintiff "has a very heavy burden to carry, and must show that [a statutory scheme] cannot operate constitutionally under any circumstance." *Id*. at 243, *quoting West Virginia v. U.S. Department of Health & Human Services*, 289 F.3d 281, 292 (4th Cir. 2002).

Statistical evidence. The Court examined the State's statistical evidence of discrimination in public-sector subcontracting, including its disparity evidence and regression analysis. The Court noted that the statistical analysis analyzed the difference or disparity between the amount of subcontracting dollars minority- and woman-owned businesses actually won in a market and the amount of subcontracting dollars they would be expected to win given their presence in that market. 615 F.3d 233 at 243. The Court found that the study grounded its analysis in the

"disparity index," which measures the participation of a given racial, ethnic, or gender group engaged in subcontracting. *Id*. In calculating a disparity index, the study divided the percentage of total subcontracting dollars that a particular group won by the percent that group represents in the available labor pool, and multiplied the result by 100. *Id*. The closer the resulting index is to 100, the greater that group's participation. *Id*.

The Court held that after *Croson*, a number of our sister circuits have recognized the utility of the disparity index in determining statistical disparities in the utilization of minority- and woman-owned businesses. *Id*. at 243-244 (Citations to multiple federal circuit court decisions omitted.) The Court also found that generally "courts consider a disparity index lower than 80 as an indication of discrimination." *Id*. at 244. Accordingly, the study considered only a disparity index lower than 80 as warranting further investigation. *Id*.

The Court pointed out that after calculating the disparity index for each relevant racial or gender group, the consultant tested for the statistical significance of the results by conducting standard deviation analysis through the use of t-tests. The Court noted that standard deviation analysis "describes the probability that the measured disparity is the result of mere chance." 615 F.3d 233 at 244, *quoting Eng'g Contractors*, 122 F.3d at 914. The consultant considered the finding of two standard deviations to demonstrate "with 95 percent certainty that disparity, as represented by either overutilization or underutilization, is actually present." *Id*., *citing Eng'g Contractors*, 122 F.3d at 914.

The study analyzed the participation of minority and women subcontractors in construction contracts awarded and managed from the central NCDOT office in Raleigh, North Carolina. 615 F.3d 233 at 244. To determine utilization of minority and women subcontractors, the consultant developed a master list of contracts mainly from State-maintained electronic databases and hard copy files; then selected from that list a statistically valid sample of contracts, and calculated the percentage of subcontracting dollars awarded to minority- and woman-owned businesses during the 5-year period ending in June 2003. (The study was published in 2004). *Id*. at 244.

The Court found that the use of data for centrally-awarded contracts was sufficient for its analysis. It was noted that data from construction contracts awarded and managed from the NCDOT divisions across the state and from preconstruction contracts, which involve work from engineering firms and architectural firms on the design of highways, was incomplete and not accurate. 615 F.3d 233 at 244, n.6. This data was not relied upon in forming the opinions relating to the study. *Id*. at 244, n. 6.

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts. 615 F.3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant that prime contractors are qualified to perform subcontracting work and often do perform such work. *Id*. at 245. The Court also noted that the consultant submitted its master list to the NCDOT for verification. *Id*. at 245.

Based on the utilization and availability figures, the study prepared the disparity analysis comparing the utilization based on the percentage of subcontracting dollars over the five year period, determining the availability in numbers of firms and their percentage of the labor pool, a disparity index which is the percentage of utilization in dollars divided

by the percentage of availability multiplied by 100, and a T Value. 615 F.3d 233 at 245.

The Court concluded that the figures demonstrated prime contractors underutilized all of the minority subcontractor classifications on state-funded construction contracts during the study period. 615 F.3d 233 245. The disparity index for each group was less than 80 and, thus, the Court found warranted further investigation. *Id*. The t-test results, however, demonstrated marked underutilization only of African American and Native American subcontractors. *Id*. For African Americans the t-value fell outside of two standard deviations from the mean and, therefore, was statistically significant at a 95 percent confidence level. *Id*. The Court found there was at least a 95 percent probability that prime contractors' underutilization of African American subcontractors was *not* the result of mere chance. *Id*.

For Native American subcontractors, the t-value of 1.41 was significant at a confidence level of approximately 85 percent. 615 F.3d 233 at 245. The t-values for Hispanic American and Asian American subcontractors, demonstrated significance at a confidence level of approximately 60 percent. The disparity index for women subcontractors found that they were overutilized during the study period. The overutilization was statistically significant at a 95 percent confidence level. *Id*.

To corroborate the disparity study, the consultant conducted a regression analysis studying the influence of certain company and business characteristics – with a particular focus on owner race and gender – on a firm's gross revenues. 615 F.3d 233 at 246. The consultant obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the NCDOT. The survey pool consisted of a random sample of such firms. *Id*.

The consultant used the firms' gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender. 615 F.3d 233 at 246. The analysis revealed that minority and women ownership universally had a negative effect on revenue, and African American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. *Id*. These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. *Id*.

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data – reflecting the number of subcontractors that actually bid on Department subcontracts – estimates availability better than "vendor data." 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. *Id*. The Court found that the plaintiff's expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study's availability estimate was inadequate. *Id*. at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state's evidence," and that the plaintiff Rowe presented no viable alternative for determining availability. *Id*. at 246-247, *citing Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003).

The Court also rejected the plaintiff's argument that minority subcontractors participated on state-funded projects at a level consistent with their availability in the relevant labor pool, based on the state's response that evidence as to the *number* of minority subcontractors working with state-funded projects does not effectively rebut the evidence of discrimination in terms of subcontracting *dollars*. 615 F.3d 233 at 247. The State pointed to evidence indicating that prime contractors used minority businesses for low-value work in order to comply with the goals, and that African American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience. *Id*. The Court concluded plaintiff did not offer any contrary evidence. *Id*.

The Court found that the State bolstered its position by presenting evidence that minority subcontractors have the capacity to perform higher-value work. 615 F.3d 233 at 247. The study concluded, based on a sample of subcontracts and reports of annual firm revenue, that exclusion of minority subcontractors from contracts under $500,000 was not a function of capacity. *Id*. at 247. Further, the State showed that over 90 percent of the NCDOT's subcontracts were valued at $500,000 or less, and that capacity constraints do not operate with the same force on subcontracts as they may on prime contracts because subcontracts tend to be relatively small. *Id*. at 247. The Court pointed out that the Court in *Rothe II*, 545 F.3d at 1042-45, faulted disparity analyses of total construction dollars, including prime contracts, for failing to account for the relative capacity of firms in that case. *Id*. at 247.

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program's suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff's argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F.3d 233 at 247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors – nearly 38 percent – "surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors' reduced utilization of these groups during the suspension." *Id*. at 248, *citing Adarand v. Slater*, 228 F.3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued "strongly supports the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.") The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id*. at 248.

Anecdotal evidence. The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the anecdotal evidence showed an informal "good old boy" network of white contractors that discriminated against minority subcontractors. 615 F.3d 233 at 248. The Court noted that three-quarters of African American respondents to the telephone survey agreed that an informal network of prime and subcontractors existed in the State, as did the majority of other minorities, that more than half of African American respondents believed the network excluded their companies from bidding or awarding a contract as did many of the other minorities. *Id*. at 248. The Court found that nearly half of nonminority male respondents corroborated the existence of an informal network, however, only 17 percent of them believed that the network excluded their companies from bidding or winning contracts. *Id*.

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and

performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire minority firms. 615 F.3d 233 at 248. In addition, the anecdotal evidence showed African American and Native American respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. *Id*. at 248. The Court found that interview and focus-group responses echoed and underscored these reports. *Id*.

The anecdotal evidence indicated that prime contractors already know who they will use on the contract before they solicit bids: that the "good old boy network" affects business because prime contractors just pick up the phone and call their buddies, which excludes others from that market completely; that prime contractors prefer to use other less qualified minority-owned firms to avoid subcontracting with African American-owned firms; and that prime contractors use their preferred subcontractor regardless of the bid price. 615 F.3d 233 at 248-249. Several minority subcontractors reported that prime contractors do not treat minority firms fairly, pointing to instances in which prime contractors solicited quotes the day before bids were due, did not respond to bids from minority subcontractors, refused to negotiate prices with them, or gave minority subcontractors insufficient information regarding the project. *Id*. at 249.

The Court rejected the plaintiffs' contention that the anecdotal data was flawed because the study did not verify the anecdotal data and that the consultant oversampled minority subcontractors in collecting the data. The Court stated that the plaintiffs offered no rationale as to why a fact finder could not rely on the State's "unverified" anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot-be verified because it "is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions." 615 F.3d 233 at 249, *quoting Concrete Works*, 321 F.3d at 989.

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. *Id*. at 249. The Court rejected plaintiffs' argument that the study oversampled representatives from minority groups, and found that surveying more non-minority men would not have advanced the inquiry. *Id*. at 249. It was noted that the samples of the minority groups were randomly selected. *Id*. The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. *Id*. at 249.

Strong basis in evidence that the minority participation goals were necessary to remedy discrimination. The Court held that the State presented a "strong basis in evidence" for its conclusion that minority participation goals were necessary to remedy discrimination against African American and Native American subcontractors." 615 F.3d 233 at 250. Therefore, the Court held that the State satisfied the strict scrutiny test. The Court found that the State's data demonstrated that prime contractors grossly underutilized African American and Native American subcontractors in public sector subcontracting during the study. *Id*. at 250. The Court noted that these findings have particular resonance because since 1983, North Carolina has encouraged minority participation in state-funded highway projects, and yet African American and Native American subcontractors continue to be underutilized on such projects. *Id.* at 250.

In addition, the Court found the disparity index in the study demonstrated statistically significant underutilization of African American subcontractors at a 95 percent confidence level, and of Native American subcontractors at a confidence level of approximately 85 percent. 615 F.3d 233 at 250. The Court concluded the State bolstered the disparity evidence with regression analysis demonstrating that

African American ownership correlated with a significant, negative impact on firm revenue, and demonstrated there was a dramatic decline in the utilization of minority subcontractors during the suspension of the program in the 1990s. *Id*.

Thus, the Court held the State's evidence showing a gross statistical disparity between the availability of qualified American and Native American subcontractors and the amount of subcontracting dollars they win on public sector contracts established the necessary statistical foundation for upholding the minority participation goals with respect to these groups. 615 F.3d 233 at 250. The Court then found that the State's anecdotal evidence of discrimination against these two groups sufficiently supplemented the State's statistical showing. *Id*. The survey in the study exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors. *Id*. at 251. The Court held that the State could conclude with good reason that such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action. *Id*. The Court found the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the study. *Id*. at 251. Thus, the Court held that the State presented substantial statistical evidence of gross disparity, corroborated by "disturbing" anecdotal evidence.

The Court held in circumstances like these, the Supreme Court has made it abundantly clear a state can remedy a public contracting system that withholds opportunities from minority groups because of their race. 615 F.3d 233 at 251-252.

Narrowly tailored. The Court then addressed whether the North Carolina statutory scheme was narrowly tailored to achieve the State's compelling interest in remedying discrimination against African American and Native American subcontractors in public-sector subcontracting. The following factors were considered in determining whether the statutory scheme was narrowly tailored.

Neutral measures. The Court held that narrowly tailoring requires "serious, good faith consideration of workable race-neutral alternatives," but a state need not "exhaust [ ] … every conceivable race-neutral alternative." 615 F.3d 233 at 252 *quoting Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the study details numerous alternative race-neutral measures aimed at enhancing the development and competitiveness of small or otherwise disadvantaged businesses in North Carolina. *Id*. at 252. The Court pointed out various race-neutral alternatives and measures, including a Small Business Enterprise Program; waiving institutional barriers of bonding and licensing requirements on certain small business contracts of $500,000 or less; and the Department contracts for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development. *Id*. at 252.

The Court found that plaintiff identified no viable race-neutral alternatives that North Carolina had failed to consider and adopt. The Court also found that the State had undertaken most of the race-neutral alternatives identified by USDOT in its regulations governing the Federal DBE Program. 615 F.3d 233 at 252, *citing* 49 CFR § 26.51(b). The Court concluded that the State gave serious good faith consideration to race-neutral alternatives prior to adopting the statutory scheme. *Id*.

The Court concluded that despite these race-neutral efforts, the study demonstrated disparities continue to exist in the utilization of African American and Native American subcontractors in state-funded highway construction subcontracting, and that these "persistent disparities indicate the necessity of a race-conscious remedy." 615 F.3d 233 at 252.

Duration. The Court agreed with the district court that the program was narrowly tailored in that it set a specific expiration date and required a new disparity study every five years. 615 F.3d 233 at 253. The Court found that the program's inherent time limit and provisions requiring regular reevaluation ensure it is carefully designed to endure only until the discriminatory impact has been eliminated. *Id*. at 253, *citing Adarand Constructors v. Slater*, 228 F.3d at 1179 (*quoting United States v. Paradise*, 480 U.S. 149, 178 (1987)).

Program's goals related to percentage of minority subcontractors. The Court concluded that the State had demonstrated that the Program's participation goals are related to the percentage of minority subcontractors in the relevant markets in the State. 615 F.3d 233 at 253. The Court found that the NCDOT had taken concrete steps to ensure that these goals accurately reflect the availability of minority-owned businesses on a project-by-project basis. *Id.*

Flexibility. The Court held that the Program was flexible and thus satisfied this indicator of narrow tailoring. 615 F.3d 233 at 253. The Program contemplated a waiver of project-specific goals when prime contractors make good faith efforts to meet those goals, and that the good faith efforts essentially require only that the prime contractor solicit and consider bids from minorities. *Id*. The State does not require or expect the prime contractor to accept any bid from an unqualified bidder, or any bid that is not the lowest bid. *Id*. The Court found there was a lenient standard and flexibility of the "good faith" requirement, and noted the evidence showed only 13 of 878 good faith submissions failed to demonstrate good faith efforts. *Id*.

Burden on non-MWBE/DBEs. The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at 254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. *Id.*

Overinclusive. The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. *Id.*

In sum, the Court held that the statutory scheme is narrowly tailored to achieve the State's compelling interest in remedying discrimination in public-sector subcontracting against African American and Native American subcontractors. *Id*. at 254.

Woman-owned businesses overutilized. The study's public-sector disparity analysis demonstrated that woman-owned businesses won far more than their expected share of subcontracting dollars during the study period. 615 F.3d 233 at 254. In other words, the Court concluded that prime contractors substantially overutilized women subcontractors on public road construction projects. *Id*. The Court found the public-sector evidence did not evince the "exceedingly persuasive justification" the Supreme Court requires. *Id.* at 255.

The Court noted that the State relied heavily on private-sector data from the study attempting to demonstrate that prime contractors significantly underutilized women subcontractors in the general

construction industry statewide and in the Charlotte, North Carolina area. 615 F.3d 233 at 255. However, because the study did not provide a t-test analysis on the private-sector disparity figures to calculate statistical significance, the Court could not determine whether this private underutilization was "the result of mere chance." *Id*. at 255. The Court found troubling the "evidentiary gap" that there was no evidence indicating the extent to which woman-owned businesses competing on public-sector road projects vied for private-sector subcontracts in the general construction industry. *Id*. at 255. The Court also found that the State did not present any anecdotal evidence indicating that women subcontractors successfully bidding on State contracts faced private-sector discrimination. *Id*. In addition, the Court found missing any evidence prime contractors that discriminate against women subcontractors in the private sector nevertheless win public-sector contracts. *Id*.

The Court pointed out that it did not suggest that the proponent of a gender-conscious program "must always tie private discrimination to public action." 615 F.3d 233 at 255, n. 11. But, the Court held where, as here, there existed substantial probative evidence of overutilization in the relevant public sector, a state must present something more than generalized private-sector data unsupported by compelling anecdotal evidence to justify a gender-conscious program. *Id*. at 255, n. 11.

Moreover, the Court found the state failed to establish the amount of overlap between general construction and road construction subcontracting. 615 F.3d 233 at 256. The Court said that the dearth of evidence as to the correlation between public road construction subcontracting and private general construction subcontracting severely limits the private data's probative value in this case. *Id*.

Thus, the Court held that the State could not overcome the strong evidence of overutilization in the public sector in terms of gender participation goals, and that the proffered private-sector data failed to establish discrimination in the particular field in question. 615 F.3d 233 at 256. Further, the anecdotal evidence, the Court concluded, indicated that most women subcontractors do not experience discrimination. *Id*. Thus, the Court held that the State failed to present sufficient evidence to support the Program's current inclusion of women subcontractors in setting participation goals. *Id*.

Holding. The Court held that the state legislature had crafted legislation that withstood the constitutional scrutiny. 615 F.3d 233 at 257. The Court concluded that in light of the statutory scheme's flexibility and responsiveness to the realities of the marketplace, and given the State's strong evidence of discrimination against African American and Native American subcontractors in public-sector subcontracting, the State's application of the statute to these groups is constitutional. *Id.* at 257. However, the Court also held that because the State failed to justify its application of the statutory scheme to women, Asian American, and Hispanic American subcontractors, the Court found those applications were not constitutional.

Therefore, the Court affirmed the judgment of the district court with regard to the facial validity of the statute, and with regard to its application to African American and Native American subcontractors. 615 F.3d 233 at 258. The Court reversed the district court's judgment insofar as it upheld the constitutionality of the state legislature as applied to women, Asian American and Hispanic American subcontractors. *Id*. The Court thus remanded the case to the district court to fashion an appropriate remedy consistent with the opinion. *Id*.

Concurring opinions. It should be pointed out that there were two concurring opinions by the three Judge panel: one judge concurred in the judgment, and the other judge concurred fully in the majority opinion and the judgment.

2. *Jana-Rock Construction, Inc. v. New York State Dept. of Economic Development*, 438 F.3d 195 (2d Cir. 2006)

This recent case is instructive in connection with the determination of the groups that may be included in an MBE/WBE-type program, and the standard of analysis utilized to evaluate a local government's non-inclusion of certain groups. In this case, the Second Circuit Court of Appeals held racial classifications that are challenged as "under-inclusive" (*i.e.*, those that exclude persons from a particular racial classification) are subject to a "rational basis" review, not strict scrutiny.

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the USDOT regulations, 49 CFR § 26.5, "Hispanic Americans" are defined as "persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race." *Id*. at 201. Upon proper application, Jana-Rock was certified by the New York Department of Transportation as a Disadvantaged Business Enterprise ("DBE") under the federal regulations. *Id*.

However, unlike the federal regulations, the State of New York's local minority-owned business program included in its definition of minorities "Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race." The definition did not include all persons from, or descendants of persons from, Spain or Portugal. *Id*. Accordingly, Jana-Rock was denied MBE certification under the local program; Jana-Rock filed suit alleging a violation of the Equal Protection Clause. *Id*. at 202-03. The plaintiff conceded that the overall minority-owned business program satisfied the requisite strict scrutiny, but argued that the definition of "Hispanic" was fatally under-inclusive. *Id*. at 205.

The Second Circuit found that the narrow-tailoring prong of the strict scrutiny analysis "allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating that no other groups merit consideration for the program." *Id*. at 206. The court found that evaluating under-inclusiveness as an element of the strict scrutiny analysis was at odds with the United States Supreme Court decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) which required that affirmative action programs be no broader than necessary. *Id*. at 207-08. The court similarly rejected the argument that the state should mirror the federal definition of "Hispanic," finding that Congress has more leeway than the states to make broader classifications because Congress is making such classifications on the national level. *Id*. at 209.

The court opined — without deciding — that it may be impermissible for New York to simply adopt the "federal USDOT definition of Hispanic without at least making an independent assessment of discrimination against Hispanics of Spanish Origin in New York." *Id*. Additionally, finding that the plaintiff failed to point to any discriminatory purpose by New York in failing to include persons of Spanish or Portuguese descent, the court determined that the rational basis analysis was appropriate. *Id*. at 213.

The court held that the plaintiff failed the rational basis test for three reasons: (1) because it was not irrational nor did it display animus to exclude persons of Spanish and Portuguese descent from the definition of Hispanic; (2) because the fact the plaintiff could demonstrate evidence of discrimination that he personally had suffered did not render New York's decision to exclude persons of Spanish and Portuguese descent irrational; and (3) because the fact New York may have relied on Census data including a small percentage of Hispanics of Spanish descent did not mean that it was irrational to conclude that Hispanics of Latin American origin were in greater need of remedial

legislation. *Id*. at 213-14. Thus, the Second Circuit affirmed the conclusion that New York had a rational basis for its definition to not include persons of Spanish and Portuguese descent, and thus affirmed the district court decision upholding the constitutionality of the challenged definition.

3. *Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc.*, 460 F.3d 859 (7th Cir. 2006)

In *Rapid Test Products, Inc. v. Durham School Services Inc*., the Seventh Circuit Court of Appeals held that 42 U.S.C. § 1981 (the federal anti-discrimination law) did not provide an "entitlement" in disadvantaged businesses to receive contracts subject to set aside programs; rather, § 1981 provided a remedy for individuals who were subject to discrimination.

Durham School Services, Inc. ("Durham"), a prime contractor, submitted a bid for and won a contract with an Illinois school district. The contract was subject to a set-aside program reserving some of the subcontracts for disadvantaged business enterprises (a race- and gender-conscious program). Prior to bidding, Durham negotiated with Rapid Test Products, Inc. ("Rapid Test"), made one payment to Rapid Test as an advance, and included Rapid Test in its final bid. Rapid Test believed it had received the subcontract. However, after the school district awarded the contract to Durham, Durham gave the subcontract to one of Rapid Test's competitor's, a business owned by an Asian male. The school district agreed to the substitution. Rapid Test brought suit against Durham under 42 U.S.C. § 1981 alleging that Durham discriminated against it because Rapid's owner was a black woman.

The district court granted summary judgment in favor of Durham holding the parties' dealing had been too indefinite to create a contract. On appeal, the Seventh Circuit Court of Appeals stated that "§ 1981 establishes a rule against discrimination in contracting and does not create any entitlement to be the beneficiary of a contract reserved for firms owned by specified racial, sexual, ethnic, or religious groups. Arguments that a particular set-aside program is a lawful remedy for prior discrimination may or may not prevail if a potential subcontractor claims to have been excluded, but it is to victims of discrimination rather than frustrated beneficiaries that § 1981 assigns the right to litigate."

The court held that if race or sex discrimination is the reason why Durham did not award the subcontract to Rapid Test, then § 1981 provides relief. Having failed to address this issue, the Seventh Circuit Court of Appeals remanded the case to the district court to determine whether Rapid Test had evidence to back up its claim that race and sex discrimination, rather than a nondiscriminatory reason such as inability to perform the services Durham wanted, accounted for Durham's decision to hire Rapid Test's competitor.

4. *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005)(unpublished opinion)

Although it is an unpublished opinion, *Virdi v. DeKalb County School District* is a recent Eleventh Circuit decision reviewing a challenge to a local government MBE/WBE-type program, which is instructive to the disparity study. In *Virdi*, the Eleventh Circuit struck down an MBE/WBE goal program that the court held contained racial classifications. The court based its ruling primarily on the failure of the DeKalb County School District (the "District") to seriously consider and implement a race-neutral program and to the infinite duration of the program.

Plaintiff Virdi, an Asian American architect of Indian descent, filed suit against the District, members of the DeKalb County Board of Education (both individually and in their official capacities)(the "Board") and the

Superintendent (both individually and in his official capacity)(collectively "defendants") pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment alleging that they discriminated against him on the basis of race when awarding architectural contracts. 135 Fed. Appx. 262, 264 (11th Cir. 2005). Virdi also alleged the school district's Minority Vendor Involvement Program was facially unconstitutional. *Id*.

The district court initially granted the defendants' Motions for Summary Judgment on all of Virdi's claims and the Eleventh Circuit Court of Appeals reversed in part, vacated in part, and remanded. *Id*. On remand, the district court granted the defendants' Motion for Partial Summary Judgment on the facial challenge, and then granted the defendants' motion for a judgment as a matter of law on the remaining claims at the close of Virdi's case. *Id*.

In 1989, the Board appointed the Tillman Committee (the "Committee") to study participation of female- and minority-owned businesses with the District. *Id*. The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. *Id*. Based upon a "general feeling" that minorities were under-represented, the Committee issued the Tillman Report (the "Report") stating "the Committee's impression that '[m]inorities ha[d] not participated in school board purchases and contracting in a ratio reflecting the minority make-up of the community." *Id*. The Report contained no specific evidence of past discrimination nor any factual findings of discrimination. *Id*.

The Report recommended that the District: (1) Advertise bids and purchasing opportunities in newspapers targeting minorities, (2) conduct periodic seminars to educate minorities on doing business with the District, (3) notify organizations representing minority firms regarding bidding and purchasing opportunities, and (4) publish a "how to" booklet to be made available to any business interested in doing business with the District.

Id. The Report also recommended that the District adopt annual, aspirational participation goals for women- and minority-owned businesses. *Id*. The Report contained statements indicating the selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. *Id*.

In 1991, the Board adopted the Report and implemented several of the recommendations, including advertising in the AJC, conducting seminars, and publishing the "how to" booklet. *Id*. The Board also implemented the Minority Vendor Involvement Program (the "MVP") which adopted the participation goals set forth in the Report. *Id*. at 265.

The Board delegated the responsibility of selecting architects to the Superintendent. *Id*. Virdi sent a letter to the District in October 1991 expressing interest in obtaining architectural contracts. *Id*. Virdi sent the letter to the District Manager and sent follow-up literature; he re-contacted the District Manager in 1992 and 1993. *Id*. In August 1994, Virdi sent a letter and a qualifications package to a project manager employed by Heery International. *Id*. In a follow-up conversation, the project manager allegedly told Virdi that his firm was not selected based upon his qualifications, but because the "District was only looking for 'black-owned firms.'" *Id*. Virdi sent a letter to the project manager requesting confirmation of his statement in writing and the project manager forwarded the letter to the District. *Id*.

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id*. at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id*. Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id*.

The Eleventh Circuit considered whether the MVP was facially unconstitutional and whether the defendants intentionally discriminated against Virdi on the basis of his race. The court held that strict scrutiny applies to all racial classifications and is not limited to merely set-asides or mandatory quotas; therefore, the MVP was subject to strict scrutiny because it contained racial classifications. *Id*. at 267. The court first questioned whether the identified government interest was compelling. *Id*. at 268. However, the court declined to reach that issue because it found the race-based participation goals were not narrowly tailored to achieving the identified government interest. *Id*.

The court held the MVP was not narrowly tailored for two reasons. *Id*. First, because no evidence existed that the District considered race-neutral alternatives to "avoid unwitting discrimination." The court found that "[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake." *Id*., *citing Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). The court found that District could have engaged in any number of equally effective race-neutral alternatives, including using its outreach procedure and tracking the participation and success of minority-owned business as compared to non-minority-owned businesses. *Id*. at 268, n.8. Accordingly, the court held the MVP was not narrowly tailored. *Id*. at 268.

Second, the court held that the unlimited duration of the MVP's racial goals negated a finding of narrow tailoring. *Id*. "[R]ace conscious … policies must be limited in time." *Id*., *citing Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5th Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id*. at 268.

With respect to Virdi's claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Virdi to lose a contract that he would have otherwise received. *Id*. Thus, because Virdi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court's grant of judgment on that issue. *Id*. at 269. Similarly, the court found that Virdi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id*.

The court reversed the district court's order pertaining to the facial constitutionality of the MVP's racial goals, and affirmed the district court's order granting defendants' motion on the issue of intentional discrimination against Virdi. *Id*. at 270.

5. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027, 124 S. Ct. 556 (2003)(Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari)

This case is instructive to the disparity study because it is one of the only recent decisions to uphold the validity of a local government MBE/WBE program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an MBE/WBE-type program.

In *Concrete Works* the United States Court of Appeals for the Tenth Circuit held that the City and County of Denver had a compelling interest in limiting race discrimination in the construction industry, that the City had an important governmental interest in remedying gender discrimination in the construction industry, and found that the City and County of Denver had established a compelling governmental interest to have a race- and gender-based program. In *Concrete Works*, the Court of Appeals did not address the issue of whether the MWBE Ordinance was narrowly tailored because it held the district court was barred under the law of the case doctrine from considering that issue since it was not raised on appeal by the plaintiff construction companies after they had lost that issue on summary judgment in an earlier decision. Therefore, the Court of Appeals did not reach a decision as to narrowly tailoring or consider that issue in the case.

Case history. Plaintiff, Concrete Works of Colorado, Inc. ("CWC") challenged the constitutionality of an "affirmative action" ordinance enacted by the City and County of Denver (hereinafter the "City" or "Denver"). 321 F.3d 950, 954 (10th Cir. 2003). The ordinance established participation goals for racial minorities and women on certain City construction and professional design projects. *Id.*

The City enacted an Ordinance No. 513 ("1990 Ordinance") containing annual goals for MBE/WBE utilization on all competitively bid projects. *Id*. at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using "good faith efforts." *Id*. In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the "1996 Ordinance"). The district court stated that the 1996 Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the program; refined the requirements for MBE/WBE certification and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority-owned contractors in failing to perform the affirmative action commitments made on City projects. *Id*. at 956-57.

The 1996 Ordinance was amended in 1998 by Ordinance No. 948 (the "1998 Ordinance"). The 1998 Ordinance reduced annual percentage goals and prohibited an MBE or a WBE, acting as a bidder, from counting self-performed work toward project goals. *Id*. at 957.

CWC filed suit challenging the constitutionality of the 1990 Ordinance. *Id*. The district court conducted a bench trial on the constitutionality of the three ordinances. *Id*. The district court ruled in favor of CWC and concluded that the ordinances violated the Fourteenth Amendment. *Id*. The City then appealed to the Tenth Circuit Court of Appeals. *Id*. The Court of Appeals reversed and remanded. *Id*. at 954.

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures. *Id*. at 957-58, 959. The Court of Appeals also cited *Richmond v. J.A. Croson Co.*, for the proposition that a governmental entity "can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment." 488 U.S. 469, 492 (1989)(plurality opinion). Because "an effort to alleviate the effects of *societal* discrimination is not a compelling interest," the Court of Appeals held that Denver could demonstrate that its interest is compelling only if it (1) identified the past or present discrimination "with some specificity," and (2) demonstrated that a "strong basis in evidence" supports its conclusion that remedial action is necessary. *Id*. at 958, *quoting Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

The court held that Denver could meet its burden without conclusively proving the existence of past or present racial discrimination. *Id*. Rather, Denver could rely on "empirical evidence that demonstrates 'a significant statistical disparity between the number of qualified minority

contractors … and the number of such contractors actually engaged by the locality or the locality's prime contractors.'" *Id*., *quoting Croson*, 488 U.S. at 509 (plurality opinion). Furthermore, the Court of Appeals held that Denver could rely on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area (MSA) and could supplement the statistical evidence with anecdotal evidence of public and private discrimination. *Id*.

The Court of Appeals held that Denver could establish its compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. *Id*. The Court of Appeals held that once Denver met its burden, CWC had to introduce "credible, particularized evidence to rebut [Denver's] initial showing of the existence of a compelling interest, which could consist of a neutral explanation for the statistical disparities." *Id*. (internal citations and quotations omitted). The Court of Appeals held that CWC could also rebut Denver's statistical evidence "by (1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data." *Id*. (internal citations and quotations omitted). The Court of Appeals held that the burden of proof at all times remained with CWC to demonstrate the unconstitutionality of the ordinances. *Id*. at 960.

The Court of Appeals held that to meet its burden of demonstrating an important governmental interest per the intermediate scrutiny analysis, Denver must show that the gender-based measures in the ordinances were based on "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions." *Id*., *quoting Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

The studies. Denver presented historical, statistical and anecdotal evidence in support of its MBE/WBE programs. Denver commissioned a number of studies to assess its MBE/WBE programs. *Id*. at 962. The consulting firm hired by Denver utilized disparity indices in part. *Id*. at 962. The 1990 Study also examined MBE and WBE utilization in the overall Denver MSA construction market, both public and private. *Id.* at 963.

The consulting firm also interviewed representatives of MBEs, WBEs, majority-owned construction firms, and government officials. *Id*. Based on this information, the 1990 Study concluded that, despite Denver's efforts to increase MBE and WBE participation in Denver Public Works projects, some Denver employees and private contractors engaged in conduct designed to circumvent the goals program. *Id*. After reviewing the statistical and anecdotal evidence contained in the 1990 Study, the City Council enacted the 1990 Ordinance. *Id*.

After the Tenth Circuit decided Concrete Works II, Denver commissioned another study (the "1995 Study"). *Id*. at 963. Using 1987 Census Bureau data, the 1995 Study again examined utilization of MBEs and WBEs in the construction and professional design industries within the Denver MSA. *Id*. The 1995 Study concluded that MBEs and WBEs were more likely to be one-person or family-run businesses. The Study concluded that Hispanic-owned firms were less likely to have paid employees than white-owned firms but that Asian/Native American-owned firms were more likely to have paid employees than white- or other minority-owned firms. To determine whether these factors explained overall market disparities, the 1995 Study used the Census data to calculate disparity indices for all firms in the Denver MSA construction industry and separately calculated disparity indices for firms with paid employees and firms with no paid employees. *Id*. at 964.

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and woman-owned

firms with paid employees all reported lower revenues per employee than majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id*.

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. *Id*. at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 64 for MBEs and 70 for WBEs in the construction industry. In the professional design industry, disparity indices were 67 for MBEs and 69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. *Id*.

In 1997, the City conducted another study to estimate the availability of MBEs and WBEs and to examine, *inter alia,* whether race and gender discrimination limited the participation of MBEs and WBEs in construction projects of the type typically undertaken by the City (the "1997 Study"). *Id*. at 966. The 1997 Study used geographic and specialization information to calculate MBE/WBE availability. Availability was defined as "the ratio of MBE/WBE firms to the total number of firms in the four-digit SIC codes and geographic market area relevant to the City's contracts." *Id*.

The 1997 Study compared MBE/WBE availability and utilization in the Colorado construction industry. *Id*. The statewide market was used because necessary information was unavailable for the Denver MSA. *Id*. at 967. Additionally, data collected in 1987 by the Census Bureau was used because more current data was unavailable. The Study calculated disparity indices for the statewide construction market in Colorado as follows: 41 for African American firms, 40 for Hispanic firms, 14 for Asian and other minorities, and 74 for woman-owned firms. *Id*.

The 1997 Study also contained an analysis of whether African Americans, Hispanics, or Asian Americans working in the construction industry are less likely to be self-employed than similarly situated whites. *Id*. Using data from the Public Use Microdata Samples ("PUMS") of the 1990 Census of Population and Housing, the Study used a sample of individuals working in the construction industry. The Study concluded that in both Colorado and the Denver MSA, African Americans, Hispanics, and Native Americans working in the construction industry had lower self-employment rates than whites. Asian Americans had higher self-employment rates than whites.

Using the availability figures calculated earlier in the Study, the Study then compared the actual availability of MBE/WBEs in the Denver MSA with the potential availability of MBE/WBEs if they formed businesses at the same rate as whites with the same characteristics. *Id*. Finally, the Study examined whether self-employed minorities and women in the construction industry have lower earnings than white males with similar characteristics. *Id*. at 968. Using linear regression analysis, the Study

compared business owners with similar years of education, of similar age, doing business in the same geographic area, and having other similar demographic characteristics. Even after controlling for several factors, the results showed that self-employed African Americans, Hispanics, Native Americans, and women had lower earnings than white males. *Id*.

The 1997 Study also conducted a mail survey of both MBE/WBEs and non-MBE/WBEs to obtain information on their experiences in the construction industry. Of the MBE/WBEs who responded, 35 percent indicated that they had experienced at least one incident of disparate treatment within the last five years while engaged in business activities. The survey also posed the following question: "How often do prime contractors who use your firm as a subcontractor on public sector projects with [MBE/WBE] goals or requirements … also use your firm on public sector or private sector projects without [MBE/WBE] goals or requirements?" Fifty-eight percent of minorities and 41 percent of white women who responded to this question indicated they were "seldom or never" used on non-goals projects. *Id*.

MBE/WBEs were also asked whether the following aspects of procurement made it more difficult or impossible to obtain construction contracts: (1) bonding requirements, (2) insurance requirements, (3) large project size, (4) cost of completing proposals, (5) obtaining working capital, (6) length of notification for bid deadlines, (7) prequalification requirements, and (8) previous dealings with an agency. This question was also asked of non-MBE/WBEs in a separate survey. With one exception, MBE/WBEs considered each aspect of procurement more problematic than non-MBE/WBEs. To determine whether a firm's size or experience explained the different responses, a regression analysis was conducted that controlled for age of the firm, number of employees, and level of revenues. The results again showed that with the same, single exception, MBE/WBEs had more difficulties than non-MBE/WBEs with the same characteristics. *Id*. at 968-69.

After the 1997 Study was completed, the City enacted the 1998 Ordinance. The 1998 Ordinance reduced the annual goals to 10 percent for both MBEs and WBEs and eliminated a provision which previously allowed MBE/WBEs to count their own work toward project goals. *Id*. at 969.

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and woman-owned construction firms that they were subject to different work rules than majority-owned firms. *Id*. He also testified that he frequently observed graffiti containing racial or gender epithets written on job sites in the Denver metropolitan area. Further, he stated that he believed, based on his personal experiences, that many majority-owned firms refused to hire minority- or woman-owned subcontractors because they believed those firms were not competent. *Id*.

Several MBE/WBE witnesses testified that they experienced difficulty prequalifying for private sector projects and projects with the City and other governmental entities in Colorado. One individual testified that her company was required to prequalify for a private sector project while no similar requirement was imposed on majority-owned firms. Several others testified that they attempted to prequalify for projects but their applications were denied even though they met the prequalification requirements. *Id*.

Other MBE/WBEs testified that their bids were rejected even when they were the lowest bidder; that they believed they were paid more slowly than majority-owned firms on both City projects and private sector projects; that they were charged more for supplies and materials; that

they were required to do additional work not part of the subcontracting arrangement; and that they found it difficult to join unions and trade associations. *Id*. There was testimony detailing the difficulties MBE/WBEs experienced in obtaining lines of credit. One WBE testified that she was given a false explanation of why her loan was declined; another testified that the lending institution required the co-signature of her husband even though her husband, who also owned a construction firm, was not required to obtain her co-signature; a third testified that the bank required her father to be involved in the lending negotiations. *Id*.

The court also pointed out anecdotal testimony involving recitations of racially- and gender-motivated harassment experienced by MBE/WBEs at work sites. There was testimony that minority and female employees working on construction projects were physically assaulted and fondled, spat upon with chewing tobacco, and pelted with two-inch bolts thrown by males from a height of 80 feet. *Id*. at 969-70.

The legal framework applied by the court. The Court held that the district court incorrectly believed Denver was required to prove the existence of discrimination. Instead of considering whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the district court analyzed whether Denver's evidence showed that there is pervasive discrimination. *Id*. at 970. The court, *quoting Concrete Works II*, stated that "the Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination." *Id*. at 970, *quoting Concrete Works II*, 36 F.3d 1513, 1522 (10th Cir. 1994). Denver's initial burden was to demonstrate that strong evidence of discrimination supported its conclusion that remedial measures were necessary. Strong evidence is that "approaching a prima facie case of a constitutional or statutory violation," not irrefutable or definitive proof of discrimination. *Id*. at 97, *quoting Croson*, 488 U.S. at 500. The burden of proof at all times remained with the contractor plaintiff to prove by a preponderance of the evidence that Denver's "evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id*., *quoting Adarand VII*, 228 F.3d at 1176.

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. *Id*. at 971. Thus, Denver's evidence did not suffer from the problem discussed by the court in *Croson.* The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The *Croson* majority concluded that a "city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market." *Id*. at 971, *quoting Croson*, 488 U.S. 503. Thus, the Court held Denver's burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. *Id*.

The Court noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities. *Id*., *citing Croson*, 488 U.S. at 503. Accordingly, it concluded that Denver could meet its burden through the introduction of statistical and anecdotal evidence. To the extent the district court required Denver to introduce additional evidence to show discriminatory motive or intent on the part of private construction firms, the district court erred. Denver, according to the Court, was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. *Id*. at 972.

The court found Denver's statistical and anecdotal evidence relevant because it identifies discrimination in the local construction industry, not simply discrimination in society. The court held the genesis of the identified discrimination is irrelevant and the district court erred when it discounted Denver's evidence on that basis. *Id*.

The court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. *Id*. at 973. The court rejected the district court's erroneous legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in *Concrete Works II* and the plurality opinion in *Croson. Id*. The court held it previously recognized in this case that "a municipality has a compelling interest in taking affirmative steps to remedy both public *and private* discrimination specifically identified in its area." *Id*., *quoting Concrete Works II,* 36 F.3d at 1529 (emphasis added). In *Concrete Works II,* the court stated that "we do not read Croson as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination." *Id*., *quoting Concrete Works II,* 36 F.3d at 1529.

The court stated that Denver could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination. *Id*. at 973. Thus, Denver was not required to demonstrate that it is "guilty of prohibited discrimination" to meet its initial burden. *Id*.

Additionally, the court had previously concluded that Denver's statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that "local prime contractors" are engaged in racial and gender discrimination. *Id*. at 974, *quoting Concrete Works II,* 36 F.3d at 1529. Thus, the court held Denver's disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination. *Id*.

The Court's rejection of CWC's arguments and the District Court findings.

Use of marketplace data. The court held the district court, inter alia, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured discrimination in the overall Denver MSA construction industry, not discrimination by the City itself. *Id*. at 974. The court found that the district court's conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant. *Id*., *citing Adarand VII*, 228 F.3d at 1166-67).

The court held the conclusion reached by the majority in *Croson* that marketplace data are relevant in equal protection challenges to affirmative action programs was consistent with the approach later taken by the court in *Shaw v. Hunt. Id*. at 975. In *Shaw,* a majority of the court relied on the majority opinion in *Croson* for the broad proposition that a governmental entity's "interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." *Id*., *quoting Shaw*, 517 U.S. at 909. The *Shaw* court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The court, however, did set out two conditions that must be met for the governmental entity to show a compelling interest. "First, the discrimination must be identified discrimination." *Id*. at 976, *quoting Shaw*, 517 U.S. at 910. The City can satisfy this condition by identifying the discrimination, "'*public or private,* with some specificity.'" *Id*. at 976, *citing Shaw*, 517 U.S. at 910, *quoting Croson,* 488 U.S. at 504 (emphasis added). The governmental entity must also have a

"strong basis in evidence to conclude that remedial action was necessary." *Id.* Thus, the court concluded *Shaw* specifically stated that evidence of either public or private discrimination could be used to satisfy the municipality's burden of producing strong evidence. *Id*. at 976.

In *Adarand VII,* the court noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation. *Id*., *citing Adarand VII*, 228 F.3d at 1166-67 ("[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*" (emphasis added)). Further, the court pointed out in this case it earlier rejected the argument CWC reasserted here that marketplace data are irrelevant and remanded the case to the district court to determine whether Denver could link its public spending to "the Denver MSA evidence of industry-wide discrimination." *Id*., *quoting Concrete Works II,* 36 F.3d at 1529. The court stated that evidence explaining "the Denver government's role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*" was relevant to Denver's burden of producing strong evidence. *Id*., *quoting Concrete Works II,* 36 F.3d at 1530 (emphasis added).

Consistent with the court's mandate in *Concrete Works II,* the City attempted to show at trial that it "indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business." *Id*. The City can demonstrate that it is a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. *Id*., *quoting Croson,* 488 U.S. at 492.

The court rejected CWC's argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII,* the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a "strong link" between a government's "disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination." *Id*. at 977, *quoting Adarand VII*, 228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City's showing that it indirectly participates in industry discrimination. *Id*. at 977.

The City presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation. Denver introduced a disparity study prepared in 1996 and sponsored by the Denver Community Reinvestment Alliance, Colorado Capital Initiatives, and the City. The Study ultimately concluded that "despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval

or denial." *Id*. at 977-78. In *Adarand VII,* the court concluded that this study, among other evidence, "strongly support[ed] an initial showing of discrimination in lending." *Id*. at 978, *quoting*, *Adarand VII*, 228 F.3d at 1170, n. 13 ("Lending discrimination alone of course does not justify action in the construction market. However, the persistence of such discrimination … supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded."). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.

CWC did not present any evidence that undermined the reliability of the lending discrimination evidence but simply repeated the argument, foreclosed by circuit precedent, that it is irrelevant. The court rejected the district court criticism of the evidence because it failed to determine whether the discrimination resulted from discriminatory attitudes or from the neutral application of banking regulations. The court concluded that discriminatory motive can be inferred from the results shown in disparity studies. The court held the district court's criticism did not undermine the study's reliability as an indicator that the City is passively participating in marketplace discrimination. The court noted that in *Adarand VII* it took "judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects." *Id*. at 978, *quoting Adarand VII*, 228 F.3d at 1170.

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability of capital, and personal/family variables. As discussed, *supra,* the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. *Id*. at 978.

The court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. "[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiable) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion." *Id*. at 979, *quoting Adarand VII*,228 F.3d at 1174.

In sum, the court held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the City's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary. *Id*. at 979-80.

Variables. CWC challenged Denver's disparity studies as unreliable because the disparities shown in the studies may be attributable to firm size and experience rather than discrimination. Denver countered, however, that a firm's size has little effect on its qualifications or its ability to provide construction services and that MBE/WBEs, like all construction firms, can perform most services either by hiring additional employees or by employing subcontractors. CWC responded that elasticity itself is relative to size and experience; MBE/WBEs are less

capable of expanding because they are smaller and less experienced. *Id*. at 980.

The court concluded that even if it assumed that MBE/WBEs are less able to expand because of their smaller size and more limited experience, CWC did not respond to Denver's argument and the evidence it presented showing that experience and size are not race- and gender-neutral variables and that MBE/WBE construction firms are generally smaller and less experienced *because* of industry discrimination. *Id*. at 981. The lending discrimination and business formation studies, according to the court, both strongly supported Denver's argument that MBE/WBEs are smaller and less experienced because of marketplace and industry discrimination. In addition, Denver's expert testified that discrimination by banks or bonding companies would reduce a firm's revenue and the number of employees it could hire. *Id*.

Denver also argued its Studies controlled for size and the 1995 Study controlled for experience. It asserted that the 1990 Study measured revenues per employee for construction for MBE/WBEs and concluded that the resulting disparities, "suggest[ ] that even among firms of the same employment size, industry utilization of MBEs and WBEs was lower than that of non-minority male-owned firms." *Id*. at 982. Similarly, the 1995 Study controlled for size, calculating, *inter alia,* disparity indices for firms with no paid employees which presumably are the same size.

Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver's disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City's position that a firm's size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study using marketplace data and thus did not demonstrate that the disparities shown in Denver's studies would decrease or disappear if the studies controlled for size and experience to CWC's satisfaction. Consequently, the court held CWC's rebuttal evidence was insufficient to meet its burden of discrediting Denver's disparity studies on the issue of size and experience. *Id*. at 982.

Specialization. The district court also faulted Denver's disparity studies because they did not control for firm specialization. The court noted the district court's criticism would be appropriate only if there was evidence that MBE/WBEs are more likely to specialize in certain construction fields. *Id*. at 982.

The court found there was no identified evidence showing that certain construction specializations require skills less likely to be possessed by MBE/WBEs. The court found relevant the testimony of the City's expert, that the data he reviewed showed that MBEs were represented "widely across the different [construction] specializations." *Id*. at 982-83. There was no contrary testimony that aggregation bias caused the disparities shown in Denver's studies. *Id*. at 983.

The court held that CWC failed to demonstrate that the disparities shown in Denver's studies are eliminated when there is control for firm specialization. In contrast, one of the Denver studies, which controlled for SIC-code subspecialty and still showed disparities, provided support for Denver's argument that firm specialization does not explain the disparities. *Id*. at 983.

The court pointed out that disparity studies may make assumptions about availability as long as the same assumptions can be made for all firms. *Id*. at 983.

Utilization of MBE/WBEs on City projects. CWC argued that Denver could not demonstrate a compelling interest because it overutilized MBE/WBEs on City construction projects. This argument, according to the court, was an extension of CWC's argument that Denver could justify the ordinances only by presenting evidence of discrimination by the City itself or by contractors while working on City projects. Because the court concluded that Denver could satisfy its burden by showing that it is an indirect participant in industry discrimination, CWC's argument relating to the utilization of MBE/WBEs on City projects goes only to the weight of Denver's evidence. *Id*. at 984.

Consistent with the court's mandate in *Concrete Works II,* at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program were tainted by the program and "reflect[ed] the intended remedial effect on MBE and WBE utilization." *Id*. at 984, *quoting Concrete Works II*, 36 F.3d at 1526. Denver argued that the non-goals data were the better indicator of past discrimination in public contracting than the data on all City construction projects. *Id*. at 984-85. The court concluded that Denver presented ample evidence to support the conclusion that the evidence showing MBE/WBE utilization on City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. *Id*. at 985.

The court rejected CWC's argument that the marketplace data were irrelevant but agreed that the non-goals data were also relevant to Denver's burden. The court noted that Denver did not rely heavily on the non-goals data at trial but focused primarily on the marketplace studies to support its burden. *Id*. at 985.

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver's position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id*. at 987-88.

Anecdotal evidence. The anecdotal evidence, according to the court, included several incidents involving profoundly disturbing behavior on the part of lenders, majority-owned firms, and individual employees. *Id*. at 989. The court found that the anecdotal testimony revealed behavior that was not merely sophomoric or insensitive, but which resulted in real economic or physical harm. While CWC also argued that all new or small contractors have difficulty obtaining credit and that treatment the witnesses characterized as discriminatory is experienced by all contractors, Denver's witnesses specifically testified that they believed the incidents they experienced were motivated by race or gender discrimination. The court found they supported those beliefs with testimony that majority-owned firms were not subject to the same requirements imposed on them. *Id.*

The court held there was no merit to CWC's argument that the witnesses' accounts must be verified to provide support for Denver's burden. The court stated that anecdotal evidence is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions. *Id*.

After considering Denver's anecdotal evidence, the district court found that the evidence "shows that race, ethnicity and gender affect the construction industry and those who work in it" and that the egregious mistreatment of minority and women employees "had direct financial

consequences" on construction firms. *Id*. at 989, *quoting Concrete Works III*, 86 F. Supp.2d at 1074, 1073. Based on the district court's findings regarding Denver's anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, unrebutted support for Denver's initial burden. *Id*. at 989-90, *citing Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 339 (1977)(concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it "brought the cold [statistics] convincingly to life").

Summary. The court held the record contained extensive evidence supporting Denver's position that it had a strong basis in evidence for concluding that the 1990 Ordinance and the 1998 Ordinance were necessary to remediate discrimination against both MBEs and WBEs. *Id*. at 990. The information available to Denver and upon which the ordinances were predicated, according to the court, indicated that discrimination was persistent in the local construction industry and that Denver was, at least, an indirect participant in that discrimination.

To rebut Denver's evidence, the court stated CWC was required to "establish that Denver's evidence did not constitute strong evidence of such discrimination." *Id*. at 991, *quoting Concrete Works II,* 36 F.3d at 1523. CWC could not meet its burden of proof through conjecture and unsupported criticisms of Denver's evidence. Rather, it must present "credible, particularized evidence." *Id*., *quoting Adarand VII,* 228 F.3d at 1175. The court held that CWC did not meet its burden. CWC *hypothesized* that the disparities shown in the studies on which Denver relies could be explained by any number of factors other than racial discrimination. However, the court found it did not conduct its own marketplace disparity study controlling for the disputed variables and presented no other evidence from which the court could conclude that such variables explain the disparities. *Id*. at 991-92.

Narrow tailoring. Having concluded that Denver demonstrated a compelling interest in the race-based measures and an important governmental interest in the gender-based measures, the court held it must examine whether the ordinances were narrowly tailored to serve the compelling interest and are substantially related to the achievement of the important governmental interest. *Id*. at 992.

The court stated it had previously concluded in its earlier decisions that Denver's program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in *Concrete Works II.* The court reversed the grant of summary judgment on the compelling-interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the court found Concrete Works did not challenge the district court's conclusion with respect to the second prong of *Croson's* strict scrutiny standard — *i.e.*, that the Ordinance is narrowly tailored to remedy past and present discrimination — the court held it need not address this issue. *Id*. at 992, *citing Concrete Works II,* 36 F.3d at 1531, n. 24.

The court concluded that the district court lacked authority to address the narrow tailoring issue on remand because none of the exceptions to the law of the case doctrine are applicable. The district court's earlier determination that Denver's affirmative-action measures were narrowly tailored is law of the case and binding on the parties.

6. *In re City of Memphis*, 293 F.3d 345 (6th Cir. 2002)

This case is instructive to the disparity study based on its holding that a local or state government may be prohibited from utilizing post-enactment evidence in support of an MBE/WBE-type program. 293 F.3d at 350-351. The United States Court of Appeals for the Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. *Id*. The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in *advance* of its passage.

The district court had ruled that the City could not introduce a post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. *Id.* at 350-351. The Sixth Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue. *Id.* at 350-351.

The City argued that a substantial ground for difference of opinion existed in the federal courts of appeal. 293 F.3d at 350. The court stated some circuits permit post-enactment evidence to supplement pre-enactment evidence. *Id*. This issue, according to the Court, appears to have been resolved in the Sixth Circuit. *Id*. The Court noted the Sixth Circuit decision in *AGC v. Drabik*, 214 F.3d 730 (6th Cir. 2000), which held that under *Croson* a State must have sufficient evidentiary justification for a racially-conscious statute in advance of its enactment, and that governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Memphis*, 293 F.3d at 350-351, *citing Drabik*, 214 F.3d at 738.

The Court in *Memphis* said that although *Drabik* did not directly address the admissibility of post-enactment evidence, it held a governmental entity must have pre-enactment evidence sufficient to justify a racially-conscious statute. 293 R.3d at 351. The court concluded *Drabik* indicates the Sixth Circuit would not favor using post-enactment evidence to make that showing. *Id*. at 351. Under *Drabik*, the Court in *Memphis* held the City must present pre-enactment evidence to show a compelling state interest. *Id*. at 351.

7. *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001)

This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contacts discriminated against any of the groups "favored" by the Program. The court also found that the Program was not "narrowly tailored" to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* ("*VMI*"), 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex

discrimination, although the court in *Cook County* stated the difference between the applicable standards has become "vanishingly small." *Id*. The court pointed out that the Supreme Court said in the *VMI* case, that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive' justification for that action …" and, realistically, the law can ask no more of race-based remedies either." 256 F.3d at 644, *quoting* in part *VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11th Cir. 1997) decision created the "paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes." 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and women's "set aside programs," the women's program the court determined must clear the same "hurdles" as the minority program." 256 F.3d at 644-645.

The court found that since the ordinance requires prime contractors on public projects to reserve a substantial portion of the subcontracts for minority contractors, which is inapplicable to private projects, it is "to be expected that there would be more soliciting of these contractors on public than on private projects." *Id*. Therefore, the court did not find persuasive that there was discrimination based on this difference alone. 256 F.3d at 645. The court pointed out the County "conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance." 256 F.3d at 645 quoting the district court decision, 123 F.Supp.2d at 1093. The court held that a "public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy." 256 F.3d at 645 (emphasis in original).

The court stated that minority enterprises in the construction industry "tend to be subcontractors, moreover, because as the district court found not clearly erroneously, 123 F.Supp.2d at 1115, they tend to be new and therefore small and relatively untested — factors not shown to be attributable to discrimination by the County." 256 F.3d at 645. The court held that there was no basis for attributing to the County any discrimination that prime contractors may have engaged in. *Id*. The court noted that "[i]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit … to be entitled to take remedial action." *Id*. But, the court found "of that there is no evidence either." *Id*.

The court stated that if the County had been complicit in discrimination by prime contractors, it found "puzzling" to try to remedy that discrimination by requiring discrimination in favor of minority stockholders, as distinct from employees. 256 F.3d at 646. The court held that even if the record made a case for remedial action of the general sort found in the MWBE ordinance by the County, it would "flunk the constitutional test" by not being carefully designed to achieve the ostensible remedial aim and no more. 256 F.3d at 646. The court held that a state and local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian Americans and women. *Id*. Nor, the court stated, may it discriminate more than is necessary to cure the effects of the earlier discrimination. *Id*. "Nor may it continue the remedy in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against nonminority persons." *Id*. The court, therefore, held that the ordinance was not "narrowly tailored" to the wrong that it seeks to correct. *Id*.

The court thus found that the County both failed to establish the premise for a racial remedy, and also that the remedy goes further than

is necessary to eliminate the evil against which it is directed. 256 F.3d at 647. The court held that the list of "favored minorities" included groups that have never been subject to significant discrimination by Cook County. *Id*. The court found it unreasonable to "presume" discrimination against certain groups merely on the basis of having an ancestor who had been born in a particular country. *Id*. Therefore, the court held the ordinance was overinclusive.

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts. 256 F.3d at 647. The court also rejected the proposition advanced by the County in this case—"that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project." 256 F.3d at 647-648.

8. *W.H. Scott Constr. Co. v. City of Jackson, Mississippi,* 199 F.3d 206 (5th Cir. 1999)

A non-minority general contractor brought this action against the City of Jackson and City officials asserting that a City policy and its minority business enterprise program for participation and construction contracts violated the Equal Protection Clause of the U.S. Constitution.

City of Jackson MBE Program. In 1985 the City of Jackson adopted an MBE Program, which initially had a goal of 5% of all city contracts. 199 F.3d at 208. Id. The 5% goal was not based on any objective data. Id. at 209. Instead, it was a "guess" that was adopted by the City. Id. The goal was later increased to 15% because it was found that 10% of businesses in Mississippi were minority-owned. Id.

After the MBE Program's adoption, the City's Department of Public Works included a Special Notice to bidders as part of its specifications for all City construction projects. *Id*. The Special Notice encouraged prime construction contractors to include in their bid 15% participation by subcontractors certified as Disadvantaged Business Enterprises (DBEs) and 5% participation by those certified as WBEs. *Id*.

The Special Notice defined a DBE as a small business concern that is owned and controlled by socially and economically disadvantaged individuals, which had the same meaning as under Section 8(d) of the Small Business Act and subcontracting regulations promulgated pursuant to that Act. *Id*. The court found that Section 8(d) of the SBA states that prime contractors are to presume that socially and economically disadvantaged individuals include certain racial and ethnic groups or any other individual found to be disadvantaged by the SBA. *Id*.

In 1991, the Mississippi legislature passed a bill that would allow cities to set aside 20% of procurement for minority business. *Id*. at 209-210. The City of Jackson City Council voted to implement the set-aside, contingent on the City's adoption of a disparity study. *Id*. at 210. The City conducted a disparity study in 1994 and concluded that the total underutilization of African-American and Asian-American-owned firms was statistically significant. *Id*. The study recommended that the City implement a range of MBE goals from 10-15%. *Id*. The City, however, was not satisfied with the study, according to the court, and chose not to adopt its conclusions. *Id*. Instead, the City retained its 15% MBE goal and did not adopt the disparity study. *Id*.

W.H. Scott did not meet DBE goal. In 1997 the City advertised for the construction of a project and the W.H. Scott Construction Company, Inc. (Scott) was the lowest bidder. Id. Scott obtained 11.5% WBE participation, but it reported that the bids from DBE subcontractors had

not been low bids and, therefore, its DBE-participation percentage would be only 1%. Id.

Although Scott did not achieve the DBE goal and subsequently would not consider suggestions for increasing its minority participation, the Department of Public Works and the Mayor, as well as the City's Financial Legal Departments, approved Scott's bid and it was placed on the agenda to be approved by the City Council. *Id*. The City Council voted against the Scott bid without comment. Scott alleged that it was told the City rejected its bid because it did not achieve the DBE goal, but the City alleged that it was rejected because it exceeded the budget for the project. *Id*.

The City subsequently combined the project with another renovation project and awarded that combined project to a different construction company. *Id*. at 210-211. Scott maintained the rejection of his bid was racially motivated and filed this suit. *Id*. at 211.

District court decision. The district court granted Scott's motion for summary judgment agreeing with Scott that the relevant Policy included not just the Special Notice, but that it also included the MBE Program and Policy document regarding MBE participation. *Id*. at 211. The district court found that the MBE Policy was unconstitutional because it lacked requisite findings to justify the 15% minority-participation goal and survive strict scrutiny based on the 1989 decision in the *City of Richmond, v. J.A. Croson Co. Id.* The district court struck down minority-participation goals for the City's construction contracts only. *Id*. at 211. The district court found that Scott's bid was rejected because Scott lacked sufficient minority participation, not because it exceeded the City's budget. *Id.* In addition, the district court awarded Scott lost profits. *Id.*

Standing. The Fifth Circuit determined that in equal protection cases challenging affirmative action policies, "injury in fact" for purposes of establishing standing is defined as the inability to compete on an equal footing in the bidding process. *Id*. at 213. The court stated that Scott need not prove that it lost contracts because of the Policy, but only prove that the Special Notice forces it to compete on an unequal basis. *Id*. The question, therefore, the court said is whether the Special Notice imposes an obligation that is born unequally by DBE contractors and non-DBE contractors. *Id.* at 213.

The court found that if a non-DBE contractor is unable to procure 15% DBE participation, it must still satisfy the City that adequate good faith efforts have been made to meet the contract goal or risk termination of its contracts, and that such efforts include engaging in advertising, direct solicitation and follow-up, assistance in attaining bonding or insurance required by the contractor. *Id.* at 214. The court concluded that although the language does not expressly authorize a DBE contractor to satisfy DBE-participation goals by keeping the requisite percentage of work for itself, it would be nonsensical to interpret it as precluding a DBE contractor from doing so. *Id.* at 215.

If a DBE contractor performed 15% of the contract dollar amount, according to the court, it could satisfy the participation goal and avoid both a loss of profits to subcontractors and the time and expense of complying with the good faith requirements. *Id.* at 215. The court said that non-DBE contractors do not have this option, and thus, Scott and other non-DBE contractors are at a competitive disadvantage with DBE contractors. *Id.*

The court, therefore, found Scott had satisfied standing to bring the lawsuit.

Constitutional strict scrutiny analysis and guidance in determining types of evidence to justify a remedial MBE program. The court first rejected the City's contention that the Special Notice should not be subject to strict scrutiny because it establishes goals rather than

mandate quotas for DBE participation. *Id.* at 215-217. The court stated the distinction between goals or quotas is immaterial because these techniques induce an employer to hire with an eye toward meeting a numerical target, and as such, they will result in individuals being granted a preference because of their race. *Id.* at 215. The court also rejected the City's argument that the DBE classification created a preference based on "disadvantage," not race. *Id.* at 215-216. The court found that the Special Notice relied on Section 8(d) and Section 8(a) of the Small Business Act, which provides explicitly for a race-based presumption of social disadvantage, and thus requires strict scrutiny. *Id.* at 216-217.

The court discussed the *City of Richmond v. Croson* case as providing guidance in determining what types of evidence would justify the enactment of an MBE-type program. *Id.* at 217-218. The court noted the Supreme Court stressed that a governmental entity must establish a factual predicate, tying its set-aside percentage to identified injuries in the particular local industry. *Id.* at 217. The court pointed out given the Supreme Court in *Croson's* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson's* evidentiary burden is satisfied. *Id.* at 218. The court found that disparity studies are probative evidence for discrimination because they ensure that the "relevant statistical pool," of qualified minority contractors is being considered. *Id.* at 218.

The court in a footnote stated that it did not attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* "strong basis in evidence" benchmark. *Id.* at 218, n.11. The sufficiency of a municipality's findings of discrimination in a local industry must be evaluated on a case-by-case basis. *Id.*

The City argued that it was error for the district court to ignore its statistical evidence supporting the use of racial presumptions in its DBE-participation goals, and highlighted the disparity study it commissioned in response to *Croson*. *Id.* at 218. The court stated, however, that whatever probity the study's findings might have had on the analysis is irrelevant to the case, because the City refused to adopt the study when it was issued in 1995. *Id.* In addition, the court said the study was restricted to the letting of prime contracts by the City under the City's Program, and did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool, in the City's construction projects. *Id.* at 218.

The court noted that had the City adopted particularized findings of discrimination within its various agencies, and set participation goals for each accordingly, the outcome of the decision might have been different. *Id.* at 219. Absent such evidence in the City's construction industry, however, the court concluded the City lacked the factual predicates required under the Equal Protection Clause to support the City's 15% DBE-participation goal. *Id.* Thus, the court held the City failed to establish a compelling interest justifying the MBE program or the Special Notice, and because the City failed a strict scrutiny analysis on this ground, the court declined to address whether the program was narrowly tailored.

Lost profits and damages. Scott sought damages from the City under 42 U.S.C. § 1983, including lost profits. *Id.* at 219. The court, affirming the district court, concluded that in light of the entire record the City Council rejected Scott's low bid because Scott failed to meet the Special Notice's DBE-participation goal, not because Scott's bid exceeded the City's budget. *Id.* at 220. The court, therefore, affirmed the award of lost profits to Scott.

9. *Associated Gen. Contractors v. Drabik*, 214 F.3d 730 (6th Cir. 2000), *affirming* Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998)

This case is instructive to the disparity study based on the analysis applied in finding the evidence insufficient to justify an MBE/WBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision enjoining the award of a "set-aside" contract based on the State of Ohio's MBE program with the award of construction contracts.

The court held, among other things, that the mere existence of societal discrimination was insufficient to support a racial classification. The court found that the economic data was insufficient and too outdated. The court concluded the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court said the statute failed the narrow tailoring test, including because there was no evidence that the State had considered race-neutral remedies.

This case involves a suit by the Associated General Contractors of Ohio and Associated General Contractors of Northwest Ohio, representing Ohio building contractors to stop the award of a construction contract for the Toledo Correctional Facility to a minority-owned business ("MBE"), in a bidding process from which non-minority-owned firms were statutorily excluded from participating under Ohio's state Minority Business Enterprise Act. 214 F.3d at 733.

AGC of Ohio and AGC of Northwest Ohio (Plaintiffs-Appellees) claimed the Ohio Minority Business Enterprise Act ("MBEA") was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The district court agreed, and permanently enjoined the state from awarding any construction contracts under the MBEA. Drabik, Director of the Ohio Department of Administrative Services and others appealed the district court's Order. *Id.* at 733. The Sixth Circuit Court of Appeals affirmed the Order of the district court, holding unconstitutional the MBEA and enjoining the state from awarding any construction contracts under that statute. *Id*.

Ohio passed the MBEA in 1980. *Id*. at 733. This legislation "set aside" 5%, by value, of all state construction projects for bidding by certified MBEs exclusively. *Id*. Pursuant to the MBEA, the state decided to set aside, for MBEs only, bidding for construction of the Toledo Correctional Facility's Administration Building. Non-MBEs were excluded on racial grounds from bidding on that aspect of the project and restricted in their participation as subcontractors. *Id*.

The Court noted it ruled in 1983 that the MBEA was constitutional, see *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167 (6th Cir. 1983). *Id*. Subsequently, the United States Supreme Court in two landmark decisions applied the criteria of strict scrutiny under which such "racially preferential set-asides" were to be evaluated. *Id*. (*see City of Richmond v. J.A. Croson Co*. (1989) and *Adarand Constructors, Inc. v. Pena* (1995), citation omitted.) The Court noted that the decision in *Keip* was a more relaxed treatment accorded to equal protection challenges to state contracting disputes prior to *Croson*. *Id*. at 733-734.

Strict scrutiny. The Court found it is clear a government has a compelling interest in assuring that public dollars do not serve to finance the evil of private prejudice. *Id*. at 734-735, *citing Croson*, 488 U.S. at 492. But, the Court stated, "statistical disparity in the proportion of contracts awarded to a particular group, standing alone does not demonstrate such an evil." *Id*. at 735.

The Court said there is no question that remedying the effects of past discrimination constitutes a compelling governmental interest. *Id*. at

735. The Court stated to make this showing, a state cannot rely on mere speculation, or legislative pronouncements, of past discrimination, but rather, the Supreme Court has held the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was a passive participant in private industry's discriminatory practices. *Id*. at 735, *quoting Croson*, 488 U.S. at 486-92.

Thus, the Court concluded that the linchpin of the *Croson* analysis is its mandating of strict scrutiny, the requirement that a program be narrowly tailored to achieve a compelling government interest, but above all its holding that governments must identify discrimination with some specificity before they may use race-conscious relief; explicit findings of a constitutional or statutory violation must be made. *Id*. at 735, *quoting Croson*, 488 U.S. at 497.

Statistical evidence: compelling interest. The Court pointed out that proponents of "racially discriminatory systems" such as the MBEA have sought to generate the necessary evidence by a variety of means, however, such efforts have generally focused on "mere underrepresentation" by showing a lesser percentage of contracts awarded to a particular group than that group's percentage in the general population. *Id.* at 735. "Raw statistical disparity" of this sort is part of the evidence offered by Ohio in this case, according to the Court. *Id*. at 736. The Court stated however, "such evidence of mere statistical disparities has been firmly rejected as insufficient by the Supreme Court, particularly in a context such as contracting, where special qualifications are so relevant." *Id*.

The Court said that although Ohio's most "compelling" statistical evidence in this case compared the percentage of contracts awarded to minorities to the percentage of minority-owned businesses in Ohio, which the Court noted provided stronger statistics than the statistics in *Croson*, it was still insufficient. *Id*. at 736. The Court found the problem with Ohio's statistical comparison was that the percentage of minority-owned businesses in Ohio "did not take into account how many of those businesses were construction companies of any sort, let alone how many were qualified, willing, and able to perform state construction contracts." *Id*.

The Court held the statistical evidence that the Ohio legislature had before it when the MBEA was enacted consisted of data that was deficient. *Id*. at 736. The Court said that much of the data was severely limited in scope (ODOT contracts) or was irrelevant to this case (ODOT purchasing contracts). *Id*. The Court again noted the data did not distinguish minority construction contractors from minority businesses generally, and therefore "made no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size." *Id*. The Court also pointed out the program was not narrowly tailored, because the state conceded the AGC showed that the State had not performed a recent study. *Id*.

The Court also concluded that even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified, in some minimal sense, to perform the work in question, would also fail to satisfy the Court's criteria. *Id*. at 736. "If MBEs comprise 10% of the total number of contracting firms in the state, but only get 3% of the dollar value of certain contracts, which does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete." *Id.* at 736.

The Court stated the only cases found to present the necessary "compelling interest" sufficient to justify a narrowly tailored race-based remedy, are those that expose "pervasive, systematic, and obstinate discriminatory conduct. …" *Id*. at 737, *quoting Adarand*, 515 U.S. at 237. The Court said that Ohio had made no such showing in this case.

Narrow tailoring. A second and separate hurdle for the MBEA, the Court held, is its failure of narrow tailoring. The Court noted the Supreme Court in *Adarand* taught that a court called upon to address the question of narrow tailoring must ask, "for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting …." *Id*. at 737, *quoting Croson*, 488 U.S. at 507. The Court stated a narrowly-tailored set-aside program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate and must be linked to identified discrimination. *Id*. at 737. The Court said that the program must also not suffer from "overinclusiveness." *Id*. at 737, *quoting Croson*, 515 U.S. at 506.

The Court found the MBEA suffered from defects both of over and under-inclusiveness. *Id*. at 737. By lumping together the groups of Blacks, Native Americans, Hispanics and Orientals, the MBEA may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven. *Id.* at 737. Thus, the Court said, the MBEA was satisfied if contractors of Thai origin, who might never have been seen in Ohio until recently, receive 10% of state contracts, while African-Americans receive none. *Id*.

In addition, the Court found that Ohio's own underutilization statistics suffer from a fatal conceptual flaw: they do not report the actual use of minority firms; they only report the use of minority firms who have gone to the trouble of being certified and listed among the state's 1,180 MBEs. *Id*. at 737. The Court said there was no examination of whether contracts are being awarded to minority firms who have never sought such preference to take advantage of the special minority program, for whatever reason, and who have been awarded contracts in open bidding. *Id*.

The Court pointed out the district court took note of the outdated character of any evidence that might have been marshaled in support of the MBEA, and added that even if such data had been sufficient to justify the statute twenty years ago, it would not suffice to continue to justify it forever. *Id*. at 737-738. The MBEA, the Court noted, has remained in effect for twenty years and has no set expiration. *Id*. at 738. The Court reiterated a race-based preference program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate. *Id*. at 737.

Finally, the Court mentioned that one of the factors *Croson* identified as indicative of narrow tailoring is whether non-race-based means were considered as alternatives to the goal. *Id*. at 738. The Court concluded the historical record contained no evidence that the Ohio legislature gave any consideration to the· use of race-neutral means to increase minority participation in state contracting before resorting to race-based quotas. *Id*. at 738.

The district court had found that the supplementation of the state's existing data which might be offered given a continuance of the case would not sufficiently enhance the relevance of the evidence to justify delay in the district court's hearing. *Id*. at 738. The Court stated that under *Croson*, the state must have had sufficient evidentiary justification for a racially-conscious statute in *advance* of its passage. *Id*. The Court said that *Croson* required governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Id*. at 738.

The Court also referenced the district court finding that the state had been lax in maintaining the type of statistics that would be necessary to undergird its affirmative action program, and that the proper maintenance of current statistics is relevant to the requisite narrow tailoring of such a program. *Id*. at 738-739. But, the Court noted the state does not know how many minority-owned businesses are not certified as MBEs, and how many of them have been successful in obtaining state contracts. *Id*. at 739.

The court was mindful of the fact it was striking down an entire class of programs by declaring the State of Ohio MBE statute in question unconstitutional, and noted that its decision was "not reconcilable" with the Ohio Supreme Court's decision in *Ritchie Produce*, 707 N.E.2d 871 (Ohio 1999)(upholding the Ohio State MBE Program).

10. *Monterey Mechanical v. Wilson*, 125 F.3d 702 (9th Cir. 1997)

This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of an MBE/WBE-type program. Although the program at issue utilized the term "goals" as opposed to "quotas," the Ninth Circuit rejected such a distinction, holding "[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." The case also is instructive because it found the use of "goals" and the application of "good faith efforts" in connection with achieving goals to trigger strict scrutiny.

Monterey Mechanical Co. (the "plaintiff") submitted the low bid for a construction project for the California Polytechnic State University (the "University"). 125 F.3d 702, 704 (9th Cir. 1994). The University rejected the plaintiff's bid because the plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23 percent of the work to MBE/WBEs or, alternatively, demonstrate good faith outreach efforts. *Id*. The plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the awardee prime contractor did not subcontract any portion of the work to MBE/WBEs but did include documentation of good faith outreach efforts. *Id*.

Importantly, the University did not conduct a disparity study, and instead argued that because "the 'goal requirements' of the scheme '[did] not involve racial or gender quotas, set-asides or preferences,'" the University did not need a disparity study. *Id*. at 705. The plaintiff protested the contract award and sued the University's trustees, and a number of other individuals (collectively the "defendants") alleging the state law was violative of the Equal Protection Clause. *Id*. The district court denied the plaintiff's motion for an interlocutory injunction and the plaintiff appealed to the Ninth Circuit Court of Appeals. *Id*.

The defendants first argued that the statute was constitutional because it treated all general contractors alike, by requiring all to comply with the MBE/WBE participation goals. *Id*. at 708. The court held, however, that a minority or women business enterprise could satisfy the participation goals by allocating the requisite percentage of work to itself. *Id*. at 709. The court held that contrary to the district court's finding, such a difference was not *de minimis*. *Id*.

The defendant's also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. *Id*. at 710. The court rejected the argument finding that although the statute permitted awards to bidders who did not meet the percentage goals, "they are rigid in requiring precisely described and monitored efforts to attain those goals." *Id*. The court cited its own earlier precedent to hold that "the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas … [T]he relevant question is not whether a statute requires the use of such measures, but whether it

authorizes or encourages them." *Id*. at 710-11 (internal citations and quotations omitted). The court found that the statute encouraged set asides and cited *Concrete Works of Colorado v. Denver*, 36 F.3d 1512 (10th Cir. 1994), as analogous support for the proposition. *Id*. at 711.

The court found that the statute treated contractors differently based upon their race, ethnicity and gender, and although "worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness." *Id*. The court also noted that the statute may impose additional compliance expenses upon non-MBE/WBE firms who are required to make good faith outreach efforts (*e.g.*, advertising) to MBE/WBE firms. *Id*. at 712.

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. *Id*. at 712-13. The court found the University presented "no evidence" to justify the race- and gender-based classifications and thus did not consider additional issues of proof. *Id*. at 713. The court found that the statute was not narrowly tailored because the definition of "minority" was overbroad (*e.g.*, inclusion of Aleuts). *Id*. at 714, *citing Wygant v. Jackson Board of Education*, 476 U.S. 267, 284, n. 13 (1986) and *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505-06 (1989). The court found "[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny." *Id*. at 714, *citing Hopwood v. State of Texas*, 78 F.3d 932, 951 (5th Cir. 1996). The court held that the statute violated the Equal Protection Clause.

11. *Eng'g Contractors Ass'n of S. Florida v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997)

Engineering Contractors Association of South Florida v. Metropolitan Engineering Contractors Association is a paramount case in the Eleventh Circuit and is instructive to the disparity study. This decision has been cited and applied by the courts in various circuits that have addressed MBE/WBE-type programs or legislation involving local government contracting and procurement.

In *Engineering Contractors Association*, six trade organizations (the "plaintiffs") filed suit in the district court for the Southern District of Florida, challenging three affirmative action programs administered by Engineering Contractors Association, Florida, (the "County") as violative of the Equal Protection Clause. 122 F.3d 895, 900 (11th Cir. 1997). The three affirmative action programs challenged were the Black Business Enterprise program ("BBE"), the Hispanic Business Enterprise program ("HBE"), and the Woman Business Enterprise program, ("WBE"), (collectively "MWBE" programs). *Id*. The plaintiffs challenged the application of the program to County construction contracts. *Id*.

For certain classes of construction contracts valued over $25,000, the County set participation goals of 15 percent for BBEs, 19 percent for HBEs, and 11 percent for WBEs. *Id*. at 901. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id*. The County Commission would make the final determination and its decision was appealable to the County Manager. *Id*. The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. *Id*.

In a bench trial, the district court applied strict scrutiny to the BBE and HBE programs and held that the County lacked the requisite "strong basis in evidence" to support the race- and ethnicity-conscious measures. *Id*. at 902. The district court applied intermediate scrutiny to the WBE program and found that the "County had presented insufficient probative evidence to support its stated rationale for implementing a gender preference." *Id*. Therefore, the County had failed to demonstrate a "compelling interest" necessary to support the BBE and HBE programs, and failed to demonstrate an "important interest" necessary to support the WBE program. *Id*. The district court assumed the existence of a sufficient evidentiary basis to support the existence of the MWBE programs but held the BBE and HBE programs were not narrowly tailored to the interests they purported to serve; the district court held the WBE program was not substantially related to an important government interest. *Id*. The district court entered a final judgment enjoining the County from continuing to operate the MWBE programs and the County appealed. The Eleventh Circuit Court of Appeals affirmed. *Id*. at 900, 903.

On appeal, the Eleventh Circuit considered four major issues:

1. Whether the plaintiffs had standing. [The Eleventh Circuit answered this in the affirmative and that portion of the opinion is omitted from this summary];

2. Whether the district court erred in finding the County lacked a "strong basis in evidence" to justify the existence of the BBE and HBE programs;

3. Whether the district court erred in finding the County lacked a "sufficient probative basis in evidence" to justify the existence of the WBE program; and

4. Whether the MWBE programs were narrowly tailored to the interests they were purported to serve.

Id. at 903.

The Eleventh Circuit held that the BBE and HBE programs were subject to the strict scrutiny standard enunciated by the U.S. Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Id*. at 906. Under this standard, "an affirmative action program must be based upon a 'compelling government interest' and must be 'narrowly tailored' to achieve that interest." *Id*. The Eleventh Circuit further noted:

> "In practice, the interest that is alleged in support of racial preferences is almost always the same — remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government's interest, but rather the adequacy of the evidence of discrimination offered to show that interest."

Id. (internal citations omitted).

Therefore, strict scrutiny requires a finding of a "'strong basis in evidence' to support the conclusion that remedial action is necessary." *Id*., *citing Croson*, 488 U.S. at 500). The requisite "'strong basis in evidence' cannot rest on 'an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.'" *Id*. at 907, *citing Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994)(*citing and applying Croson*)). However, the Eleventh Circuit found that a governmental entity can "justify affirmative action by demonstrating 'gross statistical disparities' between the proportion of minorities hired … and the proportion of minorities willing and able to

do the work … Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence." *Id*. (internal citations omitted).

Notwithstanding the "exceedingly persuasive justification" language utilized by the Supreme Court in *United States v. Virginia*, 116 S. Ct. 2264 (1996)(evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. *Id*. at 908. Under this standard, the government must provide "sufficient probative evidence" of discrimination, which is a lesser standard than the "strong basis in evidence" under strict scrutiny. *Id*. at 910.

The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical "anecdotal" evidence. *Id*. at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially "post-enactment" evidence (*i.e.*, evidence based on data related to years following the initial enactment of the BBE program). *Id*. However, "such evidence carries with it the hazard that the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market." *Id*. at 912. A district court should not "speculate about what the data *might* have shown had the BBE program never been enacted." *Id*.

The statistical evidence. The County presented five basic categories of statistical evidence: (1) County contracting statistics; (2) County subcontracting statistics; (3) marketplace data statistics; (4) The Wainwright Study; and (5) The Brimmer Study. *Id.* In summary, the Eleventh Circuit held that the County's statistical evidence (described more fully below) was subject to more than one interpretation. *Id.* at 924. The district court found that the evidence was "insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference, and that it was insufficiently probative to support the County's stated rationale for imposing a gender preference." *Id.* The district court's view of the evidence was a permissible one. *Id.*

County contracting statistics. The County presented a study comparing three factors for County non-procurement construction contracts over two time periods (1981-1991 and 1993): (1) the percentage of bidders that were MWBE firms; (2) the percentage of awardees that were MWBE firms; and (3) the proportion of County contract dollars that had been awarded to MWBE firms. *Id.* at 912.

The Eleventh Circuit found that notably, for the BBE and HBE statistics, generally there were no "consistently negative disparities between the bidder and awardee percentages. In fact, by 1993, the BBE and HBE bidders are being awarded *more* than their proportionate 'share' … when the bidder percentages are used as the baseline." *Id*. at 913. For the WBE statistics, the bidder/awardee statistics were "decidedly mixed" as across the range of County construction contracts. *Id*.

The County then refined those statistics by adding in the total percentage of annual County construction dollars awarded to MBE/WBEs, by calculating "disparity indices" for each program and classification of construction contract. The Eleventh Circuit explained:

> "[A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group's bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group's contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100 percent."

Id. at 914. "The utility of disparity indices or similar measures … has been recognized by a number of federal circuit courts." *Id*.

The Eleventh Circuit found that "[i]n general … disparity indices of 80 percent or greater, which are close to full participation, are not considered indications of discrimination." *Id*. The Eleventh Circuit noted that "the EEOC's disparate impact guidelines use the 80 percent test as the boundary line for determining a prima facie case of discrimination." *Id*., *citing* 29 CFR § 1607.4D. In addition, no circuit that has "explicitly endorsed the use of disparity indices [has] indicated that an index of 80 percent or greater might be probative of discrimination." *Id*., *citing Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994)(crediting disparity indices ranging from 0 % to 3.8%); *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993)(crediting disparity index of 4%).

After calculation of the disparity indices, the County applied a standard deviation analysis to test the statistical significance of the results. *Id*. at 914. "The standard deviation figure describes the probability that the measured disparity is the result of mere chance." *Id*. The Eleventh Circuit had previously recognized "[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance." *Id*.

The statistics presented by the County indicated "statistically significant underutilization of BBEs in County construction contracting." *Id*. at 916. The results were "less dramatic" for HBEs and mixed as between favorable and unfavorable for WBEs. *Id*.

The Eleventh Circuit then explained the burden of proof:

> "[O]nce the proponent of affirmative action introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [plaintiff] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [defendant's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored."

Id. (internal citations omitted).

The Eleventh Circuit noted that a plaintiff has at least three methods to rebut the inference of discrimination with a "neutral explanation" by: "(1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data." *Id*. (internal quotations and citations omitted). The Eleventh Circuit held that the plaintiffs produced "sufficient evidence to establish a neutral explanation for the disparities." *Id*.

The plaintiffs alleged that the disparities were "better explained by firm size than by discrimination … [because] minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts." *Id*. at 916-17. The plaintiffs produced Census data indicating, on average, minority- and female-owned construction firms in Engineering Contractors Association were smaller than non-MBE/WBE firms. *Id*. at 917. The Eleventh Circuit found that the plaintiff's explanation of the disparities was a "plausible one, in light of the uncontroverted evidence that MBE/WBE construction firms tend to be substantially smaller than non-MBE/WBE firms." *Id*.

Additionally, the Eleventh Circuit noted that the County's own expert admitted that "firm size plays a significant role in determining which firms win contracts." *Id*. The expert stated:

> The size of the firm has got to be a major determinant because of course some firms are going to be larger, are going to be better prepared, are going to be in a greater natural capacity to be able to work on some of the contracts while others simply by virtue of their small size simply would not be able to do it. *Id*.

The Eleventh Circuit then summarized:

> Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. *Id*.

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id*. A regression analysis is "a statistical procedure for determining the relationship between a dependent and independent variable, *e.g.*, the dollar value of a contract award and firm size." *Id*. (internal citations omitted). The purpose of the regression analysis is "to determine whether the relationship between the two variables is statistically meaningful." *Id*.

The County's regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. *Id*. The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. *Id*. The regression analyses accounted for most of the negative disparities regarding MBE/WBE participation in County construction contracts (*i.e.*, most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). *Id*.

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. *Id*. at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite "strong basis in evidence" of discrimination of BBEs and HBEs. *Id*. The Eleventh Circuit held that this decision was not clearly erroneous. *Id*.

With respect to the BBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract between 1989-1991. *Id*. The Eleventh Circuit held the district court permissibly found that this did not constitute a "strong basis in evidence" of discrimination. *Id*.

With respect to the HBE statistics, one of the regression methods failed to explain the unfavorable disparity for one type of contract between 1989-1991, and both regression methods failed to explain the unfavorable disparity for another type of contract during that same time period. *Id*. However, by 1993, both regression methods accounted for all of the unfavorable disparities, and one of the disparities for one type of contract was actually favorable for HBEs. *Id*. The Eleventh Circuit held the district court permissibly found that this did not constitute a "strong basis in evidence" of discrimination. *Id*.

Finally, with respect to the WBE statistics, the regression analysis explained all but one negative disparity for one type of construction contract in the 1993 period. *Id*. The regression analysis explained all of the other negative disparities, and in the 1993 period, a disparity for

one type of contract was actually favorable to WBEs. *Id*. The Eleventh Circuit held the district court permissibly found that this evidence was not "sufficiently probative of discrimination." *Id*.

The County argued that the district court erroneously relied on the disaggregated data (*i.e.*, broken down by contract type) as opposed to the consolidated statistics. *Id*. at 919. The district court declined to assign dispositive weight to the aggregated data for the BBE statistics for 1989-1991 because (1) the aggregated data for 1993 did not show negative disparities when regressed for firm size, (2) the BBE disaggregated data left only one unexplained negative disparity for one type of contract for 1989-1991 when regressed for firm size, and (3) "the County's own expert testified as to the utility of examining the disaggregated data 'insofar as they reflect different kinds of work, different bidding practices, perhaps a variety of other factors that could make them heterogeneous with one another." *Id*.

Additionally, the district court noted, and the Eleventh Circuit found that "the aggregation of disparity statistics for nonheterogenous data populations can give rise to a statistical phenomenon known as 'Simpson's Paradox,' which leads to illusory disparities in improperly aggregated data that disappear when the data are disaggregated." *Id*. at 919, n. 4 (internal citations omitted). "Under those circumstances," the Eleventh Circuit held that the district court did not err in assigning less weight to the aggregated data, in finding the aggregated data for BBEs for 1989-1991 did not provide a "strong basis in evidence" of discrimination, or in finding that the disaggregated data formed an insufficient basis of support for any of the MBE/WBE programs given the applicable constitutional requirements. *Id*. at 919.

County subcontracting statistics. The County performed a subcontracting study to measure MBE/WBE participation in the County's subcontracting businesses. For each MBE/WBE category (BBE, HBE, and WBE), "the study compared the proportion of the designated group that filed a subcontractor's release of lien on a County construction project between 1991 and 1994 with the proportion of sales and receipt dollars that the same group received during the same time period." *Id.*

The district court found the statistical evidence insufficient to support the use of race- and ethnicity-conscious measures, noting problems with some of the data measures. *Id*. at 920.

Most notably, the denominator used in the calculation of the MWBE sales and receipts percentages is based upon the total sales and receipts from all sources for the firm filing a subcontractor's release of lien with the County. That means, for instance, that if a nationwide non-MWBE company performing 99 percent of its business outside of Dade County filed a single subcontractor's release of lien with the County during the relevant time frame, all of its sales and receipts for that time frame would be counted in the denominator against which MWBE sales and receipts are compared. As the district court pointed out, that is not a reasonable way to measure Dade County subcontracting participation. Id. The County's argument that a strong majority (72%) of the subcontractors were located in Dade County did not render the district court's decision to fail to credit the study erroneous. *Id*.

Marketplace data statistics. The County conducted another statistical study "to see what the differences are in the marketplace and what the relationships are in the marketplace." *Id*. The study was based on a sample of 568 contractors, from a pool of 10,462 firms, that had filed a "certificate of competency" with Dade County as of January 1995. *Id*. The selected firms participated in a telephone survey inquiring about the race, ethnicity, and gender of the firm's owner, and asked for information on the firm's total sales and receipts from all sources. *Id.* The County's expert then studied the data to determine "whether

meaningful relationships existed between (1) the race, ethnicity, and gender of the surveyed firm owners, and (2) the reported sales and receipts of that firm. *Id*. The expert's hypothesis was that unfavorable disparities may be attributable to marketplace discrimination. The expert performed a regression analysis using the number of employees as a proxy for size. *Id*.

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id*. Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id*. at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id*., *quoting Croson*, 488 U.S. at 501, *quoting Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).

The Eleventh Circuit found that after regressing for firm size, neither the BBE nor WBE data showed statistically significant unfavorable disparities. *Id*. Although the marketplace data did reveal unfavorable disparities even after a regression analysis, the district court was not required to assign those disparities controlling weight, especially in light of the dissimilar results of the County Contracting Statistics, discussed *supra*. *Id*.

The Wainwright Study. The County also introduced a statistical analysis prepared by Jon Wainwright, analyzing "the personal and financial characteristics of self-employed persons working full-time in the Dade County construction industry, based on data from the 1990 Public Use Microdata Sample database" (derived from the decennial census). *Id.*

The study "(1) compared construction business ownership rates of MBE/WBEs to those of non-MBE/WBEs, and (2) analyzed disparities in personal income between MBE/WBE and non-MBE/WBE business owners." *Id*. "The study concluded that blacks, Hispanics, and women are less likely to own construction businesses than similarly situated white males, and MBE/WBEs that do enter the construction business earn less money than similarly situated white males." *Id.*

With respect to the first conclusion, Wainwright controlled for "human capital" variables (education, years of labor market experience, marital status, and English proficiency) and "financial capital" variables (interest and dividend income, and home ownership). *Id*. The analysis indicated that blacks, Hispanics and women enter the construction business at lower rates than would be expected, once numerosity, and identified human and financial capital are controlled for. *Id*. The disparities for blacks and women (but not Hispanics) were substantial and statistically significant. *Id*. at 922. The underlying theory of this business ownership component of the study is that any significant disparities remaining after control of variables are due to the ongoing effects of past and present discrimination. *Id*.

The Eleventh Circuit held, in light of *Croson*, the district court need not have accepted this theory. *Id*. The Eleventh Circuit quoted *Croson,* in which the Supreme Court responded to a similar argument advanced by the plaintiffs in that case: "There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities *as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.*" *Id*., *quoting Croson*, 488 U.S. at 503. Following the Supreme Court in *Croson*, the Eleventh Circuit held "the disproportionate attraction of a minority group to non-construction industries does not mean that discrimination in the construction industry is the reason." *Id*., *quoting Croson*, 488 U.S. at

503. Additionally, the district court had evidence that between 1982 and 1987, there was a substantial growth rate of MBE/WBE firms as opposed to non-MBE/WBE firms, which would further negate the proposition that the construction industry was discriminating against minority- and woman-owned firms. *Id*. at 922.

With respect to the personal income component of the Wainwright study, after regression analyses were conducted, only the BBE statistics indicated a statistically significant disparity ratio. *Id*. at 923. However, the Eleventh Circuit held the district court was not required to assign the disparity controlling weight because the study did not regress for firm size, and in light of the conflicting statistical evidence in the County Contracting Statistics and Marketplace Data Statistics, discussed supra, which did regress for firm size. *Id*.

The Brimmer Study. The final study presented by the County was conducted under the supervision of Dr. Andrew F. Brimmer and concerned only black-owned firms. *Id*. The key component of the study was an analysis of the business receipts of black-owned construction firms for the years of 1977, 1982 and 1987, based on the Census Bureau's Survey of Minority- and Women-Owned Businesses, produced every five years. *Id*. The study sought to determine the existence of disparities between sales and receipts of black-owned firms in Dade County compared to the sales and receipts of all construction firms in Dade County. *Id*.

The study indicated substantial disparities in 1977 and 1987 but not 1982. *Id*. The County alleged that the absence of disparity in 1982 was due to substantial race-conscious measures for a major construction contract (Metrorail project), and not due to a lack of discrimination in the industry. *Id*. However, the study made no attempt to filter for the Metrorail project and "complete[ly] fail[ed]" to account for firm size. *Id*. Accordingly, the Eleventh Circuit found the district court permissibly discounted the results of the Brimmer study. *Id*. at 924.

Anecdotal evidence. In addition, the County presented a substantial amount of anecdotal evidence of perceived discrimination against BBEs, a small amount of similar anecdotal evidence pertaining to WBEs, and no anecdotal evidence pertaining to HBEs. *Id*. The County presented three basic forms of anecdotal evidence: "(1) the testimony of two County employees responsible for administering the MBE/WBE programs; (2) the testimony, primarily by affidavit, of twenty-three MBE/WBE contractors and subcontractors; and (3) a survey of black-owned construction firms." *Id*.

The County employees testified that the decentralized structure of the County construction contracting system affords great discretion to County employees, which in turn creates the opportunity for discrimination to infect the system. *Id*. They also testified to specific incidents of discrimination, for example, that MBE/WBEs complained of receiving lengthier punch lists than their non-MBE/WBE counterparts. *Id*. They also testified that MBE/WBEs encounter difficulties in obtaining bonding and financing. *Id*.

The MBE/WBE contractors and subcontractors testified to numerous incidents of perceived discrimination in the Dade County construction market, including:

Situations in which a project foreman would refuse to deal directly with a black or female firm owner, instead preferring to deal with a white employee; instances in which an MWBE owner knew itself to be the low bidder on a subcontracting project, but was not awarded the job; instances in which a low bid by an MWBE was "shopped" to solicit even lower bids from non-MWBE firms; instances in which an MWBE owner received an invitation to bid on a subcontract within a day of the bid due date, together with a "letter of unavailability" for the MWBE owner to

sign in order to obtain a waiver from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project. Id. at 924-25.

Finally, the County submitted a study prepared by Dr. Joe E. Feagin, comprised of interviews of 78 certified black-owned construction firms. *Id*. at 925. The interviewees reported similar instances of perceived discrimination, including: "difficulty in securing bonding and financing; slow payment by general contractors; unfair performance evaluations that were tainted by racial stereotypes; difficulty in obtaining information from the County on contracting processes; and higher prices on equipment and supplies than were being charged to non-MBE/WBE firms." *Id*.

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County's construction contracting process. *Id*. However, such anecdotal evidence is helpful "only when it [is] combined with and reinforced by sufficiently probative statistical evidence." *Id*. In her plurality opinion in *Croson*, Justice O'Connor found that "evidence of a pattern of individual discriminatory acts can, *if supported by appropriate statistical proof*, lend support to a local government's determination that broader remedial relief is justified." *Id*., *quoting Croson*, 488 U.S. at 509 (emphasis added by the Eleventh Circuit). Accordingly, the Eleventh Circuit held that "anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id*. at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. *Id*. at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a "constitutionally sufficient evidentiary foundation." *Id*.

Although the Eleventh Circuit determined that the MBE/WBE program did not survive constitutional muster due to the absence of a sufficient evidentiary foundation, the Eleventh Circuit proceeded with the second prong of the strict scrutiny analysis of determining whether the MBE/WBE programs were narrowly tailored (BBE and HBE programs) or substantially related (WBE program) to the legitimate government interest they purported to serve, *i.e.*, "remedying the effects of present and past discrimination against blacks, Hispanics, and women in the Dade County construction market." *Id*.

Narrow tailoring. "The essence of the 'narrowly tailored' inquiry is the notion that explicitly racial preferences … must only be a 'last resort' option." *Id*., *quoting Hayes v. North Side Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993) and *citing Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment)("[T]he strict scrutiny standard … forbids the use of even narrowly drawn racial classifications except as a last resort.").

The Eleventh Circuit has identified four factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) "the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties." *Id*. at 927, *citing Ensley Branch*, 31 F.3d at 1569. The four factors provide "a useful analytical structure." *Id*. at 927. The Eleventh Circuit focused only on the first factor in the present case "because that is where the County's MBE/WBE programs are most problematic." *Id*.

The Eleventh Circuit *flatly reject[ed] the County's assertion that 'given a strong basis in evidence of a race-based problem, a race-based remedy*

is necessary.' That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." Id., citing Croson, 488 U.S. at 507 (holding that affirmative action program was not narrowly tailored where "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting") … Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of medicines, with many potential side effects, and must be reserved for those severe cases that are highly resistant to conventional treatment. Id. at 927.

The Eleventh Circuit held that the County "clearly failed to give serious and good faith consideration to the use of race- and ethnicity-neutral measures." *Id*. Rather, the determination of the necessity to establish the MWBE programs was based upon a conclusory legislative statement as to its necessity, which in turn was based upon an "equally conclusory analysis" in the Brimmer study, and a report that the SBA only was able to direct 5 percent of SBA financing to black-owned businesses between 1968-1980. *Id*.

The County admitted, and the Eleventh Circuit concluded, that the County failed to give any consideration to any alternative to the HBE affirmative action program. *Id*. at 928. Moreover, the Eleventh Circuit found that the testimony of the County's own witnesses indicated the viability of race- and ethnicity-neutral measures to remedy many of the problems facing black- and Hispanic-owned construction firms. *Id*. The County employees identified problems, virtually all of which were related to the County's own processes and procedures, including: "the decentralized County contracting system, which affords a high level of discretion to County employees; the complexity of County contract specifications; difficulty in obtaining bonding; difficulty in obtaining financing; unnecessary bid restrictions; inefficient payment procedures; and insufficient or inefficient exchange of information." *Id*. The Eleventh Circuit found that the problems facing MBE/WBE contractors were "institutional barriers" to entry facing every new entrant into the construction market, and were perhaps affecting the MBE/WBE contractors disproportionately due to the "institutional youth" of black- and Hispanic-owned construction firms. *Id*. "It follows that those firms should be helped the most by dismantling those barriers, something the County could do at least in substantial part." *Id*.

The Eleventh Circuit noted that the race- and ethnicity-neutral options available to the County mirrored those available and cited by Justice O'Connor in *Croson*:

[T]he city has at its disposal a whole array of race-neutral measures to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination and neglect … The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Id., *quoting Croson*, 488 U.S. at 509-10.

The Eleventh Circuit found that except for some "half-hearted programs" consisting of "limited technical and financial aid that might benefit BBEs and HBEs," the County had not "seriously considered" or tried most of the race- and ethnicity-neutral alternatives available. *Id*. at 928. "Most notably … the County has not taken any action whatsoever to ferret out and respond to instances of discrimination if and when they have occurred in the County's own contracting process." *Id*.

The Eleventh Circuit found that the County had taken no steps to "inform, educate, discipline, or penalize" discriminatory misconduct by

its own employees. *Id*. at 929. Nor had the County passed any local ordinances expressly prohibiting discrimination by local contractors, subcontractors, suppliers, bankers, or insurers. *Id*. "Instead of turning to race- and ethnicity-conscious remedies as a last resort, the County has turned to them as a first resort." Accordingly, the Eleventh Circuit held that even if the BBE and HBE programs were supported by the requisite evidentiary foundation, they violated the Equal Protection Clause because they were not narrowly tailored. *Id*.

Substantial relationship. The Eleventh Circuit held that due to the relaxed "substantial relationship" standard for gender-conscious programs, if the WBE program rested upon a sufficient evidentiary foundation, it could pass the substantial relationship requirement. *Id*. However, because it did not rest upon a sufficient evidentiary foundation, the WBE program could not pass constitutional muster. *Id*.

For all of the foregoing reasons, the Eleventh Circuit affirmed the decision of the district court declaring the MBE/WBE programs unconstitutional and enjoining their continued operation.

12. *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity ("AGCC")*, 950 F.2d 1401 (9th Cir. 1991)

In *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity ("AGCC")*, the Ninth Circuit Court of Appeals denied plaintiffs request for preliminary injunction to enjoin enforcement of the city's bid preference program. 950 F.2d 1401 (9th Cir. 1991). Although an older case, *AGCC* is instructive as to the analysis conducted by the Ninth Circuit. The court discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the five percent preference given Local Business Enterprises ("LBEs") and the 5 percent preference given MBEs and WBEs. *Id*. The ordinance defined "MBE" as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. "WBE" was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed $14 million. *Id*.

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id*. at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC's constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id*. at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interesting in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities' legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id*. at 1412-13, *citing Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, "the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this

sub-part of strict scrutiny review." *Id*. at 1413, *quoting Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong." *Id*. at 1413 *quoting Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id*. at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id*. And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found "discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City's procurement practices." *Id*. at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. *Id*. at 1414. Using the City and County of San Francisco as the "relevant market," the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id*. at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. *Id*. Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id*. For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id*. The Ninth Circuit stated than in its decision in *Coral Construction*, it emphasized that such statistical disparities are "an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id*. at 1414, *citing* to *Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring "the cold numbers convincingly to life. *Id*. at 1414, *quoting Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id* at 1415. The City pointed to numerous individual accounts of discrimination, that an "old boy network" still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id*. The court found that such a "combination of convincing anecdotal and statistical evidence is potent." *Id*. at 1415 *quoting Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id*. at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id*.

The court pointed out the City's findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id*. at 1416.

In its analysis of the "narrowly tailored" requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id*. at 1416. Second, the plan should avoid the use of "rigid numerical quotas." *Id*. According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id*. Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id*. Third, "an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id*. at 1416 *quoting Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that "while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative … however irrational, costly, unreasonable, and unlikely to succeed such alternative may be." *Id*. at 1417 *quoting Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id*. at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id*. at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id*. at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id*. at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id*. at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy "superfluous," and would thwart the Supreme Court's directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id*. at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear "relatively light and well distributed." *Id*. at 1417. The court stated that the Ordinance was "limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id*. at 1418, *quoting Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the

ordinance to benefit only those MBEs located within the City's borders. *Id*. 1418.

13. *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991)

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington's minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County's MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a prima facie case of discrimination. *Id*. The court pointed out that the U.S. Supreme Court in *Croson* held that where "gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Id*. at 918, *quoting Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id*. at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id*. at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id*.

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id*. at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics "convincingly to life." *Id*. at 919, *quoting International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id*. at 919, *citing Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id*. at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id*. at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id*. Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id*. Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id*.

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a "propelling government interest" for King County's adopting the MBE Program. *Id*. at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id*. at 922, *citing Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id*. at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id*.

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id*. at 922, *citing Croson*, 488 U.S. at 507. The second characteristic of the narrowly-tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id*. Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id*.

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives as among the most important. *Id*. at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id*. at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id*. Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id*. The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id*. The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id*.

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id*. at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id*. The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id*.

A second indicator of a program's narrowly tailoring is program flexibility. *Id*. at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id*. at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at five percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id*. at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or services and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id*.

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id*. The actual percentages of required MBE participation are determined on a case-by-case basis. Levels of participation may be reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id*.

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id*. at 925. Here the court held that King County's MBE program fails this third portion of "narrowly tailored" requirement. The court found the definition of "minority business" included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id*. at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. *Id*. This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id*. Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id*.

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id*. at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community. *Id*. Because King County's program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id*. Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. *Id*. at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and

there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id*. at 931.

In this case, the court concluded that King County's WBE preference survived a facial challenge. *Id*. at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. *Id*. The court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. *Id*. at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court's grant of summary judgment to King County for the WBE program.

b. Recent District Court Decisions

14. *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016)

Plaintiff Kossman is a company engaged in the business of providing erosion control services and is majority owned by a white male. 2016 WL 1104363 at *1. Kossman brought this action as an equal protection challenge to the City of Houston's Minority and Women Owned Business Enterprise ("MWBE") program. *Id*. The MWBE program that is challenged has been in effect since 2013 and sets a 34 percent MWBE goal for construction projects. *Id*. Houston set this goal based on a disparity study issued in 2012. *Id*. The study analyzed the status of minority-owned and woman-owned business enterprises in the geographic and product markets of Houston's construction contracts. *Id*.

Kossman alleges that the MWBE program is unconstitutional on the ground that it denies non-MWBEs equal protection of the law, and asserts that it has lost business as a result of the MWBE program because prime contractors are unwilling to subcontract work to a non-MWBE firm like Kossman. *Id*. at *1. Kossman filed a motion for summary judgment; Houston filed a motion to exclude the testimony of Kossman's expert; and Houston filed a motion for summary judgment. *Id*.

The district court referred these motions to the Magistrate Judge. The Magistrate Judge, on February 17, 2016, issued its Memorandum & Recommendation to the district court in which it found that Houston's motion to exclude Kossman's expert should be granted because the expert articulated no method and had no training in statistics or economics that would allow him to comment on the validity of the disparity study. *Id*. at *1 The Magistrate Judge also found that the MWBE program was constitutional under strict scrutiny, except with respect to the inclusion of Native-American-owned businesses. *Id*. The Magistrate Judge found there was insufficient evidence to establish a need for remedial action for businesses owned by Native Americans, but found there was sufficient evidence to justify remedial action and inclusion of other racial and ethnic minorities and women-owned businesses. *Id*.

After the Magistrate Judge issued its Memorandum & Recommendation, Kossman filed objections, which the district court subsequently in its order adopting Memorandum & Recommendation, decided on March 22, 2016, affirmed and adopted the Memorandum & Recommendation of the magistrate judge and overruled the objections by Kossman. *Id*. at *2.

District court order adopting Memorandum & Recommendation of Magistrate Judge.

Dun & Bradstreet underlying data properly withheld and Kossman's proposed expert properly excluded. The district court first rejected Kossman's objection that the City of Houston improperly withheld the Dun & Bradstreet data that was utilized in the disparity study. This ruling was in connection with the district court's affirming the decision of the Magistrate Judge granting the motion of Houston to exclude the testimony of Kossman's proposed expert. Kossman had conceded that the Magistrate Judge correctly determined that Kossman's proposed expert articulated no method and relied on untested hypotheses. *Id*. at *2. Kossman also acknowledged that the expert was unable to produce data to confront the disparity study. *Id*.

Kossman had alleged that Houston withheld the underlying data from Dun & Bradstreet. The court found that under the contractual agreement between Houston and its consultant, the consultant for Houston had a licensing agreement with Dun & Bradstreet that prohibited it from providing the Dun & Bradstreet data to any third-party. *Id*. at *2. In addition, the court agreed with Houston that Kossman would not be able to offer admissible analysis of the Dun & Bradstreet data, even if it had access to the data. *Id*. As the Magistrate Judge pointed out, the court found Kossman's expert had no training in statistics or economics, and thus would not be qualified to interpret the Dun & Bradstreet data or challenge the disparity study's methods. *Id*. Therefore, the court affirmed the grant of Houston's motion to exclude Kossman's expert.

Dun & Bradstreet data is reliable and accepted by courts; bidding data rejected as problematic. The court rejected Kossman's argument that the disparity study was based on insufficient, unverified information furnished by others, and rejected Kossman's argument that bidding data is a superior measure of determining availability. *Id*. at *3.

The district court held that because the disparity study consultant did not collect the data, but instead utilized data that Dun & Bradstreet had collected, the consultant could not guarantee the information it relied on in creating the study and recommendations. *Id*. at *3. The consultant's role was to analyze that data and make recommendations based on that analysis, and it had no reason to doubt the authenticity or accuracy of the Dun & Bradstreet data, nor had Kossman presented any evidence that would call that data into question. *Id*. As Houston pointed out, Dun & Bradstreet data is extremely reliable, is frequently used in disparity studies, and has been consistently accepted by courts throughout the country. *Id*.

Kossman presented no evidence indicating that bidding data is a comparably more accurate indicator of availability than the Dun & Bradstreet data, but rather Kossman relied on pure argument. *Id*. at *3. The court agreed with the Magistrate Judge that bidding data is inherently problematic because it reflects only those firms actually solicited for bids. *Id*. Therefore, the court found the bidding data would fail to identify those firms that were not solicited for bids due to discrimination. *Id*.

The anecdotal evidence is valid and reliable. The district court rejected Kossman's argument that the study improperly relied on anecdotal evidence, in that the evidence was unreliable and unverified. Id. at *3. The district court held that anecdotal evidence is a valid supplement to the statistical study. Id. The MWBE program is supported by both statistical and anecdotal evidence, and anecdotal evidence provides a valuable narrative perspective that statistics alone cannot provide. Id.

The district court also found that Houston was not required to independently verify the anecdotes. *Id*. at *3. Kossman, the district

court concluded, could have presented contrary evidence, but it did not. *Id*. The district court cited other courts for the proposition that the combination of anecdotal and statistical evidence is potent, and that anecdotal evidence is nothing more than a witness's narrative of an incident told from the witness's perspective and including the witness's perceptions. *Id*. Also, the court held the city was not required to present corroborating evidence, and the plaintiff was free to present its own witness to either refute the incident described by the city's witnesses or to relate their own perceptions on discrimination in the construction industry. *Id*.

The data relied upon by the study was not stale. The court rejected Kossman's argument that the study relied on data that is too old and no longer relevant. Id. at *4. The court found that the data was not stale and that the study used the most current available data at the time of the study, including Census Bureau data (2006-2008) and Federal Reserve data (1993, 1998 and 2003), and the study performed regression analyses on the data. Id.

Moreover, Kossman presented no evidence to suggest that Houston's consultant could have accessed more recent data or that the consultant would have reached different conclusions with more recent data. *Id*.

The Houston MWBE Program is narrowly tailored. The district court agreed with the Magistrate Judge that the study provided substantial evidence that Houston engaged in race-neutral alternatives, which were insufficient to eliminate disparities, and that despite race-neutral alternatives in place in Houston, adverse disparities for MWBEs were consistently observed. Id. at *4. Therefore, the court found there was strong evidence that a remedial program was necessary to address discrimination against MWBEs. Id. Moreover, Houston was not required to exhaust every possible race-neutral alternative before instituting the MWBE program. Id.

The district court also found that the MWBE program did not place an undue burden on Kossman or similarly situated companies. *Id*. at *4. Under the MWBE program, a prime contractor may substitute a small business enterprise like Kossman for an MWBE on a race and gender-neutral basis for up to four percent of the value of a contract. *Id*. Kossman did not present evidence that he ever bid on more than four percent of a Houston contract. *Id*. In addition, the court stated the fact the MWBE program placed *some* burden on Kossman is insufficient to support the conclusion that the program is not nearly tailored. *Id*. The court concurred with the Magistrate Judge's observation that the proportional sharing of opportunities is, at the core, the point of a remedial program. *Id*. The district court agreed with the Magistrate Judge's conclusion that the MWBE program is nearly tailored.

Native American-owned businesses. The study found that Native-American-owned businesses were utilized at a higher rate in Houston's construction contracts than would be anticipated based on their rate of availability in the relevant market area. *Id*. at *4. The court noted this finding would tend to negate the presence of discrimination against Native Americans in Houston's construction industry. *Id*.

This Houston disparity study consultant stated that the high utilization rate for Native Americans stems largely from the work of two Native-American-owned firms. *Id*. The Houston consultant suggested that without these two firms, the utilization rate for Native Americans would decline significantly, yielding a statistically significant disparity ratio. *Id*.

The Magistrate Judge, according to the district court, correctly held and found that there was insufficient evidence to support including Native Americans in the MWBE program. *Id*. The court approved and adopted the Magistrate Judge explanation that the opinion of the disparity study consultant that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, is not

evidence of the need for remedial action. *Id*. at *5. The district court found no equal-protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms. *Id*. Therefore, the utilization goal for businesses owned by Native Americans is not supported by a strong evidentiary basis. *Id*. at *5.

The district court agreed with the Magistrate Judge's recommendation that the district court grant summary judgment in favor of Kossman with respect to the utilization goal for Native-American-owned business. *Id*. The court found there was limited significance to the Houston consultant's opinion that utilization of Native-American-owned businesses would drop to statistically significant levels if two Native-American-owned businesses were ignored. *Id*. at *5.

The court stated the situation presented by the Houston disparity study consultant of a "hypothetical non-existence" of these firms is not evidence and cannot satisfy strict scrutiny. *Id*. at *5. Therefore, the district court adopted the Magistrate Judge's recommendation with respect to excluding the utilization goal for Native-American-owned businesses. *Id*. The court noted that a preference for Native-American-owned businesses could become constitutionally valid in the future if there were sufficient evidence of discrimination against Native-American-owned businesses in Houston's construction contracts. *Id*. at *5.

Conclusion. The district court held that the Memorandum & Recommendation of the Magistrate Judge is adopted in full; Houston's motion to exclude the Kossman's proposed expert witness is granted; Kossman's motion for summary judgment is granted with respect to excluding the utilization goal for Native-American-owned businesses and denied in all other respects; Houston's motion for summary judgment is denied with respect to including the utilization goal for Native-American-owned businesses and granted in all other respects as to the MWBE program for other minorities and women-owned firms. *Id*. at *5.

Memorandum and Recommendation by Magistrate Judge, dated February 17, 2016, S.D. Texas, Civil Action No. H-14-1203.

Kossman's proposed expert excluded and not admissible. Kossman in its motion for summary judgment solely relied on the testimony of its proposed expert, and submitted no other evidence in support of its motion. The Magistrate Judge (hereinafter "MJ") granted Houston's motion to exclude testimony of Kossman's proposed expert, which the district court adopted and approved, for multiple reasons. The MJ found that his experience does not include designing or conducting statistical studies, and he has no education or training in statistics or economics. *See*, MJ, Memorandum and Recommendation ("M&R") by MJ, dated February 17, 2016, at 31, S.D. Texas, Civil Action No. H-14-1203. The MJ found he was not qualified to collect, organize or interpret numerical data, has no experience extrapolating general conclusions about a subset of the population by sampling it, has demonstrated no knowledge of sampling methods or understanding of the mathematical concepts used in the interpretation of raw data, and thus, is not qualified to challenge the methods and calculations of the disparity study. *Id.*

The MJ found that the proposed expert report is only a theoretical attack on the study with no basis and objective evidence, such as data r or testimony of construction firms in the relative market area that support his assumptions regarding available MWBEs or comparative studies that control the factors about which he complained. *Id.* at 31. The MJ stated that the proposed expert is not an economist and thus is not qualified to challenge the disparity study explanation of its economic considerations. *Id.* at 31. The proposed expert failed to provide econometric support for the use of bidder data, which he

argued was the better source for determining availability, cited no personal experience for the use of bidder data, and provided no proof that would more accurately reflect availability of MWBEs absent discriminatory influence. *Id.* Moreover, he acknowledged that no bidder data had been collected for the years covered by the study. *Id*.

The court found that the proposed expert articulated no method at all to do a disparity study, but merely provided untested hypotheses. *Id.* at 33. The proposed expert's criticisms of the study, according to the MJ, were not founded in cited professional social science or econometric standards. *Id.* at 33. The MJ concludes that the proposed expert is not qualified to offer the opinions contained in his report, and that his report is not relevant, not reliable, and, therefore, not admissible. *Id.* at 34.

Relevant geographic market area. The MJ found the market area of the disparity analysis was geographically confined to area codes in which the majority of the public contracting construction firms were located. *Id.* at 3-4, 51. The relevant market area, the MJ said, was weighted by industry, and therefore the study limited the relevant market area by geography and industry based on Houston's past years' records from prior construction contracts. *Id.* at 3-4, 51.

Availability of MWBEs. The MJ concluded disparity studies that compared the availability of MWBEs in the relevant market with their utilization in local public contracting have been widely recognized as strong evidence to find a compelling interest by a governmental entity for making sure that its public dollars do not finance racial discrimination. *Id*. at 52-53. Here, the study defined the market area by reviewing past contract information, and defined the relevant market according to two critical factors, geography and industry. *Id*. at 3-4, 53. Those parameters, weighted by dollars attributable to each industry, were used to identify for comparison MWBEs that were available and MWBEs that had been utilized in Houston's construction contracting over the last five and one-half years. *Id*. at 4-6, 53. The study adjusted for owner labor market experience and educational attainment in addition to geographic location and industry affiliation. *Id.* at 6, 53.

Kossman produced no evidence that the availability estimate was inadequate. *Id.* at 53. Plaintiff's criticisms of the availability analysis, including for capacity, the court stated was not supported by any contrary evidence or expert opinion. *Id.* at 53-54. The MJ rejected Plaintiff's proposed expert's suggestion that analysis of bidder data is a better way to identify MWBEs. *Id.* at 54. The MJ noted that Kossman's proposed expert presented no comparative evidence based on bidder data, and the MJ found that bidder data may produce availability statistics that are skewed by active and passive discrimination in the market. *Id.*

In addition to being underinclusive due to discrimination, the MJ said bidder data may be overinclusive due to inaccurate self-evaluation by firms offering bids despite the inability to fulfill the contract. *Id.* at 54. It is possible that unqualified firms would be included in the availability figure simply because they bid on a particular project. *Id.* The MJ concluded that the law does not require an individualized approach that measures whether MWBEs are qualified on a contract-by-contract basis. *Id.* at 55.

Disparity analysis. The study indicated significant statistical adverse disparities as to businesses owned by African Americans and Asians, which the MJ found provided a *prima facie* case of a strong basis in evidence that justified the Program's utilization goals for businesses owned by African Americans, Asian-Pacific Americans, and subcontinent Asian Americans. *Id.* at 55.

The disparity analysis did not reflect significant statistical disparities as to businesses owned by Hispanic Americans, Native Americans or non-

minority women. *Id*. at 55-56. The MJ found, however, the evidence of significant statistical adverse disparity in the utilization of Hispanic-owned businesses in the unremediated, private sector met Houston's *prima facie* burden of producing a strong evidentiary basis for the continued inclusion of businesses owned by Hispanic Americans. *Id*. at 56. The MJ said the difference between the private sector and Houston's construction contracting was especially notable because the utilization of Hispanic-owned businesses by Houston has benefitted from Houston's remedial program for many years. *Id.* Without a remedial program, the MJ stated the evidence suggests, and no evidence contradicts, a finding that utilization would fall back to private sector levels. *Id.*

With regard to businesses owned by Native Americans, the study indicated they were utilized to a higher percentage than their availability in the relevant market area. *Id*. at 56. Although the consultant for Houston suggested that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, the MJ found that opinion is not evidence of the need for remedial action. *Id.* at 56. The MJ concluded there was no-equal protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms, which was indicated by Houston's consultant. *Id.*

The utilization of woman-owned businesses (WBEs) declined by fifty percent when they no longer benefitted from remedial goals. *Id*. at 57. Because WBEs were eliminated during the period studied, the significance of statistical disparity, according to the MJ, is not reflected in the numbers for the period as a whole. *Id*. at 57. The MJ said during the time WBEs were not part of the program, the statistical disparity between availability and utilization was significant. *Id.* The precipitous decline in the utilization of WBEs after WBEs were eliminated and the significant statistical disparity when WBEs did not benefit from preferential treatment, the MJ found, provided a strong basis in evidence for the necessity of remedial action. *Id*. at 57. Kossman, the MJ pointed out, offered no evidence of a gender-neutral reason for the decline. *Id*.

The MJ rejected Plaintiff's argument that prime contractor and subcontractor data should not have been combined. *Id.* at 57. The MJ said that prime contractor and subcontractor data is not required to be evaluated separately, but that the evidence should contain reliable subcontractor data to indicate discrimination by prime contractors. *Id.* at 58. Here, the study identified the MWBEs that contracted with Houston by industry and those available in the relevant market by industry. *Id.* at 58. The data, according to the MJ, was specific and complete, and separately considering prime contractors and subcontractors is not only unnecessary but may be misleading. *Id.* The anecdotal evidence indicated that construction firms had served, on different contracts, in both roles. *Id.*

The MJ stated the law requires that the targeted discrimination be identified with particularity, not that every instance of explicit or implicit discrimination be exposed. *Id.* at 58. The study, the MJ found, defined the relevant market at a sufficient level of particularity to produce evidence of past discrimination in Houston's awarding of construction contracts and to reach constitutionally sound results. *Id*.

Anecdotal evidence. Kossman criticized the anecdotal evidence with which a study supplemented its statistical analysis as not having been verified and investigated. Id. at 58-59. The MJ said that Kossman could have presented its own evidence, but did not. Id. at 59. Kossman presented no contrary body of anecdotal evidence and pointed to nothing that called into question the specific results of the market surveys and focus groups done in the study. Id. The court rejected any

requirement that the anecdotal evidence be verified and investigated. Id. at 59.

Regression analyses. Kossman challenged the regression analyses done in the study of business formation, earnings and capital markets. *Id.* at 59. Kossman criticized the regression analyses for failing to precisely point to where the identified discrimination was occurring. *Id*. The MJ found that the focus on identifying where discrimination is occurring misses the point, as regression analyses is not intended to point to specific sources of discrimination, but to eliminate factors other than discrimination that might explain disparities. *Id.* at 59-60. Discrimination, the MJ said, is not revealed through evidence of explicit discrimination, but is revealed through unexplainable disparity. *Id*. at 60.

The MJ noted that data used in the regression analyses were the most current available data at the time, and for the most part data dated from within a couple of years or less of the start of the study period. *Id.* at 60. Again, the MJ stated, Kossman produced no evidence that the data on which the regression analyses were based were invalid. *Id.*

Narrow tailoring factors. The MJ found that the Houston MWBE program satisfied the narrow tailoring prong of a strict scrutiny analysis. The MJ said that the 2013 MWBE program contained a variety of race-neutral remedies, including many educational opportunities, but that the evidence of their efficacy or lack thereof is found in the disparity analyses. *Id.* at 60-61. The MJ concluded that while the race-neutral remedies may have a positive effect, they have not eliminated the discrimination. *Id.* at 61. The MJ found Houston's race-neutral programming sufficient to satisfy the requirements of narrow tailoring. *Id.*

As to the factors of flexibility and duration of the 2013 Program, the MJ also stated these aspects satisfy narrow tailoring. *Id.* at 61. The 2013 Program employs goals as opposed to quotas, sets goals on a contract-by-contract basis, allows substitution of small business enterprises for MWBEs for up to four percent of the contract, includes a process for allowing good-faith waivers, and builds in due process for suspensions of contractors who fail to make good-faith efforts to meet contract goals or MWSBEs that fail to make good-faith efforts to meet all participation requirements. *Id.* at 61. Houston committed to review the 2013 Program at least every five years, which the MJ found to be a reasonably brief duration period. *Id.*

The MJ concluded that the thirty-four percent annual goal is proportional to the availability of MWBEs historically suffering discrimination. *Id.* at 61. Finally, the MJ found that the effect of the 2013 Program on third parties is not so great as to impose an unconstitutional burden on non-minorities. *Id.* at 62. The burden on non-minority SBEs, such as Kossman, is lessened by the four-percent substitution provision. *Id.* at 62. The MJ noted another district court's opinion that 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. *Id.* at 62.

Holding. The MJ held that Houston established a *prima facie* case of compelling interest and narrow tailoring for all aspects of the MWBE program, except goals for Native-American-owned businesses. *Id.* at 62. The MJ also held that Plaintiff failed to produce any evidence, much less the greater weight of evidence, that would call into question the constitutionality of the 2013 MWBE program. *Id.* at 62.

15. *H.B. Rowe Corp., Inc. v. W. Lyndo Tippett, North Carolina DOT, et al*., 589 F. Supp.2d 587 (E.D.N.C. 2008), *affirmed in part, reversed in part, and remanded*, 615 F.3d 233 (4th Cir. 2010)

In *H.B. Rowe Company v. Tippett, North Carolina Department of Transportation, et al*. ("*Rowe*"), the United States District Court for the Eastern District of North Carolina, Western Division, heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina "affirmative action" program administered by the NCDOT. The NCDOT MWBE Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

Background. In this case plaintiff, a family-owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff's bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate "good faith efforts" to obtain pre-designated levels of minority participation on the project.

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff's bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff's good faith efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT's MWBE Program "largely mirrors" the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT's MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id*. An individual target for MBE participation was set for each project. *Id*.

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id*. The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippett. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

March 29, 2007 Order of the District Court. The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant

NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

September 28, 2007 Order of the District Court. On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a

genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

December 9, 2008 Order of the District Court (589 F.Supp.2d 587). The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

North Carolina's MWBE Program. The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code title 19A, § 2D.1101, et seq. The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id*. NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id*.

A firm could be certified as an MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 1980, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT." 589 F.Supp.2d 587. In determining whether the lowest bidder is "responsible," NCDOT would consider whether the bidder obtained the level of certified MBE and

WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C .Admin. Code tit. 19A§ 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT "dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of 'good faith' attempts to do so." 589 F.Supp.2d 587.

Compelling interest. The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in *Croson* made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587*, citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina's road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program's suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, "based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination." 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

Narrowly tailored. The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of

minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, *quoting Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id*. at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to "those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department." § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F3d 233 (4th Cir. 2010), discussed above.

16. *Thompson Building Wrecking Co. v. Augusta, Georgia*, No. 1:07CV019, 2007 WL 926153 (S.D. Ga. Mar. 14, 2007)(Slip. Op.)

This case considered the validity of the City of Augusta's local minority DBE program. The district court enjoined the City from favoring any contract bid on the basis of racial classification and based its decision principally upon the outdated and insufficient data proffered by the City in support of its program. 2007 WL 926153 at *9-10.

The City of Augusta enacted a local DBE program based upon the results of a disparity study completed in 1994. The disparity study examined the disparity in socioeconomic status among races, compared black-owned businesses in Augusta with those in other regions and those owned by other racial groups, examined "Georgia's racist history" in contracting and procurement, and examined certain data related to Augusta's contracting and procurement. *Id*. at *1-4. The plaintiff contractors and subcontractors challenged the constitutionality of the DBE program and sought to extend a temporary injunction enjoining the City's implementation of racial preferences in public bidding and procurement.

The City defended the DBE program arguing that it did not utilize racial classifications because it only required vendors to make a "good faith

effort" to ensure DBE participation. *Id*. at *6. The court rejected this argument noting that bidders were required to submit a "Proposed DBE Participation" form and that bids containing DBE participation were treated more favorably than those bids without DBE participation. The court stated: "Because a person's business can qualify for the favorable treatment based on that person's race, while a similarly situated person of another race would not qualify, the program contains a racial classification." *Id*.

The court noted that the DBE program harmed subcontractors in two ways: first, because prime contractors will discriminate between DBE and non-DBE subcontractors and a bid with a DBE subcontractor would be treated more favorably; and second, because the City would favor a bid containing DBE participation over an equal or even superior bid containing no DBE participation. *Id*.

The court applied the strict scrutiny standard set forth in *Croson* and *Engineering Contractors Association* to determine whether the City had a compelling interest for its program and whether the program was narrowly tailored to that end. The court noted that pursuant to *Croson*, the City would have a compelling interest in assuring that tax dollars would not perpetuate private prejudice. But, the court found (*citing* to *Croson*), that a state or local government must identify that discrimination, "public or private, with some specificity before they may use race-conscious relief." The court cited the Eleventh Circuit's position that "'gross statistical disparities' between the proportion of minorities hired by the public employer and the proportion of minorities willing and able to work" may justify an affirmative action program. *Id*. at *7. The court also stated that anecdotal evidence is relevant to the analysis.

The court determined that while the City's disparity study showed some statistical disparities buttressed by anecdotal evidence, the study suffered from multiple issues. *Id*. at *7-8. Specifically, the court found that those portions of the study examining discrimination outside the area of subcontracting (*e.g.*, socioeconomic status of racial groups in the Augusta area) were irrelevant for purposes of showing a compelling interest. The court also cited the failure of the study to differentiate between different minority races as well as the improper aggregation of race- and gender-based discrimination referred to as Simpson's Paradox.

The court assumed for purposes of its analysis that the City could show a compelling interest but concluded that the program was not narrowly tailored and thus could not satisfy strict scrutiny. The court found that it need look no further beyond the fact of the thirteen-year duration of the program absent further investigation, and the absence of a sunset or expiration provision, to conclude that the DBE program was not narrowly tailored. *Id*. at *8. Noting that affirmative action is permitted only sparingly, the court found: "[i]t would be impossible for Augusta to argue that, 13 years after last studying the issue, racial discrimination is so rampant in the Augusta contracting industry that the City must affirmatively act to avoid being complicit." *Id*. The court held in conclusion, that the plaintiffs were "substantially likely to succeed in proving that, when the City requests bids with minority participation and in fact favors bids with such, the plaintiffs will suffer racial discrimination in violation of the Equal Protection Clause." *Id*. at *9.

In a subsequent Order dated September 5, 2007, the court denied the City's motion to continue plaintiff's Motion for Summary Judgment, denied the City's Rule 12(b)(6) motion to dismiss, and stayed the action for 30 days pending mediation between the parties. Importantly, in this Order, the court reiterated that the female- and locally-owned business components of the program (challenged in plaintiff's Motion for Summary Judgment) would be subject to intermediate scrutiny and rational basis scrutiny, respectively. The court also reiterated its rejection of the City's challenge to the plaintiffs' standing. The court

noted that under *Adarand*, preventing a contractor from competing on an equal footing satisfies the particularized injury prong of standing. And showing that the contractor will sometime in the future bid on a City contract "that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors" satisfies the second requirement that the particularized injury be actual or imminent. Accordingly, the court concluded that the plaintiffs have standing to pursue this action.

17. *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, 333 F. Supp.2d 1305 (S.D. Fla. 2004)

The decision in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, is significant to the disparity study because it applied and followed the *Engineering Contractors Association* decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus *Hershell Gill* is instructive as to the analysis relating to architect and engineering services. The decision in *Hershell Gill* also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County Commissioners due to the district court's finding of their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 .3d 950 (10th Cir. 2003). *See* discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the "plaintiffs") brought suit against Engineering Contractors Association (the "County"), the former County Manager, and various current County Commissioners (the "Commissioners") in their official and personal capacities (collectively the "defendants"), seeking to enjoin the same "participation goals" in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit's decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise ("CSBE") program for construction contracts, "but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services." *Id*. at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively "MBE/WBE"). *Id*. The MBE/WBE programs applied to A&E contracts in excess of $25,000. *Id*. at 1312. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id*. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id*. The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id*. at 1313. However, the district court found "the participation goals for the three MBE/WBE programs challenged … remained unchanged since 1994." *Id*.

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id*. at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the "County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services." The final report further stated, "Based on all the

analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures." *Id*. at 1315. The district court also found that the Commissioners were informed that "there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers then there was in contract construction." *Id*. Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id*.

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.

Id. The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id*. at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id*. at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present "a strong basis of evidence" indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id*. at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the "gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective." *Id*. at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present "sufficient probative evidence" of discrimination. *Id*. (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a "last resort." *Id*.

The County presented both statistical and anecdotal evidence. *Id*. at 1318. The statistical evidence consisted of Dr. Carvajal's report, most of which consisted of "post-enactment" evidence. *Id*. Dr. Carvajal's analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id*. The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id*. Dr. Carvajal used the phone book, a list compiled by infoUSA, and a list of firms registered for technical certification with the County's Department of Public Works to compile a list of the "universe" of firms competing in the market. *Id*. For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. *Id*.

Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed

between the percentage of A&E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. *Id*. Dr. Carvajal conducted regression analyses "in order to determine the effect a firm owner's gender or race had on certain dependent variables." *Id*. Dr. Carvajal used the firm's annual volume of business as a dependent variable and determined the disparities were due in each case to the firm's gender and/or ethnic classification. *Id*. at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms." *Id*. Dr. Carvajal's results remained substantially unchanged. *Id*.

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the "gross statistical disparities" in the annual business volume for Hispanic- and women-owned firms could be attributed to discrimination; he "did not find sufficient evidence of discrimination against blacks." *Id*.

The court held that Dr. Carvajal's study constituted neither a "strong basis in evidence" of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute "sufficient probative evidence" necessary to justify the gender-conscious measures. *Id*. The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id*. The court found that an analysis of the award data indicated, "[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace." *Id*.

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. *Id*. at 1321. With respect to the marketplace data for Hispanics and women, the court found it "unreliable and inaccurate" for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace survey was unreliable. *Id*. at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), as the burden of proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the "Tenth Circuit's decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari." *Id*. at 1325 (internal citations omitted).

The defendant interveners presented anecdotal evidence pertaining only to discrimination against women in the County's A&E industry. *Id*. The anecdotal evidence consisted of the testimony of three A&E professional women, "nearly all" of which was related to discrimination in the award of County contracts. *Id*. at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal's study indicating that no disparity existed with respect to the award of County A&E contracts. *Id*.

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition "that only in the rare case will anecdotal evidence suffice standing alone." *Id*. (internal citations omitted). The court held that "[t]his is not one of those rare cases." The district court concluded that the statistical evidence was "unreliable and fail[ed] to establish the existence of discrimination," and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence

in *Engineering Contractors Association* where the County employees themselves testified. *Id*.

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id*. at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal's report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id*. at 1330. However, the court found that because the study failed to "identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is accomplished … it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone." *Id*.

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id*. Instead, the Commissioners voted to continue the HBE program. *Id*. The court held that the County's failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id*. at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id*. However, "not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry," leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id*. Under either scenario, the HBE program could not be narrowly tailored. *Id*.

The court found the waiver provisions in the HBE program inflexible in practice. *Id*. Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. *Id*. The court found this even "more problematic" because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences "must be limited in time." *Id*. at 1332, *citing Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id*. at 1332.

With respect to the WBE program, the court found that "the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination." *Id*. at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id*.

The court held that the County was liable for any compensatory damages. *Id*. at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known … Accordingly, the question is whether the state of the law at the time the

Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them 'fair warning' that their actions were unconstitutional." *Id*. at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they "had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs … were unconstitutional: *Croson*, *Adarand* and [*Engineering Contractors Association*]." *Id*. at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand*. *Id*. Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id*. Thus, the case law was "clearly established" and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id*.

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. *Id*. at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. *Id*. For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs $100 each in nominal damages and reasonable attorneys' fees and costs, for which it held the County and the Commissioners jointly and severally liable.

18. *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307 (N.D. Fla. 2004)

This case is instructive to the disparity study as to the manner in which district courts within the Eleventh Circuit are interpreting and applying *Engineering Contractors Association*. It is also instructive in terms of the type of legislation to be considered by the local and state governments as to what the courts consider to be a "race-conscious" program and/or legislation, as well as to the significance of the implementation of the legislation to the analysis.

The plaintiffs, A.G.C. Council, Inc. and the South Florida Chapter of the Associated General Contractors brought this case challenging the constitutionality of certain provisions of a Florida statute (Section 287.09451, *et seq.*). The plaintiffs contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment by instituting race- and gender-conscious "preferences" in order to increase the numeric representation of "MBEs" in certain industries.

According to the court, the Florida Statute enacted race-conscious and gender-conscious remedial programs to ensure minority participation in state contracts for the purchase of commodities and in construction contracts. The State created the Office of Supplier Diversity ("OSD") to assist MBEs to become suppliers of commodities, services and construction to the state government. The OSD had certain responsibilities, including adopting rules meant to assess whether state agencies have made good faith efforts to solicit business from MBEs, and to monitor whether contractors have made good faith efforts to comply with the objective of greater overall MBE participation.

The statute enumerated measures that contractors should undertake, such as minority-centered recruitment in advertising as a means of advancing the statute's purpose. The statute provided that each State agency is "encouraged" to spend 21 percent of the monies actually

expended for construction contracts, 25 percent of the monies actually expended for architectural and engineering contracts, 24 percent of the monies actually expended for commodities and 50.5 percent of the monies actually expended for contractual services during the fiscal year for the purpose of entering into contracts with certified MBEs. The statute also provided that state agencies are allowed to allocate certain percentages for black Americans, Hispanic Americans and for American women, and the goals are broken down by construction contracts, architectural and engineering contracts, commodities and contractual services.

The State took the position that the spending goals were "precatory." The court found that the plaintiffs had standing to maintain the action and to pursue prospective relief. The court held that the statute was unconstitutional based on the finding that the spending goals were not narrowly tailored to achieve a governmental interest. The court did not specifically address whether the articulated reasons for the goals contained in the statute had sufficient evidence, but instead found that the articulated reason would, "if true," constitute a compelling governmental interest necessitating race-conscious remedies. Rather than explore the evidence, the court focused on the narrowly tailored requirement and held that it was not satisfied by the State.

The court found that there was no evidence in the record that the State contemplated race-neutral means to accomplish the objectives set forth in Section 287.09451 *et seq.*, such as "'simplification of bidding procedures, relaxation of bonding requirements, training or financial aid for disadvantaged entrepreneurs of all races [which] would open the public contracting market to all those who have suffered the effects of past discrimination.'" *Florida A.G.C. Council*, 303 F.Supp.2d at 1315, *quoting Eng'g Contractors Ass'n*, 122 F.3d at 928, *quoting Croson*, 488 U.S. at 509-10.

The court noted that defendants did not seem to disagree with the report issued by the State of Florida Senate that concluded there was little evidence to support the spending goals outlined in the statute. Rather, the State of Florida argued that the statute is "permissive." The court, however, held that "there is no distinction between a statute that is precatory versus one that is compulsory when the challenged statute 'induces an employer to hire with an eye toward meeting … [a] numerical target.' *Florida A.G.C. Council*, 303 F.Supp.2d at 1316.

The court found that the State applies pressure to State agencies to meet the legislative objectives of the statute extending beyond simple outreach efforts. The State agencies, according to the court, were required to coordinate their MBE procurement activities with the OSD, which includes adopting an MBE utilization plan. If the State agency deviated from the utilization plan in two consecutive and three out of five total fiscal years, then the OSD could review any and all solicitations and contract awards of the agency as deemed necessary until such time as the agency met its utilization plan. The court held that based on these factors, although alleged to be "permissive," the statute textually was not.

Therefore, the court found that the statute was not narrowly tailored to serve a compelling governmental interest, and consequently violated the Equal Protection Clause of the Fourteenth Amendment.

19. *The Builders Ass'n of Greater Chicago v. The City of Chicago*, 298 F. Supp.2d 725 (N.D. Ill. 2003)

This case is instructive because of the court's focus and analysis on whether the City of Chicago's MBE/WBE program was narrowly tailored. The basis of the court's holding that the program was not narrowly tailored is instructive for any program considered because of the reasons provided as to why the program did not pass muster.

The plaintiff, the Builders Association of Greater Chicago, brought this suit challenging the constitutionality of the City of Chicago's construction Minority- and Women-Owned Business ("MWBE") Program. The court held that the City of Chicago's MWBE program was unconstitutional because it did not satisfy the requirement that it be narrowly tailored to achieve a compelling governmental interest. The court held that it was not narrowly tailored for several reasons, including because there was no "meaningful individualized review" of MBE/WBEs; it had no termination date nor did it have any means for determining a termination; the "graduation" revenue amount for firms to graduate out of the program was very high, $27,500,000, and in fact very few firms graduated; there was no net worth threshold; and, waivers were rarely or never granted on construction contracts. The court found that the City program was a "rigid numerical quota," not related to the number of available, willing and able firms. Formulistic percentages, the court held, could not survive the strict scrutiny.

The court held that the goals plan did not address issues raised as to discrimination regarding market access and credit. The court found that a goals program does not directly impact prime contractor's selection of subcontractors on non-goals private projects. The court found that a set-aside or goals program does not directly impact difficulties in accessing credit, and does not address discriminatory loan denials or higher interest rates. The court found the City has not sought to attack discrimination by primes directly, "but it could." 298 F.2d 725. "To monitor possible discriminatory conduct it could maintain its certification list and require those contracting with the City to consider unsolicited bids, to maintain bidding records, and to justify rejection of any certified firm submitting the lowest bid. It could also require firms seeking City work to post private jobs above a certain minimum on a website or otherwise provide public notice …" *Id*.

The court concluded that other race-neutral means were available to impact credit, high interest rates, and other potential marketplace discrimination. The court pointed to race-neutral means including linked deposits, with the City banking at institutions making loans to startup and smaller firms. Other race-neutral programs referenced included quick pay and contract downsizing; restricting self-performance by prime contractors; a direct loan program; waiver of bonds on contracts under $100,000; a bank participation loan program; a 2 percent local business preference; outreach programs and technical assistance and workshops; and seminars presented to new construction firms.

The court held that race and ethnicity do matter, but that racial and ethnic classifications are highly suspect, can be used only as a last resort, and cannot be made by some mechanical formulation. Therefore, the court concluded the City's MWBE Program could not stand in its present guise. The court held that the present program was not narrowly tailored to remedy past discrimination and the discrimination demonstrated to now exist.

The court entered an injunction, but delayed the effective date for six months from the date of its Order, December 29, 2003. The court held that the City had a "compelling interest in not having its construction projects slip back to near monopoly domination by white male firms." The court ruled a brief continuation of the program for six months was appropriate "as the City rethinks the many tools of redress it has available." Subsequently, the court declared unconstitutional the City's MWBE Program with respect to construction contracts and permanently enjoined the City from enforcing the Program. 2004 WL 757697 (N.D. Ill 2004).

20. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 218 F. Supp.2d 749 (D. Md. 2002)

This case is instructive because the court found the Executive Order of the Mayor of the City of Baltimore was precatory in nature (creating no legal obligation or duty) and contained no enforcement mechanism or penalties for noncompliance and imposed no substantial restrictions; the Executive Order announced goals that were found to be aspirational only.

The Associated Utility Contractors of Maryland, Inc. ("AUC") sued the City of Baltimore challenging its ordinance providing for minority and woman-owned business enterprise ("MWBE") participation in city contracts. Previously, an earlier City of Baltimore MWBE program was declared unconstitutional. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000). The City adopted a new ordinance that provided for the establishment of MWBE participation goals on a contract-by-contract basis, and made several other changes from the previous MWBE program declared unconstitutional in the earlier case.

In addition, the Mayor of the City of Baltimore issued an Executive Order that announced a goal of awarding 35 percent of all City contracting dollars to MBE/WBEs. The court found this goal of 35 percent participation was aspirational only and the Executive Order contained no enforcement mechanism or penalties for noncompliance. The Executive Order also specified many "noncoercive" outreach measures to be taken by the City agencies relating to increasing participation of MBE/WBEs. These measures were found to be merely aspirational and no enforcement mechanism was provided.

The court addressed in this case only a motion to dismiss filed by the City of Baltimore arguing that the Associated Utility Contractors had no standing. The court denied the motion to dismiss holding that the association had standing to challenge the new MBE/WBE ordinance, although the court noted that it had significant issues with the AUC having representational standing because of the nature of the MBE/WBE plan and the fact the AUC did not have any of its individual members named in the suit. The court also held that the AUC was entitled to bring an as applied challenge to the Executive Order of the Mayor, but rejected it having standing to bring a facial challenge based on a finding that it imposes no requirement, creates no sanctions, and does not inflict an injury upon any member of the AUC in any concrete way. Therefore, the Executive Order did not create a "case or controversy" in connection with a facial attack. The court found the wording of the Executive Order to be precatory and imposing no substantive restrictions.

After this decision, the City of Baltimore and the AUC entered into a settlement agreement and a dismissal with prejudice of the case. An order was issued by the court on October 22, 2003 dismissing the case with prejudice.

21. *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d 1232 (W.D. OK. 2001)

Plaintiffs, non-minority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act ("MBE Act"). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F.Supp.2d at 1235–36. Under the MBE Act, the bids of non-minority contractors were raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id*. at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were non-minority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10th Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing minority businesses. *Id*. at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, *citing Adarand VII*, 228 F.3d 1147, 1174.

Compelling state interest. The district court, following *Adarand VII*, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment's Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id.* at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. *Id*. The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a "passive participant" in a system of racial exclusion practiced by private businesses. *Id*. at 1240. Therefore, the district court concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. *Id*.

The district court stated that a "mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial prejudice." *Id*. Rather, the court held that the "benchmark for judging the adequacy of a state's factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state's conclusion that remedial action was necessary." *Id*. The district court found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was "a passive participant" in private industry's discriminatory practices. *Id*. at 1240, *citing* to *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest "is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts." *Id*. at 1240. Thus, the district court found the State admitted that the MBE Act's bid preference "is not based on past discrimination," rather, it is based on a desire to "encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole." *Id*. In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not "compelling" in the absence of evidence of past or present racial discrimination. *Id*.

The district court considered testimony presented by Interveners who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other

participating legislators. The study was conducted more than 14 years prior to the case and the Interveners did not actually offer any of the evidence to the court in this case. The Interveners submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Interveners have not produced — or indeed even described — the evidence of discrimination. *Id*. at 1241. The district court found that it cannot be discerned from the documents which minority businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id*.

The court also found that the Interveners' evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id*. The district court stated that the Interveners did not identify "a single qualified, minority-owned bidder who was excluded from a state contract." *Id*. The district court, thus, held that broad allegations of "systematic" exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id*. at 1242. The district court stated that this was particularly true in light of the "State's admission here that the State's governmental interest was not in remedying past discrimination in the state competitive bidding process, but in 'encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.'" *Id*. at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id*. at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio's statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id*. at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id*.

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id*. at 1242.

Narrow tailoring. The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative

remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id*. at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id*. at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id*. at 1243 *citing Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croson* decision, nor does it appear that the Program was racially neutral. *Id*. at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral alternative means to achieve the state's goal prior to adoption of the minority bid preference provisions. *Id*. at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses, and can help alleviate the effects of past and present-day discrimination. *Id*. at 1243, footnote 15 *citing Adarand VII*.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, "and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act." *Id*. at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id*. at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the "goal" of 10 percent of the state's contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. *Id*. at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id*. Unlike the federal programs at issue in *Adarand VII*, the court stated the

Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to "graduate" from preference eligibility. *Id*. The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id*.

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act's duration was not tied in any way to the eradication of such discrimination. *Id*. Instead, the court found the MBE Act rests on the "questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable." *Id*. at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court concluded that the MBE Act's minority preference provisions lacked reasonable durational limits. *Id*. at 1245.

With regard to the factor of "numerical proportionality" between the MBE Act's aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act's 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. *Id*. at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. *Id*. at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id*.

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id*. at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id*. In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is "not necessarily an absolute cap" on the percentage that a remedial program might legitimately seek to achieve. *Id*. at 1246, *citing Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer "substantial evidence" that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id*. at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in *Adarand VII* stated 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. *Id*. at 1247. The district court found the MBE Act's bid preference provisions prevented non-minority businesses from competing on an equal basis with certified minority business

enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. *Id*. The court pointed out that the 5 percent preference is applicable to *all* contracts awarded under the state's Central Purchasing Act with no time limitation. *Id*.

In terms of the "under- and over-inclusiveness" factor, the court observed that the MBE Act extended its bidding preference to several racial minority groups without regard to whether each of those groups had suffered from the effects of past or present racial discrimination. *Id*. at 1247. The district court reiterated the Oklahoma State defendants did not offer any evidence at all that the minority racial groups identified in the Act had actually suffered from discrimination. *Id*.

Second, the district court found the MBE Act's bidding preference extends to all contracts for goods and services awarded under the State's Central Purchasing Act, without regard to whether members of the preferred minority groups had been the victims of past or present discrimination within that particular industry or trade. *Id*.

Third, the district court noted the preference extends to all businesses certified as minority-owned and controlled, without regard to whether a particular business is economically or socially disadvantaged, or has suffered from the effects of past or present discrimination. *Id*. The court thus found that the factor of over-inclusiveness weighs against a finding that the MBE Act was narrowly tailored. *Id*.

The district court in conclusion found that the Oklahoma MBE Act violated the Constitution's Fifth Amendment guarantee of equal protection and granted the plaintiffs' Motion for Summary Judgment.

22. *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000)

The court held unconstitutional the City of Baltimore's "affirmative action" program, which had construction subcontracting "set-aside" goals of 20 percent for MBEs and 3 percent for WBEs. The court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MBE/WBE availability and utilization in the subcontracting construction market in Baltimore. The court enjoined the City Ordinance.

23. *Webster v. Fulton County*, 51 F. Supp.2d 1354 (N.D. Ga. 1999), *affirmed per curiam* 218 F.3d 1267 (11th Cir. 2000)

This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

In this case, plaintiff Webster brought an action challenging the constitutionality of Fulton County's (the "County") minority and female business enterprise program ("M/FBE") program. 51 F. Supp.2d 1354, 1357 (N.D. Ga. 1999). [The district court first set forth the provisions of the M/FBE program and conducted a standing analysis at 51 F. Supp.2d at 1356-62].

The court, *citing Engineering Contractors Association of S. Florida, Inc. v. Metro. Engineering Contractors Association*, 122 F.3d 895 (11th Cir.

1997), held that "[e]xplicit racial preferences may not be used except as a 'last resort.'" *Id*. at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id*. at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a "strong basis in evidence" for strict scrutiny, and "sufficient probative evidence" for intermediate scrutiny. *Id*.

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id*. at 1364. The court found that the plaintiff has at least three methods "to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data." *Id*., *citing Eng'g Contractors Ass'n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id*. at 1368, *citing Eng'g Contractors Assoc.*, 122 F.3d at 914. The court then considered the County's pre-1994 disparity study (the "Brimmer-Marshall Study") and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id*. at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id*. at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id*. Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the County must show that it was a "passive participant" in discrimination by the private sector. *Id*. The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are "exacerbating a pattern of prior discrimination that can be identified with specificity." *Id*. However, the court found that the Brimmer-Marshall Study contained no such data. *Id*.

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id*. at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id*. The court thus concluded that the County failed to present a "strong basis in evidence" of discrimination to justify the County's racial and ethnic preferences. *Id*.

The court next considered the County's post-1994 disparity study. *Id*. at 1371. The study first sought to determine the availability and utilization of minority- and female-owned firms. *Id*. The court explained:

Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which

submitted bids during the same period. Id. The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id*. at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id*. at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id*. at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. *Id*. Additionally, the court found that the County's standard deviation analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id*. (internal citations omitted).

The court considered the County's anecdotal evidence, and quoted *Engineering Contractors Association* for the proposition that "[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id*., *quoting Eng'g Contractors Ass'n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. *Id*. at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. *Id*. The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id*. The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id*.

The court also applied a narrow tailoring analysis of the M/FBE program. "The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a 'last resort.'" *Id*. at 1380, *citing Eng'g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit's four-part test and concluded that the County's M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a race-based solution. "If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Id*., *quoting Eng'g Contractors Ass'n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id*. at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id*. The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity …. *Id*.

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id*. The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. *Id*. at 1381. The court concluded that because

the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id*.

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id*. The court rejected the County's argument that its program was permissible because it set "goals" as opposed to "quotas," because the program in *Engineering Contractors Association* also utilized "goals" and was struck down. *Id*.

Per the M/FBE program's gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id*. at 1383. However, the court held that the County failed to present "sufficient probative evidence" of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id*.

The court found the County's M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id*. On appeal, the Eleventh Circuit affirmed per curiam, stating only that it affirmed on the basis of the district court's opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11th Cir. 2000).

24. *Associated Gen. Contractors v. Drabik*, 50 F. Supp.2d 741 (S.D. Ohio 1999)

The district court in this case pointed out that it had struck down Ohio's MBE statute that provided race-based preferences in the award of state construction contracts in 1998. 50 F.Supp.2d at 744. Two weeks earlier, the district court for the Northern District of Ohio, likewise, found the same Ohio law unconstitutional when it was relied upon to support a state mandated set-aside program adopted by the Cuyahoga Community College. *See F. Buddie Contracting, Ltd. v. Cuyahoga Community College District,* 31 F.Supp.2d 571 (N.D. Ohio 1998). *Id*. at 741.

The state defendant's appealed this court's decision to the United States court of Appeals for the Sixth Circuit. *Id*. Thereafter, the Supreme Court of Ohio held in the case of *Ritchey Produce, Co., Inc. v. The State of Ohio, Department of Administrative*, 704 N.E. 2d 874 (1999), that the Ohio statute, which provided race-based preferences in the state's purchase of nonconstruction-related goods and services, was constitutional. *Id*. at 744.

While this court's decision related to construction contracts and the Ohio Supreme Court's decision related to other goods and services, the decisions could not be reconciled, according to the district court. *Id*. at 744. Subsequently, the state defendants moved this court to stay its order of November 2, 1998 in light of the Ohio State Supreme Court's decision in *Ritchey Produce*. The district court took the opportunity in this case to reconsider its decision of November 2, 1998, and to the reasons given by the Supreme Court of Ohio for reaching the opposite result in *Ritchey Produce*, and decide in this case that its original decision was correct, and that a stay of its order would only serve to perpetuate a "blatantly unconstitutional program of race-based benefits. *Id*. at 745.

In this decision, the district court reaffirmed its earlier holding that the State of Ohio's MBE program of construction contract awards is unconstitutional. The court cited *F. Buddie Contracting v. Cuyahoga Community College*, 31 F. Supp.2d 571 (N.D. Ohio 1998), holding a similar local Ohio program unconstitutional. The court repudiated the Ohio Supreme Court's holding in *Ritchey Produce*, 707 N.E. 2d 871 (Ohio 1999), which held that the State of Ohio's MBE program as applied to the state's purchase of non-construction-related goods and services was constitutional. The court found the evidence to be insufficient to justify

the Ohio MBE program. The court held that the program was not narrowly tailored because there was no evidence that the State had considered a race-neutral alternative.

Strict scrutiny. The district court held that the Supreme Court of Ohio decision in *Ritchey Produce* was wrongly decided for the following reasons:

1. Ohio's MBE program of race-based preferences in the award of state contracts was unconstitutional because it is unlimited in duration. *Id.* at 745.

2. A program of race-based benefits cannot be supported by evidence of discrimination which is over 20 years old. *Id*.

3. The state Supreme Court found that there was a severe numerical imbalance in the amount of business the State did with minority-owned enterprises, based on its uncritical acceptance of essentially "worthless calculations contained in a twenty-one year-old report, which miscalculated the percentage of minority-owned businesses in Ohio and misrepresented data on the percentage of state purchase contracts they had received, all of which was easily detectable by examining the data cited by the authors of the report." Id. at 745.

4. The state Supreme Court failed to recognize that the incorrectly calculated percentage of minority-owned businesses in Ohio (6.7 percent) bears no relationship to the 15 percent set-aside goal of the Ohio Act. Id.

5. The state Supreme Court applied an incorrect rule of law when it announced that Ohio's program must be upheld unless it is clearly unconstitutional beyond a reasonable doubt, whereas according to the district court in this case, the Supreme Court of the United States has said that all racial class classifications are highly suspect and must be subjected to strict judicial scrutiny. Id.

6. The evidence of past discrimination that the Ohio General Assembly had in 1980 did not provide a firm basis in evidence for a race-based remedy. Id.

Thus, the district court determined the evidence could not support a compelling state-interest for race-based preferences for the state of Ohio MBE Act, in part based on the fact evidence of past discrimination was stale and twenty years old, and the statistical analysis was insufficient because the state did not know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction contracts. *Id*. at 763-771. The statistical evidence was fatally flawed because the relevant universe of minority businesses is not all minority businesses in the state of Ohio, but only those willing and able to enter into contracts with the state of Ohio. *Id*. at 761. In the case of set-aside program in state construction, the relevant universe is minority-owned construction firms willing and able to enter into state construction contracts. *Id*.

Narrow tailoring. The court addressed the second prong of the strict scrutiny analysis, and found that the Ohio MBE program at issue was not narrowly tailored. The court concluded that the state could not satisfy the four factors to be considered in determining whether race-conscious remedies are appropriate. *Id*. at 763. First, the court stated that there was no consideration of race-neutral alternatives to increase minority participation in state contracting before resorting to "race-based quotas." *Id*. at 763-764. The court held that failure to consider race-neutral means was fatal to the set-aside program in *Croson*, and the failure of the State of Ohio to consider race-neutral means before

adopting the MBE Act in 1980 likewise "dooms Ohio's program of race-based quotas." *Id*. at 765.

Second, the court found the Ohio MBE Act was not flexible. The court stated that instead of allowing flexibility to ameliorate harmful effects of the program, the imprecision of the statutory goals has been used to justify bureaucratic decisions which increase its impact on non-minority business." *Id.* at 765. The court said the waiver system for prime contracts focuses solely on the availability of MBEs. *Id.* at 766. The court noted the awarding agency may remove the contract from the set aside program and open it up for bidding by non-minority contractors if no certified MBE submits a bid, or if all bids submitted by MBEs are considered unacceptably high. *Id.* But, in either event, the court pointed out the agency is then required to set aside additional contracts to satisfy the numerical quota required by the statute. *Id.* The court concluded that there is no consideration given to whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the state or prime contractors. *Id.*

Third, the court found the Ohio MBE Act was not appropriately limited such that it will not last longer than the discriminatory effects it was designed to eliminate. *Id.* at 766. The court stated the 1980 MBE Act is unlimited in duration, and there is no evidence the state has ever reconsidered whether a compelling state interest exists that would justify the continuation of a race-based remedy at any time during the two decades the Act has been in effect. *Id.*

Fourth, the court found the goals of the Ohio MBE Act were not related to the relevant market and that the Act failed this element of the "narrowly tailored" requirement of strict scrutiny. *Id.* at 767-768. The court said the goal of 15 percent far exceeds the percentage of available minority firms, and thus bears no relationship to the relevant market. *Id.*

Fifth, the court found the conclusion of the Ohio Supreme Court that the burdens imposed on non-MBEs by virtue of the set-aside requirements were relatively light was incorrect. *Id.* at 768. The court concluded non-minority contractors in various trades were effectively excluded from the opportunity to bid on any work from large state agencies, departments, and institutions solely because of their race. *Id.* at 678.

Sixth, the court found the Ohio MBE Act provided race-based benefits based on a random inclusion of minority groups. *Id.* at 770-771. The court stated there was no evidence about the number of each racial or ethnic group or the respective shares of the total capital improvement expenditures they received. *Id.* at 770. None of the statistical information, the court said, broke down the percentage of all firms that were owned by specific minority groups or the dollar amounts of contracts received by firms in specific minority groups. *Id.* The court, thus, concluded that the Ohio MBE Act included minority groups randomly without any specific evidence that any group suffered from discrimination in the construction industry in Ohio. *Id.* at 771.

Conclusion. The court thus denied the motion of the state defendants to stay the court's prior order holding unconstitutional the Ohio MBE Act pending the appeal of the court's order. *Id.* at 771. This opinion underscored that governments must show several factors to demonstrate narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies, (2) flexibility and duration of the relief, (3) relationship of numerical goals to the relevant labor market, and (4) impact of the relief on the rights of third parties. The court held the Ohio MBE program failed to satisfy this test.

25. *Phillips & Jordan, Inc. v. Watts*, 13 F. Supp.2d 1308 (N.D. Fla. 1998)

This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation's ("FDOT") program of "setting aside" certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a non-minority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts "set aside" for business enterprises owned by Hispanic and African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

The district court pointed out that Florida DOT did not claim that it had evidence of intentional discrimination in the award of its contracts. The court stated that the essence of FDOT's claim was that the two year disparity study provided evidence of a disparity between the proportion of minorities awarded FDOT road maintenance contracts and a portion of the minorities "supposedly willing and able to do road maintenance work," and that FDOT did not itself engage in any racial or ethnic discrimination, so FDOT must have been a passive participant in "somebody's" discriminatory practices.

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the court found that the record contained insufficient proof of discrimination. The court found the evidence insufficient to establish acts of discrimination against African American- and Hispanic-owned businesses.

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

F. Recent Decisions Involving the Federal DBE Program and its Implementation by State and Local Governments in Other Jurisdictions

There are several recent and pending cases involving challenges to the United States Federal DBE Program and its implementation by the states and their governmental entities for federally-funded projects. These cases could have a significant impact on the nature and provisions of contracting and procurement on federally-funded projects, including and relating to the utilization of DBEs. In addition, these cases provide an instructive analysis of the recent application of the strict scrutiny test to MBE/WBE- and DBE-type programs.

Recent Decisions in Federal Circuit Courts of Appeal

1. *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al*., 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (not for publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, *dismissing in part, reversing in part and remanding* the U. S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014). On remand case voluntarily dismissed by parties and district court (March 2018)

Note: The Ninth Circuit Court of Appeals Memorandum provides: "This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3."

Introduction. Mountain West Holding Company installs signs, guardrails, and concrete barriers on highways in Montana. It competes to win subcontracts from prime contractors who have contracted with the State. It is not owned and controlled by women or minorities. Some of its competitors are disadvantaged business enterprises (DBEs) owned by women or minorities. In this case it claims that Montana's DBE goal-setting program unconstitutionally required prime contractors to give preference to these minority or female-owned competitors, which Mountain West Holdings Company argues is a violation of the Equal Protection Clause, 42 U.S.C. § 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*

Factual and procedural background. *In Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al*., 2014 WL 6686734 (D. Mont. Nov. 26, 2014); Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, plaintiff Mountain West Holding Co., Inc. ("Mountain West"), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation ("MDT") and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

Following the Ninth Circuit's 2005 decision in *Western States Paving v. Washington DOT, et al.,* MDT commissioned a disparity study which was completed in 2009. MDT utilized the results of the disparity study to establish its overall DBE goal. MDT determined that to meet its overall goal, it would need to implement race-conscious contract specific goals. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were

necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all "relevant" minority groups were underutilized in "professional services" and Asian Pacific Americans and Hispanic Americans were underutilized in "business categories combined," but it also concluded that all "relevant" minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are "significantly overrepresented" in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her business success; and the certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the MDT filed cross Motions for Summary Judgment. Mountain West asserts that there was no evidence that all relevant minority groups had suffered discrimination in Montana's transportation contracting industry because, while the study had determined there were substantial disparities in the utilization of all minority groups in professional services contracts, there was no disparity in the utilization of minority groups in construction contracts.

AGC, San Diego v. California DOT and Western States Paving Co. v. Washington DOT. The Ninth Circuit and the district court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 713 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state's implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at *2 (D. Mont. November 26, 2014). The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state's implementation of the DBE Program "is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry." *Mountain West*, 2014 WL 6686734 at *2, *quoting Western States*, at 997-998, and *Mountain West,* 2017 WL 2179120 at *2 (9th Cir. May 16, 2017) Memorandum, May 16, 2017, at 5-6, *quoting AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The Ninth Circuit in *Mountain West* also pointed out it had held that "even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination." *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6, and 2014 WL 6686734 at *2, *quoting Western States*, 407 F.3d at 997-999.

MDT Study. MDT obtained a firm to conduct a disparity study that was completed in 2009. The district court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all

minority groups in "professional services" contracts, significant underutilization of Asian Pacific Americans and Hispanic Americans in "business categories combined," slight underutilization of nonminority women in "business categories combined," and overutilization of all groups in subcontractor "construction" contracts. *Mountain West*, 2014 WL 6686734 at *2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The district court stated the anecdotal evidence suggested various forms of discrimination existed within Montana's transportation contracting industry, including evidence of an exclusive "good ole boy network" that made it difficult for DBEs to break into the market. *Id*. at *3. The district court said that despite these findings, the consulting firm recommended that MDT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that MDT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study, and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

Montana's DBE utilization after ceasing the use of contract goals. The district court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL 6686734 at *3. The utilization rate dropped, according to the district court, to 5 percent in 2007, 3 percent in 2008, 2.5 percent in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent *Id*. In response to this decline, for fiscal years 2011-2014, the district court said MDT employed contract goals on certain USDOT contracts in order to achieve 3.27 percentage points of Montana's overall goal of 5.83 percent DBE utilization.

MDT then conducted and prepared a new Goal Methodology for DBE utilization for federal fiscal years 2014-2016. *Id.* US DOT approved the new and current goal methodology for MDT, which does not provide for the use of contract goals to meet the overall goal. *Id.* Thus, the new overall goal is to be made entirely through the use of race-neutral means. *Id.*

Mountain West's claims for relief. Mountain West sought declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the MDT for alleged violation of Title VI. 2014 WL 6686734 at *3. Mountain West's claim for monetary damages is based on its claim that on three occasions it was a low-quoting subcontractor to a prime contractor submitting a bid to the MDT on a project that utilized contract goals, and that despite being a low-quoting bidder, Mountain West was not awarded the contract. *Id*. Mountain West brings an as-applied challenge to Montana's DBE program. *Id.*

The two-prong test demonstrates that a DBE program is narrowly tailored. The Court, *citing* AGC, *San Diego v. California DOT*, 713 F.3d 1187, 1196, stated that under the two-prong test established in *Western States*, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination. *Mountain West,* 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6-7.

District Court Holding in 2014 and the Appeal. The district court granted summary judgment to the State, and Mountain West appealed.

See Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al. 2014 WL 6686734 (D. Mont. Nov. 26, 2014) , *dismissed in part, reversed in part, and remanded,* U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017). Montana also appealed the district court's threshold determination that Mountain West had a private right of action under Title VI, and it appealed the district court's denial of the State's motion to strike an expert report submitted in support of Mountain West's motion.

Ninth Circuit Holding. The Ninth Circuit Court of Appeals in its Memorandum opinion dismissed Mountain West's appeal as moot to the extent Mountain West pursues equitable remedies, affirmed the district court's determination that Mountain West has a private right to enforce Title VI, affirmed the district court's decision to consider the disputed expert report by Mountain West's expert witness, and reversed the order granting summary judgment to the State. 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017), U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum, at 3, 5, 11.

Mootness. The Ninth Circuit found that Montana does not currently employ gender- or race-conscious goals, and the data it relied upon as justification for its previous goals are now several years old. The Court thus held that Mountain West's claims for injunctive and declaratory relief are therefore moot. *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 4.

The Court also held, however, that Mountain West's Title VI claim for damages is not moot. 2017 WL 2179120 at **1-2. The Court stated that a plaintiff may seek damages to remedy violations of Title VI, *see* 42 U.S.C. § 2000d-7(a)(1)-(2); and Mountain West has sought damages. Claims for damages, according to the Court, do not become moot even if changes to a challenged program make claims for prospective relief moot. *Id.*

The appeal, the Ninth Circuit held, is therefore dismissed with respect to Mountain West's claims for injunctive and declaratory relief; and only the claim for damages under Title VI remains in the case. *Mountain West*, 2017 WL 2179120 at **1 (9th Cir.), Memorandum, May 16, 2017, at 4.

Private Right of Action and Discrimination under Title VI. The Court concluded for the reasons found in the district court's order that Mountain West may state a private claim for damages against Montana under Title VI. *Id.* at *2. The district court had granted summary judgment to Montana on Mountain West's claims for discrimination under Title VI.

Montana does not dispute that its program took race into account. The Ninth Circuit held that classifications based on race are permissible "only if they are narrowly tailored measures that further compelling governmental interests." *Mountain West*, 2017 WL 2179120 (9th Cir.) at *2, Memorandum, May 16, 2017, at 6-7. *W. States Paving*, 407 F.3d at 990 (*quoting Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). As in *Western States Paving*, the Court applied the same test to claims of unconstitutional discrimination and discrimination in violation of Title VI. *Mountain West*, 2017 WL 2179120 at *2, n.2, Memorandum, May 16, 2017, at 6, n. 2; *see,* 407 F.3d at 987.

Montana, the Court found bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state's DBE contracting program, "(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be 'limited to those minority groups that have actually suffered discrimination.'" *Mountain West*, 2017 WL 2179120 at *2 (9th

Cir.), Memorandum, May 16, 2017, at 6-7, *quoting, Assoc. Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013)(*quoting W. States Paving*, 407 F.3d at 997-99). Discrimination may be inferred from "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors." *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, *quoting*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

Here, the district court held that Montana had satisfied its burden. In reaching this conclusion, the district court relied on three types of evidence offered by Montana. First, it cited a study, which reported disparities in professional services contract awards in Montana. Second, the district court noted that participation by DBEs declined after Montana abandoned race-conscious goals in the years following the decision in *Western States Paving*, 407 F.3d 983. Third, the district court cited anecdotes of a "good ol' boys" network within the State's contracting industry. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

The Ninth Circuit reversed the district court and held that summary judgment was improper in light of genuine disputes of material fact as to the study's analysis, and because the second two categories of evidence were insufficient to prove a history of discrimination. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

Disputes of fact as to study. Mountain West's expert testified that the study relied on several questionable assumptions and an opaque methodology to conclude that professional services contracts were awarded on a discriminatory basis. *Id.* at *3. The Ninth Circuit pointed out a few examples that it found illustrated the areas in which there are disputes of fact as to whether the study sufficiently supported Montana's actions:

1. Ninth Circuit stated that its cases require states to ascertain whether lower-than-expected DBE participation is attributable to factors other than race or gender. W. States Paving, 407 F.3d at 1000-01. Mountain West argues that the study did not explain whether or how it accounted for a given firm's size, age, geography, or other similar factors. The report's authors were unable to explain their analysis in depositions for this case. Indeed, the Court noted, even Montana appears to have questioned the validity of the study's statistical results Mountain West, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 8.

2. The study relied on a telephone survey of a sample of Montana contractors. Mountain West argued that (a) it is unclear how the study selected that sample, (b) only a small percentage of surveyed contractors responded to questions, and (c) it is unclear whether responsive contractors were representative of nonresponsive contractors. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

3. The study relied on very small sample sizes but did no tests for statistical significance, and the study consultant admitted that "some of the population samples were very small and the result may not be significant statistically." 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

4. Mountain West argued that the study gave equal weight to professional services contracts and construction contracts,

but professional services contracts composed less than ten percent of total contract volume in the State's transportation contracting industry. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

5. Mountain West argued that Montana incorrectly compared the proportion of available subcontractors to the proportion of prime contract dollars awarded. The district court did not address this criticism or explain why the study's comparison was appropriate. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

The post-2005 decline in participation by DBEs. The Ninth Circuit was unable to affirm the district court's order in reliance on the decrease in DBE participation after 2005. In *Western States Paving*, it was held that a decline in DBE participation after race- and gender- based preferences are halted is not necessarily evidence of discrimination against DBEs. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 9, *quoting Western States*, 407 F.3d at 999 ("If [minority groups have not suffered from discrimination], then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination."); *id.* at 1001 ("The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide any evidence of discrimination against DBEs."). *Id.*

The Ninth Circuit also cited to the U.S. DOT statement made to the Court in *Western States*. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, *quoting*, U.S. Dep't of Transp., *Western States Paving Co. Case* Q&A (Dec. 16, 2014)("In calculating availability of DBEs, [a state's] study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.").

Anecdotal evidence of discrimination. The Ninth Circuit said that without a statistical basis, the State cannot rely on anecdotal evidence alone. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, *quoting, Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991)("While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan."); and *quoting, Croson*, 488 U.S. at 509 ("[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."). *Id.*

In sum, the Ninth Circuit found that because it must view the record in the light most favorable to Mountain West's case, it concluded that the record provides an inadequate basis for summary judgment in Montana's favor. 2017 WL 2179120 at *3.

Conclusion. The Ninth Circuit thus reversed and remanded for the district court to conduct whatever further proceedings it considers most appropriate, including trial or the resumption of pretrial litigation. Thus, the case was dismissed in part, reversed in part, and remanded to the district court. *Mountain West*, 2017 WL 2179120 at *4 (9th Cir.), Memorandum, May 16, 2017, at 11. *Petition for Panel Rehearing and Rehearing En Banc* filed with the U.S. Court of Appeals for the Ninth Circuit by Montana DOT, May 30, 2017, *denied* on June 27, 2017. The case on remand was voluntarily dismissed by stipulation of the parties after the parties entered into a Settlement Agreement (February 23, 2018). The case was ordered dismissed by the district court on March 14, 2018 after the parties performed the Settlement Agreement.

2. *Midwest Fence Corporation v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), *cert. denied,* 2017 WL 497345 (2017)

Plaintiff Midwest Fence Corporation is a guardrails and fencing specialty contractor that usually bids on projects as a subcontractor. 2016 WL 6543514 at *1. Midwest Fence is not a DBE. *Id*. Midwest Fence alleges that the defendants' DBE programs violated its Fourteenth Amendment right to equal protection under the law, and challenges the United States DOT Federal DBE Program and the implementation of the Federal DBE Program by the Illinois DOT (IDOT). *Id*. Midwest Fence also challenges the Illinois State Toll Highway Authority (Tollway) and its implementation of its DBE Program. *Id.*

The district court granted all the defendants' motions for summary judgment. *Id.* at *1. *See Midwest Fence Corp. v. U.S. Department of Transportation, et al.,* 84 F. Supp. 3d 705 (N.D. Ill. 2015)(*see* discussion of district court decision below). The Seventh Circuit Court of Appeals affirmed the grant of summary judgment by the district court. *Id.* The court held that it joins the other federal circuit courts of appeal in holding that the Federal DBE Program is facially constitutional, the program serves a compelling government interest in remedying a history of discrimination in highway construction contracting, the program provides states with ample discretion to tailor their DBE programs to the realities of their own markets and requires the use of race– and gender-neutral measures before turning to race- and gender-conscious measures. *Id.*

The court of appeals also held the IDOT and Tollway programs survive strict scrutiny because these state defendants establish a substantial basis in evidence to support the need to remedy the effects of past discrimination in their markets, and the programs are narrowly tailored to serve that remedial purpose. *Id.* at *1.

Procedural history. Midwest Fence asserted the following primary theories in its challenge to the Federal DBE Program, IDOT's implementation of it, and the Tollway's own program:

1. The federal regulations prescribe a method for setting individual contract goals that places an undue burden on non-DBE subcontractors, especially certain kinds of subcontractors, including guardrail and fencing contractors like Midwest Fence.

2. The presumption of social and economic disadvantage is not tailored adequately to reflect differences in the circumstances actually faced by women and the various racial and ethnic groups who receive that presumption.

3. The federal regulations are unconstitutionally vague, particularly with respect to good faith efforts to justify a front-end waiver.

Id. at *3-4. Midwest Fence also asserted that IDOT's implementation of the Federal DBE Program is unconstitutional for essentially the same reasons. And, Midwest Fence challenges the Tollway's program on its face and as applied. *Id.* at *4.

The district court found that Midwest Fence had standing to bring most of its claims and on the merits, and the court upheld the facial constitutionality of the Federal DBE Program. 84 F. Supp. 3d at 722-23 729; *id.* at *4.

The district court also concluded Midwest Fence did not rebut the evidence of discrimination that IDOT offered to justify its program, and Midwest Fence had presented no "affirmative evidence" that IDOT's implementation unduly burdened non-DBEs, failed to make use of race-neutral alternatives, or lacked flexibility. 84 F. Supp. 3d at 733, 737; *id.* at *4.

The district court noted that Midwest Fence's challenge to the Tollway's program paralleled the challenge to IDOT's program, and concluded that the Tollway, like IDOT, had established a strong basis in evidence for its program. 84 F. Supp. 3d at 737, 739; *id.* at *4. In addition, the court concluded that, like IDOT's program, the Tollway's program imposed a minimal burden on non-DBEs, employed a number of race-neutral measures, and offered substantial flexibility. 84 F. Supp. 3d at 739-740; *id.* at *4.

Standing to challenge the DBE Programs generally. The defendants argued that Midwest Fence lacked standing. The court of appeals held that the district court correctly found that Midwest Fence has standing. *Id.* at *5. The court of appeals stated that by alleging and then offering evidence of lost bids, decreased revenue, difficulties keeping its business afloat as a result of the DBE program, and its inability to compete for contracts on an equal footing with DBEs, Midwest Fence showed both causation and redressability. *Id.* at *5.

The court of appeals distinguished its ruling in the *Dunnet Bay Construction Co. v. Borggren*, 799 F. 3d 676 (7th Cir. 2015), holding that there was no standing for the plaintiff Dunnet Bay based on an unusual and complex set of facts under which it would have been impossible for the plaintiff Dunnet Bay to have won the contract it sought and for which it sought damages. IDOT did not award the contract to anyone under the first bid and had re-let the contract, thus Dunnet Bay suffered no injury because of the DBE program in the first bid. *Id.* at *5. The court of appeals held this case is distinguishable from *Dunnet Bay* because Midwest Fence seeks prospective relief that would enable it to compete with DBEs on an equal basis more generally than in *Dunnet Bay*. *Id.* at *5.

Standing to challenge the IDOT Target Market Program. The district court had carved out one narrow exception to its finding that Midwest Fence had standing generally, finding that Midwest Fence lacked standing to challenge the IDOT "target market program." Id. at *6. The court of appeals found that no evidence in the record established Midwest Fence bid on or lost any contracts subject to the IDOT target market program. Id. at *6. The court stated that IDOT had not set aside any guardrail and fencing contracts under the target market program. Id. Therefore, Midwest Fence did not show that it had suffered from an inability to compete on an equal footing in the bidding process with respect to contracts within the target market program. Id.

Facial versus as-applied challenge to the USDOT Program. In this appeal, Midwest Fence did not challenge whether USDOT had established a "compelling interest" to remedy the effects of past or present discrimination. Thus, it did not challenge the national compelling interest in remedying past discrimination in its claims against the Federal DBE Program. *Id.* at *6. Therefore, the court of appeals focused on whether the federal program is narrowly tailored. *Id.*

First, the court addressed a preliminary issue, namely, whether Midwest Fence could maintain an as-applied challenge against USDOT and the Federal DBE Program or whether, as the district court held, the claim against USDOT is limited to a facial challenge. *Id.* Midwest Fence sought a declaration that the federal regulations are unconstitutional as applied in Illinois. *Id.* The district court rejected the attempt to bring that claim against USDOT, treating it as applying only to IDOT. *Id.* at *6 *citing Midwest Fence*, 84 F. Supp. 3d at 718. The court of appeals agreed with the district court. *Id.*

The court of appeals pointed out that a principal feature of the federal regulations is their flexibility and adaptability to local conditions, and that flexibility is important to the constitutionality of the Federal DBE Program, including because a race- and gender-conscious program must

be narrowly tailored to serve the compelling governmental interest. *Id.* at *6. The flexibility in regulations, according to the court, makes the state, not USDOT, primarily responsible for implementing their own programs in ways that comply with the Equal Protection Clause. *Id.* at *6. The court said that a state, not USDOT, is the correct party to defend a challenge to its implementation of its program. *Id.* Thus, the court held the district court did not err by treating the claims against USDOT as only a facial challenge to the federal regulations. *Id.*

Federal DBE Program: narrow tailoring. The Seventh Circuit noted that the Eighth, Ninth, and Tenth Circuits all found the Federal DBE Program constitutional on its face, and the Seventh Circuit agreed with these other circuits. *Id.* at *7. The court found that narrow tailoring requires "a close match between the evil against which the remedy is directed and the terms of the remedy." *Id.* The court stated it looks to four factors in determining narrow tailoring: (a) "the necessity for the relief and the efficacy of alternative [race-neutral] remedies," (b) "the flexibility and duration of the relief, including the availability of waiver provisions," (c) "the relationship of the numerical goals to the relevant labor [or here, contracting] market," and (d) "the impact of the relief on the rights of third parties." *Id.* at *7 *quoting United States v. Paradise*, 480 U.S. 149, 171 (1987). The Seventh Circuit also pointed out that the Tenth Circuit added to this analysis the question of over- or under-inclusiveness. *Id.* at *7.

In applying these factors to determine narrow tailoring, the court said that first, the Federal DBE Program requires states to meet as much as possible of their overall DBE participation goals through race- and gender-neutral means. *Id.* at *7, *citing* 49 C.F.R. § 26.51(a). Next, on its face, the federal program is both flexible and limited in duration. *Id.* Quotas are flatly prohibited, and states may apply for waivers, including waivers of "any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts," § 26.15(b). *Id.* at *7.

The regulations also require states to remain flexible as they administer the program over the course of the year, including continually reassessing their DBE participation goals and whether contract goals are necessary. *Id.*

The court pointed out that a state need not set a contract goal on every USDOT-assisted contract, nor must they set those goals at the same percentage as the overall participation goal. *Id.* at *7. Together, the court found, all of these provisions allow for significant and ongoing flexibility. *Id.* at *8. States are not locked into their initial DBE participation goals. *Id.* Their use of contract goals is meant to remain fluid, reflecting a state's progress towards overall DBE goal. *Id.*

As for duration, the court said that Congress has repeatedly reauthorized the program after taking new looks at the need for it. *Id.* at *8. And, as noted, states must monitor progress toward meeting DBE goals on a regular basis and alter the goals if necessary. *Id.* They must stop using race- and gender-conscious measures if those measures are no longer needed. *Id.*

The court found that the numerical goals are also tied to the relevant markets. *Id.* at *8. In addition, the regulations prescribe a process for setting a DBE participation goal that focuses on information about the specific market, and that it is intended to reflect the level of DBE participation you would expect absent the effects of discrimination. *Id.* at *8, *citing* § 26.45(b). The court stated that the regulations thus instruct states to set their DBE participation goals to reflect actual DBE availability in their jurisdictions, as modified by other relevant factors like DBE capacity. *Id.* at *8.

Midwest Fence "mismatch" argument: burden on third parties. Midwest Fence, the court said, focuses its criticism on the burden of third parties and argues the program is over-inclusive. *Id.* at *8. But, the court found, the regulations include mechanisms to minimize the

burdens the program places on non-DBE third parties. *Id.* A primary example, the court points out, is supplied in § 26.33(a), which requires states to take steps to address overconcentration of DBEs in certain types of work if the overconcentration unduly burdens non-DBEs to the point that they can no longer participate in the market. *Id.* at *8. The court concluded that standards can be relaxed if uncompromising enforcement would yield negative consequences, for example, states can obtain waivers if special circumstances make the state's compliance with part of the federal program "impractical," and contractors who fail to meet a DBE contract goal can still be awarded the contract if they have documented good faith efforts to meet the goal. *Id.* at *8, *citing* § 26.51(a) and § 26.53(a)(2).

Midwest Fence argued that a "mismatch" in the way contract goals are calculated results in a burden that falls disproportionately on specialty subcontractors. *Id.* at *8. Under the federal regulations, the court noted, states' overall goals are set as a percentage of all their USDOT-assisted contracts. *Id.* However, states may set contract goals "*only* on those [USDOT]-assisted contracts that have subcontracting possibilities." *Id.*, *quoting* § 26.51(e)(1)(emphasis added).

Midwest Fence argued that because DBEs must be small, they are generally unable to compete for prime contracts, and this they argue is the "mismatch." *Id.* at *8. Where contract goals are necessary to meet an overall DBE participation goal, those contract goals are met almost entirely with *subcontractor* dollars, which, Midwest Fence asserts, places a heavy burden on non-DBE subcontractors while leaving non-DBE prime contractors in the clear. *Id.* at *8.

The court goes through a hypothetical example to explain the issue Midwest Fence has raised as a mismatch that imposes a disproportionate burden on specialty subcontractors like Midwest Fence. *Id.* at *8. In the example provided by the court, the overall participation goal for a state calls for DBEs to receive a certain percentage of *total* funds, but in practice in the hypothetical it requires the state to award DBEs for less than all of the available subcontractor funds because it determines that there are no subcontracting possibilities on half the contracts, thus rendering them ineligible for contract goals. *Id.* The mismatch is that the federal program requires the state to set its overall goal on all funds it will spend on contracts, but at the same time the contracts eligible for contract goals must be ones that have subcontracting possibilities. *Id.* Therefore, according to Midwest Fence, in practice the participation goals set would require the state to award DBEs from the available subcontractor funds while taking no business away from the prime contractors. *Id.*

The court stated that it found "[t]his prospect is troubling." *Id.* at *9. The court said that the DBE program can impose a disproportionate burden on small, specialized non-DBE subcontractors, especially when compared to larger prime contractors with whom DBEs would compete less frequently. *Id.* This potential, according to the court, for a disproportionate burden, however, does not render the program facially unconstitutional. *Id.* The court said that the constitutionality of the Federal DBE Program depends on how it is implemented. *Id.*

The court pointed out that some of the suggested race- and gender-neutral means that states can use under the federal program are designed to increase DBE participation in prime contracting and other fields where DBE participation has historically been low, such as specifically encouraging states to make contracts more accessible to small businesses. *Id.* at *9, *citing* § 26.39(b). The court also noted that the federal program contemplates DBEs' ability to compete equally requiring states to report DBE participation as prime contractors and makes efforts to develop that potential. *Id.* at *9.

The court stated that states will continue to resort to contract goals that open the door to the type of mismatch that Midwest Fence describes, but the program on its face does not compel an unfair distribution of burdens. *Id.* at *9. Small specialty contractors may have to bear at least some of the burdens created by remedying past discrimination under the Federal DBE Program, but the Supreme Court has indicated that innocent third parties may constitutionally be required to bear at least some of the burden of the remedy. *Id.* at *9.

Over-Inclusive argument. Midwest Fence also argued that the federal program is over-inclusive because it grants preferences to groups without analyzing the extent to which each group is actually disadvantaged. *Id.* at *9. In response, the court mentioned two federal-specific arguments, noting that Midwest Fence's criticisms are best analyzed as part of its as-applied challenge against the state defendants. *Id.* First, Midwest Fence contends nothing proves that the disparities relied upon by the study consultant were caused by discrimination. *Id.* at *9. The court found that to justify its program, USDOT does not need definitive proof of discrimination, but must have a strong basis in evidence that remedial action is necessary to remedy past discrimination. *Id.*

Second, Midwest Fence attacks what it perceives as the one-size-fits-all nature of the program, suggesting that the regulations ought to provide different remedies for different groups, but instead the federal program offers a single approach to all the disadvantaged groups, regardless of the degree of disparities. *Id.* at *9. The court pointed out Midwest Fence did not argue that any of the groups were not in fact disadvantaged at all, and that the federal regulations ultimately require individualized determinations. *Id.* at *10. Each presumptively disadvantaged firm owner must certify that he or she is, in fact, socially and economically disadvantaged, and that presumption can be rebutted. *Id.* In this way, the court said, the federal program requires states to extend benefits only to those who are actually disadvantaged. *Id.*

Therefore the court agreed with the district court that the Federal DBE Program is narrowly tailored on its face, so it survives strict scrutiny.

Claims against IDOT and the Tollway: void for vagueness. Midwest Fence argued that the federal regulations are unconstitutionally vague as applied by IDOT because the regulations fail to specify what good faith efforts a contractor must make to qualify for a waiver, and focuses its attack on the provisions of the regulations, which address possible cost differentials in the use of DBEs. *Id.* at *11. Midwest Fence argued that Appendix A of 49 C.F.R., Part 26 at ¶ IV(D)(2) is too vague in its language on when a difference in price is significant enough to justify falling short of the DBE contract goal. *Id.* The court found if the standard seems vague, that is likely because it was meant to be flexible, and a more rigid standard could easily be too arbitrary and hinder prime contractors' ability to adjust their approaches to the circumstances of particular projects. *Id.* at *11.

The court said Midwest Fence's real argument seems to be that in practice, prime contractors err too far on the side of caution, granting significant price preferences to DBEs instead of taking the risk of losing a contract for failure to meet the DBE goal. *Id.* at *12. Midwest Fence contends this creates a *de facto* system of quotas because contractors believe they must meet the DBE goal or lose the contract. *Id.* But Appendix A to the regulations, the court noted, cautions against this very approach. *Id.* The court found flexibility and the availability of waivers affect whether a program is narrowly tailored, and that the regulations caution against quotas, provide examples of good faith efforts prime contractors can make and states can consider, and instruct a bidder to use good business judgment to decide whether a price difference is reasonable or excessive. *Id.* For purposes of contract

awards, the court holds this is enough to give fair notice of conduct that is forbidden or required. *Id.* at *12.

Equal Protection challenge: compelling interest with strong basis in evidence. In ruling on the merits of Midwest Fence's equal protection claims based on the actions of IDOT and the Tollway, the first issue the court addresses is whether the state defendants had a compelling interest in enacting their programs. *Id.* at *12. The court stated that it, along with the other circuit courts of appeal, have held 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.* But, since not all of IDOT's contracts are federally funded, and the Tollway did not receive federal funding at all, with respect to those contracts, the court said it must consider whether IDOT and the Tollway established a strong basis in evidence to support their programs. *Id.*

IDOT Program. IDOT relied on an availability and a disparity study to support its program. The disparity study found that DBEs were significantly underutilized as prime contractors comparing firm availability of prime contractors in the construction field to the amount of dollars they received in prime contracts. The disparity study collected utilization records, defined IDOT's market area, identified businesses that were willing and able to provide needed services, weighted firm availability to reflect IDOT's contracting pattern with weights assigned to different areas based on the percentage of dollars expended in those areas, determined whether there was a statistically significant under-utilization of DBEs by calculating the dollars each group would be expected to receive based on availability, calculated the difference between the expected and actual amount of contract dollars received, and ensured that results were not attributable to chance. *Id.* at *13.

The court said that the disparity study determined disparity ratios that were statistically significant and the study found that DBEs were significantly underutilized as prime contractors, noting that a figure below 0.80 is generally considered "solid evidence of systematic under-utilization calling for affirmative action to correct it." *Id.* at *13. The study found that DBEs made up 25.55% of prime contractors in the construction field, received 9.13% of prime contracts valued below $500,000 and 8.25% of the available contract dollars in that range, yielding a disparity ratio of 0.32 for prime contracts under $500,000. *Id.*

In the realm of contraction subcontracting, the study showed that DBEs may have 29.24% of available subcontractors, and in the construction industry they receive 44.62% of available subcontracts, but those subcontracts amounted to only 10.65% of available subcontracting dollars. *Id.* at *13. This, according to the study, yielded a statistically significant disparity ratio of 0.36, which the court found low enough to signal systemic under-utilization. *Id.*

IDOT relied on additional data to justify its program, including conducting a zero-goal experiment in 2002 and in 2003, when it did not apply DBE goals to contracts. *Id.* at *13. Without contract goals, the share of the contracts' value that DBEs received dropped dramatically, to just 1.5% of the total value of the contracts. *Id.* at *13. And in those contracts advertised without a DBE goal, the DBE subcontractor participation rate was 0.84%.

Tollway Program. Tollway also relied on a disparity study limited to the Tollway's contracting market area. The study used a "custom census" process, creating a database of representative projects, identifying geographic and product markets, counting businesses in those markets, identifying and verifying which businesses are minority- and woman-owned, and verifying the ownership status of all the other firms. *Id.* at *13. The study examined the Tollway's historical contract data,

reported its DBE utilization as a percentage of contract dollars, and compared DBE utilization and DBE availability, coming up with disparity indices divided by race and sex, as well as by industry group. *Id.*

The study found that out of 115 disparity indices, 80 showed statistically significant under-utilization of DBEs. *Id.* at *14. The study discussed statistical disparities in earnings and the formation of businesses by minorities and women, and concluded that a statistically significant adverse impact on earnings was observed in both the economy at large and in the construction and construction-related professional services sector." *Id.* at *14. The study also found women and minorities are not as likely to start their own business, and that minority business formation rates would likely be substantially and significantly higher if markets operated in a race- and sex-neutral manner. *Id.*

The study used regression analysis to assess differences in wages, business-owner earnings, and business-formation rates between white men and minorities and women in the wider construction economy. *Id.* at *14. The study found statistically significant disparities remained between white men and other groups, controlling for various independent variables such as age, education, location, industry affiliation, and time. *Id.* The disparities, according to the study, were consistent with a market affected by discrimination. *Id.*

The Tollway also presented additional evidence, including that the Tollway set aspirational participation goals on a small number of contracts, and those attempts failed. *Id.* at *14. In 2004, the court noted the Tollway did not award a single prime contract or subcontract to a DBE, and the DBE participation rate in 2005 was 0.01% across all construction contracts. *Id.* In addition, the Tollway also considered, like IDOT, anecdotal evidence that provided testimony of several DBE owners regarding barriers that they themselves faced. *Id.*

Midwest Fence's criticisms. Midwest Fence's expert consultant argued that the study consultant failed to account for DBEs' readiness, willingness, and ability to do business with IDOT and the Tollway, and that the method of assessing readiness and willingness was flawed. *Id.* at *14. In addition, the consultant for Midwest Fence argued that one of the studies failed to account for DBEs' relative capacity, "meaning a firm's ability to take on more than one contract at a time." The court noted that one of the study consultants did not account for firm capacity and the other study consultant found no effective way to account for capacity. *Id.* at *14, n. 2. The court said one study did perform a regression analysis to measure relative capacity and limited its disparity analysis to contracts under $500,000, which was, according to the study consultant, to take capacity into account to the extent possible. *Id.*

The court pointed out that one major problem with Midwest Fence's report is that the consultant did not perform any substantive analysis of his own. *Id.* at *15. The evidence offered by Midwest Fence and its consultant was, according to the court, "speculative at best." *Id.* at *15. The court said the consultant's relative capacity analysis was similarly speculative, arguing that the assumption that firms have the same ability to provide services up to $500,000 may not be true in practice, and that if the estimates of capacity are too low the resulting disparity index overstates the degree of disparity that exists. *Id.* at *15.

The court stated Midwest Fence's expert similarly argued that the existence of the DBE program "may" cause an upward bias in availability, that any observations of the public sector in general "may" be affected by the DBE program's existence, and that data become less relevant as time passes. *Id.* at *15. The court found that given the substantial utilization disparity as shown in the reports by IDOT and the Tollway defendants, Midwest Fence's speculative critiques did not raise a genuine issue of fact as to whether the defendants had a substantial

basis in evidence to believe that action was needed to remedy discrimination. *Id.* at *15.

The court rejected Midwest Fence's argument that requiring it to provide an independent statistical analysis places an impossible burden on it due to the time and expense that would be required. *Id.* at *15. The court noted that the burden is initially on the government to justify its programs, and that since the state defendants offered evidence to do so, the burden then shifted to Midwest Fence to show a genuine issue of material fact as to whether the state defendants had a substantial basis in evidence for adopting their DBE programs. *Id.* Speculative criticism about potential problems, the court found, will not carry that burden. *Id.*

With regard to the capacity question, the court noted it was Midwest Fence's strongest criticism and that courts had recognized it as a serious problem in other contexts. *Id.* at *15. The court said the failure to account for relative capacity did not undermine the substantial basis in evidence in this particular case. *Id.* at *15. Midwest Fence did not explain how to account for relative capacity. *Id.* In addition, it has been recognized, the court stated, that defects in capacity analyses are not fatal in and of themselves. *Id.* at *15.

The court concluded that the studies show striking utilization disparities in specific industries in the relevant geographic market areas, and they are consistent with the anecdotal and less formal evidence defendants had offered. *Id.* at *15. The court found Midwest Fence's expert's "speculation" that failure to account for relative capacity might have biased DBE availability upward does not undermine the statistical core of the strong basis in evidence required. *Id.*

In addition, the court rejected Midwest Fence's argument that the disparity studies do not prove discrimination, noting again that a state need not conclusively prove the existence of discrimination to establish a strong basis in evidence for concluding that remedial action is necessary, and that where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern or practice of discrimination. *Id.* at *15. The court also rejected Midwest Fence's attack on the anecdotal evidence stating that the anecdotal evidence bolsters the state defendants' statistical analyses. *Id.* at *15.

In connection with Midwest Fence's argument relating to the Tollway defendant, Midwest Fence argued that the Tollway's supporting data was from before it instituted its DBE program. *Id.* at *16. The Tollway responded by arguing that it used the best data available and that in any event its data sets show disparities. *Id.* at *16. The court found this point persuasive even assuming some of the Tollway's data were not exact. *Id.* The court said that while every single number in the Tollway's "arsenal of evidence" may not be exact, the overall picture still shows beyond reasonable dispute a marketplace with systemic under-utilization of DBEs far below the disparity index lower than 80 as an indication of discrimination, and that Midwest Fence's "abstract criticisms" do not undermine that core of evidence. *Id.* at *16.

Narrow tailoring. The court applied the narrow tailoring factors to determine whether IDOT's and the Tollway's implementation of their DBE programs yielded a close match between the evil against which the remedy is directed and the terms of the remedy. *Id.* at *16. First the court addressed the necessity for the relief and the efficacy of alternative race-neutral remedies factor. *Id.* The court reiterated that Midwest Fence has not undermined the defendants' strong combination of statistical and other evidence to show that their programs are needed to remedy discrimination. *Id.*

Both IDOT and the Tollway, according to the court, use race- and gender-neutral alternatives, and the undisputed facts show that those alternatives have not been sufficient to remedy discrimination. *Id.* The

court noted that the record shows IDOT uses nearly all of the methods described in the federal regulations to maximize a portion of the goal that will be achieved through race-neutral means. *Id.*

As for flexibility, both IDOT and the Tollway make front-end waivers available when a contractor has made good faith efforts to comply with a DBE goal. *Id.* at *17. The court rejected Midwest Fence's arguments that there were a low number of waivers granted, and that contractors fear of having a waiver denied showed the system was a *de facto* quota system. *Id.* The court found that IDOT and the Tollway have not granted large numbers of waivers, but there was also no evidence that they have *denied* large numbers of waivers. *Id.* The court pointed out that the evidence from Midwest Fence does not show that defendants are responsible for failing to grant front-end waivers that the contractors do not request. *Id.*

The court stated in the absence of evidence that defendants failed to adhere to the general good faith effort guidelines and arbitrarily deny or discourage front-end waiver requests, Midwest Fence's contention that contractors fear losing contracts if they ask for a waiver does not make the system a quota system. *Id.* at *17. Midwest Fence's own evidence, the court stated, shows that IDOT granted in 2007, 57 of 63 front-end waiver requests, and in 2010, it granted 21 of 35 front-end waiver requests. *Id.* at *17. In addition, the Tollway granted at least some front-end waivers involving 1.02% of contract dollars. *Id.* Without evidence that far more waivers were requested, the court was satisfied that even this low total by the Tollway does not raise a genuine dispute of fact. *Id.*

The court also rejected as "underdeveloped" Midwest Fence's argument that the court should look at the dollar value of waivers granted rather than the raw number of waivers granted. *Id.* at *17. The court found that this argument does not support a different outcome in this case because the defendants grant more front-end waiver requests than they deny, regardless of the dollar amounts those requests encompass. Midwest Fence presented no evidence that IDOT and the Tollway have an unwritten policy of granting only low-value waivers. *Id.*

The court stated that Midwest's "best argument" against narrowed tailoring is its "mismatch" argument, which was discussed above. *Id.* at *17. The court said Midwest's broad condemnation of the IDOT and Tollway programs as failing to create a "light" and "diffuse" burden for third parties was not persuasive. *Id.* The court noted that the DBE programs, which set DBE goals on only some contracts and allow those goals to be waived if necessary, may end up foreclosing one of several opportunities for a non-DBE specialty subcontractor like Midwest Fence. *Id.* But, there was no evidence that they impose the entire burden on that subcontractor by shutting it out of the market entirely. *Id.* However, the court found that Midwest Fence's point that subcontractors appear to bear a disproportionate share of the burden as compared to prime contractors "is troubling." *Id.* at *17.

Although the evidence showed disparities in both the prime contracting and subcontracting markets, under the federal regulations, individual contract goals are set only for contracts that have subcontracting possibilities. *Id.* The court pointed out that some DBEs are able to bid on prime contracts, but the necessarily small size of DBEs makes that difficult in most cases. *Id.*

But, according to the court, in the end the record shows that the problem Midwest Fence raises is largely "theoretical." *Id.* at *18. Not all contracts have DBE goals, so subcontractors are on an even footing for those contracts without such goals. *Id.* IDOT and the Tollway both use neutral measures including some designed to make prime contracts more assessable to DBEs. *Id.* The court noted that DBE trucking and material suppliers count toward fulfillment of a contract's DBE goal,

even though they are not used as line items in calculating the contract goal in the first place, which opens up contracts with DBE goals to non-DBE subcontractors. *Id.*

The court stated that if Midwest Fence "had presented evidence rather than theory on this point, the result might be different." *Id.* at *18. "Evidence that subcontractors were being frozen out of the market or bearing the entire burden of the DBE program would likely require a trial to determine at a minimum whether IDOT or the Tollway were adhering to their responsibility to avoid overconcentration in subcontracting." *Id.* at *18. The court concluded that Midwest Fence "has shown how the Illinois program *could* yield that result but not that it actually does so." *Id.*

In light of the IDOT and Tollway programs' mechanisms to prevent subcontractors from having to bear the entire burden of the DBE programs, including the use of DBE materials and trucking suppliers in satisfying goals, efforts to draw DBEs into prime contracting, and other mechanisms, according to the court, Midwest Fence did not establish a genuine dispute of fact on this point. *Id.* at *18. The court stated that the "theoretical possibility of a 'mismatch' could be a problem, but we have no evidence that it actually is." *Id.* at *18.

Therefore, the court concluded that IDOT and the Tollway DBE programs are narrowly tailored to serve the compelling state interest in remedying discrimination in public contracting. *Id.* at *18. They include race- and gender-neutral alternatives, set goals with reference to actual market conditions, and allow for front-end waivers. *Id.* "So far as the record before us shows, they do not unduly burden third parties in service of remedying discrimination," according to the court. Therefore, Midwest Fence failed to present a genuine dispute of fact "on this point." *Id.*

3. *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), *cert. denied, Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al.*, 2016 WL 193809 (Oct. 3, 2016)

Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT's DBE Program discriminates on the basis of race. The district court granted summary judgment to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 799 F.3d at 679. (*See* 2014 WL 552213, C.D. Ill. Fed. 12, 2014)(*See* summary of district decision in Section E. below). The Court of Appeals affirmed the grant of summary judgment to IDOT.

Dunnet Bay engages in general highway construction and is owned and controlled by two white males. 799 F. 3d at 679. Its average annual gross receipts between 2007 and 2009 were over $52 million. *Id.* IDOT administers its DBE Program implementing the Federal DBE Program. IDOT established a statewide aspirational goal for DBE participation of 22.77%. *Id.* at 680. Under IDOT's DBE Program, if a bidder fails to meet the DBE contract goal, it may request a modification of the goal, and provide documentation of its good faith efforts to meet the goal. *Id.* at 681. These requests for modification are also known as "waivers." *Id.*

The record showed that IDOT historically granted goal modification request or waivers: in 2007, it granted 57 of 63 pre-award goal modification requests; the six other bidders ultimately met the contract goal with post-bid assistance. *Id.* at 681. In 2008, IDOT granted 50 of the 55 pre-award goal modification requests; the other five bidders ultimately met the DBE goal. In calendar year 2009, IDOT granted 32 of 58 goal modification requests; the other contractors ultimately met the goals. In calendar year 2010, IDOT received 35 goal modification requests; it granted 21 of them and denied the rest. *Id.*

Dunnet Bay alleged that IDOT had taken the position no waivers would be granted. *Id*. at 697-698. IDOT responded that it was not its policy to not grant waivers, but instead IDOT would aggressively pursue obtaining the DBE participation in their contract goals, including that waivers were going to be reviewed at a high level to make sure the appropriate documentation was provided in order for a waiver to be issued. *Id.*

The U.S. FHWA approved the methodology IDOT used to establish a statewide overall DBE goal of 22.77%. *Id.* at 683, 698. The FHWA reviewed and approved the individual contract goals set for work on a project known as the Eisenhower project that Dunnet Bay bid on in 2010. *Id*. Dunnet Bay submitted to IDOT a bid that was the lowest bid on the project, but it was substantially over the budget estimate for the project. *Id.* at 683-684. Dunnet Bay did not achieve the goal of 22%, but three other bidders each met the DBE goal. *Id.* at 684. Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. *Id.* at 684. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. *Id.* at 684-687, 699.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at 687. There were four separate Eisenhower projects advertised for bids, and IDOT granted one of the four goal modification requests from that bid letting. Dunnet Bay bid on one of the rebid projects, but it was not the lowest bid; it was the third out of five bidders. *Id.* at 687. Dunnet Bay did meet the 22.77% contract DBE goal, on the rebid prospect, but was not awarded the contract because it was not the lowest. *Id.*

Dunnet Bay then filed its lawsuit seeking damages as well as a declaratory judgment that the IDOT DBE Program is unconstitutional and injunctive relief against its enforcement.

The district court granted the IDOT Defendants' motion for summary judgment and denied Dunnet Bay's motion. *Id.* at 687. The district court concluded that Dunnet Bay lacked Article III standing to raise an equal protection challenge because it has not suffered a particularized injury that was called by IDOT, and that Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id. Dunnet Bay Construction Company v. Hannig*, 2014 WL 552213, at *30 (C.D. Ill. Feb. 12, 2014).

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at 687. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a showing that the state exceeded its federal authority. *Id.* at 688. (*See* discussion of the district court decision in *Dunnet Bay* below in Section E).

Dunnet Bay lacks standing to raise an equal protection claim. The court first addressed the issue whether Dunnet Bay had standing to challenge IDOT's DBE Program on the ground that it discriminated on the basis of race in the award of highway construction contracts.

The court found that Dunnet Bay had not established that it was excluded from competition or otherwise disadvantaged because of race-based measures. *Id.* at 690. Nothing in IDOT's DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. *Id.* IDOT's DBE Program is not a "set aside program," in which non-minority owned businesses could not even bid on certain contracts. *Id.*

Under IDOT's DBE Program, all contractors, minority and non-minority contractors, can bid on all contracts. *Id.* at 690-691.

The court said the absence of complete exclusion from competition with minority- or woman-owned businesses distinguished the IDOT DBE Program from other cases in which the court ruled there was standing to challenge a program. *Id.* at 691. Dunnet Bay, the court found, has not alleged and has not produced evidence to show that it was treated less favorably than any other contractor because of the race of its owners. *Id.* This lack of an explicit preference from minority-owned businesses distinguishes the IDOT DBE Program from other cases. *Id*. Under IDOT's DBE Program, all contractors are treated alike and subject to the same rules. *Id*.

In addition, the court distinguished other cases in which the contractors were found to have standing because in those cases standing was based in part on the fact they had lost an award of a contract for failing to meet the DBE goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. *Id.* at 691. In contrast with these cases where the plaintiffs had standing, the court said Dunnet Bay could not establish that it would have been awarded the contract but for its failure to meet the DBE goal or demonstrate good faith efforts. *Id.* at 692.

The evidence established that Dunnet Bay's bid was substantially over the program estimated budget, and IDOT rebid the contract because the low bid was over the project estimate. *Id.* In addition, Dunnet Bay had been left off the For Bidders List that is submitted to DBEs, which was another reason IDOT decided to rebid the contract. *Id.*

The court found that even assuming Dunnet Bay could establish it was excluded from competition with DBEs or that it was disadvantaged as compared to DBEs, it could not show that any difference in treatment was because of race. *Id.* at 692. For the three years preceding 2010, the year it bid on the project, Dunnet Bay's average gross receipts were over $52 million. *Id.* Therefore, the court found Dunnet Bay's size makes it ineligible to qualify as a DBE, regardless of the race of its owners. *Id.* Dunnet Bay did not show that any additional costs or burdens that it would incur are because of race, but the additional costs and burdens are equally attributable to Dunnet Bay's *size*. *Id.* Dunnet Bay had not established, according to the court, that the denial of equal treatment resulted from the imposition of a racial barrier. *Id.* at 693.

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. *Id.* at 693. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* The court concluded that Dunnet Bay's claimed injury of being forced to participate in a discriminatory scheme amounts to a challenge to the state's application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined "must be limited to the question of whether the state exceeded its authority." *Id.* at 694, *quoting*, *Northern Contracting*, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay's *size*. *Id.*

The court stated that Dunnet Bay did not establish causational or redressability. *Id.* at 695. It failed to demonstrate that the DBE Program caused it any injury during the first bid process. *Id.* IDOT did not award the contract to anyone under the first bid and re-let the contract. *Id.* Therefore, Dunnet Bay suffered no injury because of the DBE Program. *Id.* The court also found that Dunnet Bay could not establish redressability because IDOT's decision to re-let the contract redressed any injury. *Id.*

In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at 695. The court said that a litigant generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The court rejected Dunnet Bay's attempt to assert the equal protection rights of a non-minority-owned small business. *Id.* at 695-696.

Dunnet Bay did not produce sufficient evidence that IDOT's implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority. The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at 696. The court stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT "acted with discriminatory intent." *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.*, at 697, *quoting Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: "[A] state is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority." *Id. quoting Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and eliminating waivers. *Id.* at 697. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract's DBE participation goal at 22% without the required analysis; (2) implementing a "no-waiver" policy; (3) preliminarily denying its goal modification request without assessing its good faith efforts; (4) denying it a meaningful reconsideration hearing; (5) determining that its good faith efforts were inadequate; and (6) providing no written or other explanation of the basis for its good-faith-efforts determination. *Id.*

In challenging the DBE contract goal, Dunnet Bay asserts that the 22% goal was "arbitrary" and that IDOT manipulated the process to justify a preordained goal. *Id.* at 698. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

The FHWA approved IDOT's methodology to establish its statewide DBE goal and approved the individual contract goals for the Eisenhower project. *Id.* at 698. Dunnet Bay did not identify any part of the regulation that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal. *Id.*

The court agreed with the district court's conclusion that because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. *Id.* at 698.

The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. *Id.* at 698. The court noted IDOT had granted waivers in 2009 and in 2010 that amounted to 60% of the waiver requests. *Id.* The court stated that IDOT's record of granting waivers refutes any suggestion of a no-waiver policy. *Id.* at 699.

The court did not agree with Dunnet Bay's challenge that IDOT rejected its bid without determining whether it had made good faith efforts, pointing out that IDOT in fact determined that Dunnet Bay failed to document adequate good faith efforts, and thus it had complied with the federal regulations. *Id.* at 699. The court found IDOT's determination that Dunnet Bay failed to show good faith efforts was supported in the record. *Id*. The court noted the reasons provided by IDOT, included Dunnet Bay did not utilize IDOT's supportive services, and that the other bidders all met the DBE goal, whereas Dunnet Bay did not come close to the goal in its first bid. *Id.* at 699-700.

The court said the performance of other bidders in meeting the contract goal is listed in the federal regulations as a consideration when deciding whether a bidder has made good faith efforts to obtain DBE participation goals, and was a proper consideration. *Id.* at 700. The court said Dunnet Bay's efforts to secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bid List, but found the rebidding of the contract remedied that oversight. *Id.*

Conclusion. The court affirmed the district court's grant of summary judgment to the Illinois DOT, concluding that Dunnet Bay lacks standing, and that the Illinois DBE Program implementing the Federal DBE Program survived the constitutional and other challenges made by Dunnet Bay.

Petition for a Writ of Certiorari Denied. Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in January 2016. The Supreme Court denied the Petition on October 3, 2016.

4. *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al*., 713 F.3d 1187 (9th Cir. 2013)

The Associated General Contractors of America, Inc., San Diego Chapter, Inc., ("AGC") sought declaratory and injunctive relief against the California Department of Transportation ("Caltrans") and its officers on the grounds that Caltrans' Disadvantaged Business initial Enterprise ("DBE") program unconstitutionally provided race -and sex-based preferences to African American, Native American-, Asian-Pacific American-, and woman-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans' DBE program implementing the Federal DBE Program and granted summary judgment to Caltrans. The district court held that Caltrans' DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of discrimination in the California transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans' substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

The AGC appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit initially held that because the AGC did not identify any of the members who have suffered or will suffer harm as a result of Caltrans' program, the AGC did not establish that it had associational standing to bring the lawsuit. *Id.* Most significantly, the Ninth Circuit

held that even if the AGC could establish standing, its appeal failed because the Court found Caltrans' DBE program implementing the Federal DBE Program is constitutional and satisfied the applicable level of strict scrutiny required by the Equal Protection Clause of the United States Constitution. *Id.* at 1194-1200.

Court applies *Western States Paving Co. v. Washington State DOT* decision. In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d. 983 (9th Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of Transportation to distribute funds to States for transportation-related projects. *Id*. at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id*. Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the federal statute and the federal regulations (the Federal DBE Program), but struck down Washington DOT's program because it was not narrowly tailored. *Id*., *citing Western States Paving Co*., 407 F.3d at 990-995, 999-1002.

In *Western States Paving*, the Ninth Circuit announced a two-pronged test for "narrow tailoring":

"(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination." Id. 1191, citing Western States Paving Co., 407 F.3d at 997-998.

Evidence gathering and the 2007 Disparity Study. On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the *Western States Paving* decision. *Id*. at 1191. Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California's transportation contracting industry. *Id*. The Court noted that disparity analysis involves making a comparison between the availability of minority- and woman-owned businesses and their actual utilization, producing a number called a "disparity index." *Id*. An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. *Id*. An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.*

The Court found the research firm and the disparity study gathered extensive data to calculate disadvantaged business availability in the California transportation contracting industry. *Id*. at 1191. The Court stated: "Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, the firm concluded that minority- and woman-owned businesses should be expected to receive 13.5 percent of contact dollars from Caltrans administered federally assisted contracts." *Id*. at 1191-1192.

The Court said the research firm "examined over 10,000 transportation-related contracts administered by Caltrans between 2002 and 2006 to determine actual DBE utilization. The firm assessed disparities across a variety of contracts, separately assessing contracts based on funding source (state or federal), type of contract (prime or subcontract), and type of project (engineering or construction)." *Id*. at 1192.

The Court pointed out a key difference between federally funded and state funded contracts is that race-conscious goals were in place for the federally funded contracts during the 2002–2006 period, but not for the state funded contracts. *Id*. at 1192. Thus, the Court stated: "state

funded contracts functioned as a control group to help determine whether previous affirmative action programs skewed the data." *Id*.

Moreover, the Court found the research firm measured disparities in all twelve of Caltrans' administrative districts, and computed aggregate disparities based on statewide data. *Id*. at 1192. The firm evaluated statistical disparities by race and gender. The Court stated that within and across many categories of contracts, the research firm found substantial statistical disparities for African American, Asian–Pacific, and Native American firms. *Id*. However, the research firm found that there were not substantial disparities for these minorities in *every* subcategory of contract. *Id*. The Court noted that the disparity study also found substantial disparities in utilization of woman-owned firms for some categories of contracts. *Id.* After publication of the disparity study, the Court pointed out the research firm calculated disparity indices for all woman-owned firms, including female minorities, showing substantial disparities in the utilization of all woman-owned firms similar to those measured for white women. *Id*.

The Court found that the disparity study and Caltrans also developed extensive anecdotal evidence, by (1) conducting twelve public hearings to receive comments on the firm's findings; (2) receiving letters from business owners and trade associations; and (3) interviewing representatives from twelve trade associations and 79 owners/managers of transportation firms. *Id.* at 1192. The Court stated that some of the anecdotal evidence indicated discrimination based on race or gender. *Id*.

Caltrans' DBE Program. Caltrans concluded that the evidence from the disparity study supported an inference of discrimination in the California transportation contracting industry. *Id*. at 1192-1193. Caltrans concluded that it had sufficient evidence to make race- and gender-conscious goals for African American-, Asian–Pacific American-, Native American-, and woman-owned firms. *Id*. The Court stated that Caltrans adopted the recommendations of the disparity report and set an overall goal of 13.5 percent for disadvantaged business participation. Caltrans expected to meet one-half of the 13.5 percent goal using race-neutral measures. *Id*.

Caltrans submitted its proposed DBE program to the USDOT for approval, including a request for a waiver to implement the program only for the four identified groups. *Id*. at 1193. The Caltrans' DBE program included 66 race-neutral measures that Caltrans already operated or planned to implement, and subsequent proposals increased the number of race-neutral measures to 150. *Id*. The USDOT granted the waiver, but initially did not approve Caltrans' DBE program until in 2009, the DOT approved Caltrans' DBE program for fiscal year 2009.

District Court proceedings. AGC then filed a complaint alleging that Caltrans' implementation of the Federal DBE Program violated the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act, and other laws. Ultimately, the AGC only argued an as-applied challenge to Caltrans' DBE program. The district court on motions of summary judgment held that Caltrans' program was "clearly constitutional," as it "was supported by a strong basis in evidence of discrimination in the California contracting industry and was narrowly tailored to those groups which had actually suffered discrimination. *Id*. at 1193.

Subsequent Caltrans study and program. While the appeal by the AGC was pending, Caltrans commissioned a new disparity study from BBC to update its DBE program as required by the federal regulations. *Id*. at 1193. In August 2012, BBC published its second disparity report, and Caltrans concluded that the updated study provided evidence of continuing discrimination in the California transportation contracting industry against the same four groups and Hispanic Americans. *Id*.

Caltrans submitted a modified DBE program that is nearly identical to the program approved in 2009, except that it now includes Hispanic Americans and sets an overall goal of 12.5 percent, of which 9.5 percent will be achieved through race- and gender-conscious measures. *Id*. The USDOT approved Caltrans' updated program in November 2012. *Id*.

Jurisdiction issue. Initially, the Ninth Circuit Court of Appeals considered whether it had jurisdiction over the AGC's appeal based on the doctrines of mootness and standing. The Court held that the appeal is not moot because Caltrans' new DBE program is substantially similar to the prior program and is alleged to disadvantage AGC's members "in the same fundamental way" as the previous program. *Id*. at 1194.

The Court, however, held that the AGC did not establish associational standing. *Id*. at 1194-1195: The Court found that the AGC did not identify any affected members by name nor has it submitted declarations by any of its members attesting to harm they have suffered or will suffer under Caltrans' program. *Id*. at 1194-1195. Because AGC failed to establish standing, the Court held it must dismiss the appeal due to lack of jurisdiction. *Id*. at 1195.

Caltrans' DBE Program held constitutional on the merits. The Court then held that even if AGC could establish standing, its appeal would fail. *Id*. at 1194-1195. The Court held that Caltrans' DBE program is constitutional because it survives the applicable level of scrutiny required by the Equal Protection Clause and jurisprudence. *Id*. at 1195-1200.

The Court stated that race-conscious remedial programs must satisfy strict scrutiny and that although strict scrutiny is stringent, it is not "fatal in fact." *Id*. at 1194-1195 (*quoting Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 237 (1995)(*Adarand III*)). The Court quoted *Adarand III*: "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." *Id. (quoting Adarand III*, 515 U.S. at 237.)

The Court pointed out that gender-conscious programs must satisfy intermediate scrutiny which requires that gender-conscious programs be supported by an 'exceedingly persuasive justification' and be substantially related to the achievement of that underlying objective. *Id.* at 1195 (*citing Western States Paving,* 407 F.3d at 990 n. 6.).

The Court held that Caltrans' DBE program contains both race- and gender-conscious measures, and that the "entire program passes strict scrutiny." *Id*. at 1195.

Application of strict scrutiny standard articulated in *Western States Paving*. The Court held that the framework for AGC's as-applied challenge to Caltrans' DBE program is governed by *Western States Paving.* The Ninth Circuit in *Western States Paving* devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be "limited to those minority groups that have actually suffered discrimination." *Id.* at 1195-1196 (*quoting Western States Paving,* 407 F.3d at 997–99).

Evidence of discrimination in California contracting industry. The Court held that in Equal Protection cases, courts consider statistical and anecdotal evidence to identify the existence of discrimination. *Id*. at 1196. The U.S. Supreme Court has suggested that a "significant statistical disparity" could be sufficient to justify race-conscious remedial programs. *Id*. at *7 (*citing City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 509 (1989)). The Court stated that although generally not sufficient, anecdotal evidence complements statistical evidence because of its ability to bring "the cold numbers convincingly to life." *Id*. (*quoting Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 339 (1977)).

The Court pointed out that Washington DOT's DBE program in the *Western States Paving* case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. *Id.* at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to the purported disparity because Washington's data "did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs skewed the prior utilization of minority businesses in the state." *Id*. (*quoting Western States Paving,* 407 F.3d at 999-1001). The Court said that it struck down Washington's program after determining that the record was devoid of any evidence suggesting that minorities currently suffer – or have ever suffered – discrimination in the Washington transportation contracting industry." *Id.*

Significantly, the Court held in this case as follows: "In contrast, Caltrans' affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry." *Id*. at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and woman-owned firms. *Id*. The Court found the disparity study "accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs." *Id*. (*citing Western States,* 407 F.3d at 1000).

The Court also held: "Moreover, the statistical evidence from the disparity study is bolstered by anecdotal evidence supporting an inference of discrimination. The substantial statistical disparities alone would give rise to an inference of discrimination, *see Croson,* 488 U.S. at 509, and certainly Caltrans' statistical evidence combined with anecdotal evidence passes constitutional muster." *Id*. at 1196.

The Court specifically rejected the argument by AGC that strict scrutiny requires Caltrans to provide evidence of "specific acts" of "deliberate" discrimination by Caltrans employees or prime contractors. *Id*. at 1196-1197. The Court found that the Supreme Court in *Croson* explicitly states that "[t]he degree of specificity required in the findings of discrimination … may vary." *Id.* at 1197 (*quoting Croson*, 488 U.S. at 489). The Court concluded that a rule requiring a state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in *Croson* that statistical disparities alone could be sufficient to support race-conscious remedial programs. *Id.* (*citing Croson*, 488 U.S. at 509). The Court rejected AGC's argument that Caltrans' program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. *Id.*

The Court rejected a second argument by AGC that this study showed inconsistent results for utilization of minority businesses depending on the type and nature of the contract, and thus cannot support an inference of discrimination in the entire transportation contracting industry. *Id.* at 1197. AGC argued that each of these subcategories of contracts must be viewed in isolation when considering whether an inference of discrimination arises, which the Court rejected. *Id.* The Court found that AGC's argument overlooks the rationale underpinning the constitutional justification for remedial race-conscious programs: they are designed to root out "patterns of discrimination." *Id. quoting Croson*, 488 U.S. at 504.

The Court stated that the issue is not whether Caltrans can show underutilization of disadvantaged businesses in *every* measured category of contract. But rather, the issue is whether Caltrans can meet the evidentiary standard required by *Western States Paving* if, looking

at the evidence in its entirety, the data show substantial disparities in utilization of minority firms suggesting that public dollars are being poured into "a system of racial exclusion practiced by elements of the local construction industry." *Id.* at 1197 *quoting Croson* 488 U.S. at 492.

The Court concluded that the disparity study and anecdotal evidence document a pattern of disparities for the four groups, and that the study found substantial underutilization of these groups in numerous categories of California transportation contracts, which the anecdotal evidence confirms. *Id.* at 1197. The Court held this is sufficient to enable Caltrans to infer that these groups are systematically discriminated against in publicly-funded contracts. *Id.*

Third, the Court considered and rejected AGC's argument that the anecdotal evidence has little or no probative value in identifying discrimination because it is not verified. *Id.* at *9. The Court noted that the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence, and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

The Court pointed out that AGC attempted to discount the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the "good ol' boy" network of contractors. *Id.* at 1197-1198. The Court held, however, that the federal courts and regulations have precisely identified these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. *Id*. at 1198, *citing Western States Paving*, 407 and *AGCC II*, 950 F.2d at 1414.

The Court found that AGC ignores the many incidents of racial and gender discrimination presented in the anecdotal evidence. *Id.* at 1198. The Court said that Caltrans does not claim, and the anecdotal evidence does not need to prove, that *every* minority-owned business is discriminated against. *Id.* The Court concluded: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id*. The individual accounts of discrimination offered by Caltrans, according to the Court, met this burden. *Id.*

Fourth, the Court rejected AGC's contention that Caltrans' evidence does not support an inference of discrimination against all women because gender-based disparities in the study are limited to white women. *Id.* at 1198. AGC, the Court said, misunderstands the statistical techniques used in the disparity study, and that the study correctly isolates the effect of gender by limiting its data pool to white women, ensuring that statistical results for gender-based discrimination are not skewed by discrimination against minority women on account of their race. *Id.*

In addition, after AGC's early incorrect objections to the methodology, the research firm conducted a follow-up analysis of all woman-owned firms that produced a disparity index of 59. *Id.* at 1198. The Court held that this index is evidence of a substantial disparity that raises an inference of discrimination and is sufficient to support Caltrans' decision to include all women in its DBE program. *Id.* at 1195.

Program tailored to groups who actually suffered discrimination. The Court pointed out that the second prong of the test articulated in *Western States Paving* requires that a DBE program be limited to those groups that actually suffered discrimination in the state's contracting industry. *Id*. at 1198. The Court found Caltrans' DBE program is limited to those minority groups that have actually suffered discrimination. *Id*. The Court held that the 2007 disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American-, and woman-owned firms across a range of contract categories. *Id*. at 1198-1199. *Id.* These disparities, according to

the Court, support an inference of discrimination against those groups. *Id.*

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id*. at 1199. California applied for and received a waiver from the USDOT in order to limit its 2009 program to African American, Native American, Asian-Pacific American, and woman-owned firms. *Id.* The Court held that Caltrans' program "adheres precisely to the narrow tailoring requirements of *Western States*." *Id.*

The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are "sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime *and* subcontractors." *Id.*

Consideration of race–neutral alternatives. The Court rejected the AGC assertion that Caltrans' program is not narrowly tailored because it failed to evaluate race-neutral measures before implementing the system of racial preferences, and stated the law imposes no such requirement. *Id.* at 1199. The Court held that *Western States Paving* does not require states to independently meet this aspect of narrow tailoring, and instead focuses on whether the federal statute sufficiently considered race-neutral alternatives. *Id.*

Second, the Court found that even if this requirement does apply to Caltrans' program, narrow tailoring only requires "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 1199, *citing Grutter v. Bollinger,* 539 U.S. 306, 339 (2003). The Court found that the Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC's claim that Caltrans' program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.

Certification affidavits for Disadvantaged Business Enterprises. The Court rejected the AGC argument that Caltrans' program is not narrowly tailored because affidavits that applicants must submit to obtain certification as DBEs do not require applicants to assert they have suffered discrimination *in California. Id.* at 1199-1200. The Court held the certification process employed by Caltrans follows the process detailed in the federal regulations, and that this is an impermissible collateral attack on the facial validity of the Congressional Act authorizing the Federal DBE Program and the federal regulations promulgated by the USDOT (The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub.L.No. 109-59, § 1101(b), 119 Sect. 1144 (2005)). *Id.* at 1200.

Application of program to mixed state- and federally-funded contracts. The Court also rejected AGC's challenge that Caltrans applies its program to transportation contracts funded by both federal and state money. *Id*. at 1200. The Court held that this is another impermissible collateral attack on the federal program, which explicitly requires goals to be set for mix-funded contracts. *Id*.

Conclusion. The Court concluded that the AGC did not have standing, and that further, Caltrans' DBE program survives strict scrutiny by: 1) having a strong basis in evidence of discrimination within the California

transportation contracting industry, and 2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id*. at 1200. The Court then dismissed the appeal. *Id*.

5. *Braunstein v. Arizona DOT*, 683 F.3d 1177 (9th Cir. 2012)

Braunstein is an engineering contractor that provided subsurface utility location services for ADOT. Braunstein sued the Arizona DOT and others seeking damages under the Civil Rights Act, pursuant to §§ 1981 and 1983, and challenging the use of Arizona's former affirmative action program, or race- and gender- conscious DBE program implementing the Federal DBE Program, alleging violation of the equal protection clause.

Factual background. ADOT solicited bids for a new engineering and design contract. Six firms bid on the prime contract, but Braunstein did not bid because he could not satisfy a requirement that prime contractors complete 50 percent of the contract work themselves. Instead, Braunstein contacted the bidding firms to ask about subcontracting for the utility location work. 683 F.3d at 1181. All six firms rejected Braunstein's overtures, and Braunstein did not submit a quote or subcontracting bid to any of them. *Id.*

As part of the bid, the prime contractors were required to comply with federal regulations that provide states receiving federal highway funds maintain a DBE program. 683 F.3d at 1182. Under this contract, the prime contractor would receive a maximum of 5 points for DBE participation. *Id. at 1182*. All six firms that bid on the prime contract received a maximum of 5 points for DBE participation. All six firms committed to hiring DBE subcontractors to perform at least 6 percent of the work. Only one of the six bidding firms selected a DBE as its desired utility location subcontractor. Three of the bidding firms selected another company other than Braunstein to perform the utility location work. *Id*. DMJM won the bid for the 2005 contract using Aztec to perform the utility location work. Aztec was not a DBE. *Id. at 1182*.

District Court rulings. Braunstein brought this suit in federal court against ADOT and employees of the DOT alleging that ADOT violated his right to equal protection by using race and gender preferences in its solicitation and award of the 2005 contract. The district court dismissed as moot Braunstein's claims for injunctive and declaratory relief because ADOT had suspended its DBE program in 2006 following the Ninth Circuit decision in *Western States Paving Co. v. Washington State DOT*, 407 F.3d 9882 (9th Cir. 2005). This left only Braunstein's damages claims against the State and ADOT under §2000d, and against the named individual defendants in their individual capacities under §§ 1981 and 1983. *Id. at 1183*.

The district court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT's DBE program had affected him personally. The court noted that "Braunstein was afforded the opportunity to bid on subcontracting work, and the DBE goal did not serve as a barrier to doing so, nor was it an impediment to his securing a subcontract." *Id.* at 1183. The district court found that Braunstein's inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE. *Id.*

Lack of standing. The Ninth Circuit Court of Appeals held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT and the individual employees of ADOT. The Court found that Braunstein had not provided any evidence showing that ADOT's DBE program affected him personally or that it impeded his ability to compete for utility location work on an equal basis. *Id. at 1185.* The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract. *Id*.

The Court also pointed out that Braunstein did not seek prospective relief against the government "affirmative action" program, noting the district court dismissed as moot his claims for declaratory and injunctive relief since ADOT had suspended its DBE program before he brought the suit. *Id. at 1186*. Thus, Braunstein's surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE Program. *Id.* Accordingly, the Court held he must show more than that he is "able and ready" to seek subcontracting work. *Id*.

The Court found Braunstein presented no evidence to demonstrate that he was in a position to compete equally with the other subcontractors, no evidence comparing himself with the other subcontractors in terms of price or other criteria, and no evidence explaining why the six prospective prime contractors rejected him as a subcontractor. *Id. at 1186.* The Court stated that there was nothing in the record indicating the ADOT DBE program posed a barrier that impeded Braunstein's ability to compete for work as a subcontractor. *Id. at 1187.* The Court held that the existence of a racial or gender barrier is not enough to establish standing, without a plaintiff's showing that he has been subjected to such a barrier. *Id. at 1186.*

The Court noted Braunstein had explicitly acknowledged previously that the winning bidder on the contract would not hire him as a subcontractor for reasons unrelated to the DBE program. *Id*. at 1186. At the summary judgment stage, the Court stated that Braunstein was required to set forth specific facts demonstrating the DBE program impeded his ability to compete for the subcontracting work on an equal basis. *Id. at 1187*.

Summary judgment granted to ADOT. The Court concluded that Braunstein was unable to point to any evidence to demonstrate how the ADOT DBE program adversely affected him personally or impeded his ability to compete for subcontracting work. *Id*. The Court thus held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT.

6. *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 (7th Cir. 2007)

In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation's *("*IDOT") DBE Program. Plaintiff Northern Contracting Inc. ("NCI") was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7th Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. *Id*. at 719. The district court granted the USDOT's Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. *Id*. at 720. NCI also forfeited the argument that IDOT's DBE program did not serve a compelling government interest. *Id*. The sole issue on appeal to the Seventh Circuit was whether IDOT's program was narrowly tailored. *Id*.

IDOT typically adopted a new DBE plan each year. *Id*. at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id*. The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id*. The consultant then determined availability of minority- and woman-owned firms through analysis of Dun & Bradstreet's Marketplace data. *Id*. This initial list was corrected for errors in the data by surveying the D&B list. *Id*. In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. *Id*. The consultant then ran a regression analysis on earnings

and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. *Id*. IDOT considered this, along with other data, including DBE utilization on IDOTs "zero goal" experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id*. at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id*.

Despite the fact the NCI forfeited the argument that IDOT's DBE program did not serve a compelling state interest, the Seventh Circuit briefly addressed the compelling interest prong of the strict scrutiny analysis, noting that IDOT had satisfied its burden. *Id*. at 720. The court noted that, post-*Adarand*, two other circuits have held that a state may rely on the federal government's compelling interest in implementing a local DBE plan. *Id*. at 720-21, *citing Western States Paving Co., Inc. v. Washington State DOT*, 407 F.3d 983, 987 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The court stated that NCI had not articulated any reason to break ranks from the other circuits and explained that "[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government …. If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution." *Id*. at 721, *quoting Milwaukee County Pavers Association v. Fielder*, 922 F.2d 419, 423 (7th Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT's DBE program, the court held that IDOT had complied. *Id*. The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id*. at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Pena*, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id*. at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id*. The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id*. at 722, n. 5. Relatedly, the court stated that the Eighth Circuit's opinion in *Sherbrooke* (that the *Milwaukee* decision was compromised by the fact that it was decided under the prior law "when the 10 percent federal set-aside was more mandatory") was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id*. at 722. Federal law makes more clear now that the compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. *Id*. at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI's collateral attack on the federal regulations was impermissible. *Id*. at 722.

The remainder of the court's opinion addressed the question of whether IDOT exceeded its grant of authority under federal law, and held that all of NCI's arguments failed. *Id*. First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. *Id*. NCI argued that the number of registered

and prequalified DBEs in Illinois should have simply been counted. *Id*. The court stated that while the federal regulations list several examples of methods for determining the local base figure, *Id*. at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled "Alternative Methods," and states: "You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designated to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market." *Id*. (*citing* 49 CFR § 26.45(c)(5)). According to the court, the regulations make clear that "relative availability" means "the availability of ready, willing and able DBEs relative to all business ready, willing, and able to participate" on DOT contracts. *Id*. The court stated NCI pointed to nothing in the federal regulations that indicated that a recipient must so narrowly define the scope of the ready, willing, and available firms to a simple count of the number of registered and prequalified DBEs. *Id*. The court agreed with the district court that the remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. *Id*.

Second, NCI argued that the IDOT failed to properly adjust its goal based on local market conditions. *Id*. The court noted that the federal regulations do not require any adjustments to the base figure, but simply provide recipients with authority to make such adjustments if necessary. *Id*. According to the court, NCI failed to identify any aspect of the regulations requiring IDOT to separate prime contractor availability from subcontractor availability, and pointed out that the regulations require the local goal to be focused on overall DBE participation. *Id*.

Third, NCI contended that IDOT violated the federal regulations by failing to meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. *Id*. at 723-24. NCI argued that IDOT should have considered DBEs who had won subcontracts on goal projects where the prime contractor did not consider DBE status, instead of only considering DBEs who won contracts on no-goal projects. *Id*. at 724. The court held that while the regulations indicate that where DBEs win subcontracts on goal projects strictly through low bid this can be counted as race-neutral participation, the regulations did not require IDOT to search for this data, for the purpose of calculating past levels of race-neutral DBE participation. *Id*. According to the court, the record indicated that IDOT used nearly all the methods described in the regulations to maximize the portion of the goal that will be achieved through race-neutral means. *Id*.

The court affirmed the decision of the district court upholding the validity of the IDOT DBE program and found that it was narrowly tailored to further a compelling governmental interest. *Id*.

7. *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006)

This case out of the Ninth Circuit struck down a state's implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington's implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. ("plaintiff") was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9th Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT("WSDOT") under the Transportation Equity Act for the 21st Century ("TEA-21"). *Id*.

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. *Id*. at 988. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally-funded projects. *Id*. The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. *Id*. TEA-21 indicates the 10 percent DBE utilization requirement is "aspirational," and the statutory goal "does not authorize or require recipients to set overall or contract 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." *Id*.

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to "adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies." *Id*. at 989 (citing regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id*. (citing regulation). TEA-21 requires a generalized, "undifferentiated" minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (*e.g.*, between Hispanics, blacks, and women). *Id*. at 990 (citing regulation).

"A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses." *Id*. (citing regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id*. (citing regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to "obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means." *Id*. (citing regulation).

A prime contractor must use "good faith efforts" to satisfy a contract's DBE utilization goal. *Id*. (citing regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id*. (citing regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff's bid in favor of a higher bidding minority-owned subcontracting firm. *Id*. at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id*. The prime contractor expressly stated that he rejected plaintiff's bid due to the minority utilization requirement. *Id*.

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id*. The district court rejected both of plaintiff's challenges. The district court held the

program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id*. at 988. The district court rejected the as-applied challenge concluding that Washington's implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. *Id*. Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id*.

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally-funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. *Id*. at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it "would not yield a different result." *Id*. at 990, n. 6.

Facial challenge (Federal Government). The court first noted that the federal government has a compelling interest in "ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." *Id*. at 991, *citing City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater* ("*Adarand VII*"), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that "[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination." *Id*. at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. *Id*. However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of discrimination in the transportation contracting industry to justify TEA-21. *Id*. The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. *Id*. at 992-93. The court accordingly rejected plaintiff's facial challenge. *Id*.

As-applied challenge (State of Washington). Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington's transportation contracting industry. *Id*. at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. *Id*. The United States intervened to defend TEA-21's facial constitutionality, and "unambiguously conceded that TEA-21's race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present." *Id*. at 996; *see also* Br. for the United States at 28 (April 19, 2004)("DOT's regulations … are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient." (emphasis in original)).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), *cert. denied* 124 S. Ct. 2158 (2004). *Id*. at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress's nationwide remedial objective. *Id*. However, the Eighth Circuit did consider whether the states' implementation of TEA-21 was narrowly tailored to achieve Congress's remedial objective. *Id*. The Eighth Circuit thus looked to the states' independent evidence of discrimination because "to be narrowly tailored, a *national* program

must be limited to those parts of the country where its race-based measures are demonstrably needed." *Id*. (internal citations omitted). The Eighth Circuit relied on the states' statistical analyses of the availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. *Id*. at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. *Id*. However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. *Id*. Rather, the court held that whether Washington's DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington's transportation contracting industry. *Id*. at 997-98. "If no such discrimination is present in Washington, then the State's DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex." *Id*. at 998. The court held that a Sixth Circuit decision to the contrary, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6th Cir. 1991), misinterpreted earlier case law. *Id*. at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id*. at 998, *citing Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997), it had "previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination." *Id*. In *Monterey Mechanical*, the court held that "the overly inclusive designation of benefited minority groups was a 'red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.'" *Id*., *citing Monterey Mechanical*, 125 F.3d at 714. The court found that other courts are in accord. *Id*. at 998-99, *citing Builders Ass'n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT's DBE program must have suffered discrimination within the State. *Id*. at 999.

The court found that WSDOT's program closely tracked the sample USDOT DBE program. *Id*. WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau's Washington database, which equaled 11.17%). *Id*. WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent "to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period]." *Id*. Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id*. at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id*. WSDOT similarly did not make any adjustment to reflect present or past discrimination "because it lacked any statistical studies evidencing such discrimination." *Id*.

WSDOT then determined that it needed to achieve 5 percent of its 14 percent goal through race-conscious means based on a 9 percent DBE participation rate on state-funded contracts that did not include

affirmative action components (*i.e.*, 9% participation could be achieved through race-neutral means). *Id*. at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. *Id*.

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. *Id*. It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14 percent of the State's transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action's component. *Id*. The court found that the State's methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed *supra*, which included contracts with affirmative action components. *Id*. The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. *Id*. The court also found the State conceded as much to the district court. *Id*.

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without "does not provide any evidence of discrimination against DBEs." *Id*. The court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id*. However, the court determined that such evidence was entitled to "little weight" because it did not take into account a multitude of other factors such as firm size. *Id*.

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id*. at 1001. The court found that WSDOT did not present any anecdotal evidence. *Id*. The court rejected the State's argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to certify that they had been victims of discrimination in the contracting industry. *Id*. Accordingly, the court held that because the State failed to proffer evidence of discrimination within its own transportation contracting market, its DBE program was not narrowly tailored to Congress's compelling remedial interest. *Id*. at 1002-03.

The court affirmed the district court's grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, reversed the grant of summary judgment to Washington on the as-applied challenge, and remanded to determine the State's liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.

8. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000*) cert. granted then dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941, 534 U.S. 103 (2001)

This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari "as improvidently granted" without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

The Supreme Court held that the Tenth Circuit had not considered the issue before the Supreme Court on certiorari, namely whether a race-based program applicable to direct federal contracting is constitutional. This issue is distinguished from the issue of the constitutionality of the USDOT DBE Program as it pertains to procurement of federal funds for highway projects let by states, and the implementation of the Federal DBE Program by state DOTs. Therefore, the Supreme Court held it would not reach the merits of a challenge to federal laws relating to direct federal procurement.

Turning to the Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is "narrowly tailored," and therefore upheld the constitutionality of the Federal DBE Program.

It is significant to note that the court in determining the Federal DBE Program is "narrowly tailored" focused on the current regulations, 49 CFR Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

> [y]ou must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation, 49 CFR § 26.51(a)(2000); *see also* 49 CFR § 26.51(f)(2000)(if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures), and enumerate a list of race-neutral measures, see 49 CFR § 26.51(b)(2000). The current regulations also outline several race-neutral means available to program recipients including assistance in overcoming bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. See 49 CFR § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized. 228 F.3d at 1178-1179.

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state's construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress's power to enact nationwide legislation. *Id*. at 1185-1186. The court held that because of the "unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications," extrapolating findings of discrimination against the various ethnic groups "is more a question of nomenclature than of narrow tailoring." *Id*. The court found that the "Constitution does not erect a barrier to the government's effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications." *Id*.

Finally, the Tenth Circuit did not specifically address a challenge to the letting of federally-funded construction contracts by state departments of transportation. The court pointed out that plaintiff Adarand "conceded that its challenge in the instant case is to 'the federal program, implemented by federal officials,' and not to the letting of federally-funded construction contracts by state agencies." 228 F.3d at 1187. The court held that it did not have before it a sufficient record to

enable it to evaluate the separate question of Colorado DOT's implementation of race-conscious policies. *Id*. at 1187-1188.

Recent District Court Decisions

9. *Midwest Fence Corporation v. United States DOT* and *Federal Highway Administration, the Illinois DOT, the Illinois State Toll Highway Authority, et al.*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill, 2015*), affirmed* 840 F.3d 932 (7th Cir. 2016)[232]

In *Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority*, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise ("DBE") Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation's ("IDOT") implementation of the Federal DBE Program for federally-funded projects, IDOT's implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority's ("Tollway") separate DBE Program.

The federal district court in 2011 issued an Opinion and Order denying the Defendants' Motion to Dismiss for lack of standing, denying the Federal Defendants' Motion to Dismiss certain Counts of the Complaint as a matter of law, granting IDOT Defendants' Motion to Dismiss certain Counts and granting the Tollway Defendants' Motion to Dismiss certain Counts, but giving leave to Midwest to replead subsequent to this Order. *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al*., 2011 WL 2551179 (N.D. Ill. June 27, 2011).

Midwest Fence in its Third Amended Complaint challenged the constitutionality of the Federal DBE Program on its face and as applied, and challenged the IDOT's implementation of the Federal DBE Program. Midwest Fence also sought a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that SAFETEA-LU is unconstitutional. Midwest Fence sought relief from the IDOT Defendants, including a declaration that state statutes authorizing IDOT's DBE Program for State-funded contracts are unconstitutional; a declaration that IDOT does not follow the USDOT regulations; a declaration that the IDOT DBE Program is unconstitutional and other relief against the IDOT. The remaining Counts sought relief against the Tollway Defendants, including that the Tollway's DBE Program is unconstitutional, and a request for punitive damages against the Tollway Defendants. The court in 2012 granted the Tollway Defendants' Motion to Dismiss Midwest Fence's request for punitive damages.

Equal protection framework, strict scrutiny and burden of proof. The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 84 F. Supp. 3d at 720. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. *Id.* Since the Supreme Court decision in *Croson*, numerous courts have recognized that disparity studies provide probative evidence of discrimination. *Id.* The court stated that an inference of discrimination may be made with empirical evidence that demonstrates a significant

[232] 49 CFR Part 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs ("Federal DBE Program").See the Transportation Equity Act for the 21st Century (TEA-21) as amended and reauthorized ("MAP-21," "SAFETEA" and "SAFETEA-LU"), and the United States Department of Transportation ("USDOT" or "DOT") regulations promulgated to implement TEA-21 the Federal regulations known as Moving Ahead for Progress in the 21st Century Act ("MAP-21"), Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.; preceded by Pub L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1156; preceded by Pub L. 105-178, Title I, § 1101(b), June 9, 1998, 112 Stat. 107.

statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality's prime contractors. *Id.* The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing "hard proof" to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at 720. While narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," the court said it does not require "exhaustion of every conceivable race-neutral alternative." *Id.*, *citing Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Fischer v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2420 (2013).

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. 84 F. Supp. 3d at 721. To successfully rebut the government's evidence, a challenger must introduce "credible, particularized evidence" of its own. *Id.*

This can be accomplished, according to the court, by providing a neutral explanation for the disparity between DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data. *Id.* Conjecture and unsupported criticisms of the government's methodology are insufficient. *Id.*

Standing. The court found that Midwest had standing to challenge the Federal DBE Program, IDOT's implementation of it, and the Tollway Program. *Id.* at 722. The court, however, did not find that Midwest had presented any facts suggesting its inability to compete on an equal footing for the Target Market Program contracts. The Target Market Program identified a variety of remedial actions that IDOT was authorized to take in certain Districts, which included individual contract goals, DBE participation incentives, as well as set-asides. *Id.* at 722-723.

The court noted that Midwest did not identify any contracts that were subject to the Target Market Program, nor identify any set-asides that were in place in these districts that would have hindered its ability to compete for fencing and guardrails work. *Id.* at 723. Midwest did not allege that it would have bid on contracts set aside pursuant to the Target Market Program had it not been prevented from doing so. *Id.* Because nothing in the record Midwest provided suggested that the Target Market Program impeded Midwest's ability to compete for work in these Districts, the court dismissed Midwest's claim relating to the Target Market Program for lack of standing. *Id.*

Facial challenge to the Federal DBE Program. The court found that remedying the effects of race and gender discrimination within the road construction industry is a compelling governmental interest. The court also found that the Federal Defendants have supported their compelling interest with a strong basis in evidence. *Id.* at 725. The Federal Defendants, the court said, presented an extensive body of testimony, reports, and studies that they claim provided a strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id*. The court took judicial notice of the existence of Congressional hearings and reports and the collection of evidence presented to Congress in support of the Federal DBE Program's 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id*.

The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority-and woman-

owned businesses, as well as anecdotal evidence, which were completed from 2000 to 2012. *Id.* at 726. Sixty-four of the studies had previously been presented to Congress. *Id*. The studies examine procurement for over 100 public entities and funding sources across 32 states. *Id*. The consultant's report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all "likely to be influenced by the presence of discrimination if it exists" and could potentially result in a built-in downward bias in the availability measure. *Id.*

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a "disparity index" for each study. *Id.* at 726. The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed lower earnings and business formation rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *Rothe Dev. Corp. v. Dep't. of Def.,* 545 F. 3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government's compelling interest in implementing a national program. *Id.* at 727*, citing Rothe*, 545 F. 3d at 1046. The court here noted the consultant report supplements the testimony and reports presented to Congress in support of the Federal DBE Program, which courts have found to establish a "strong basis in evidence" to support the conclusion that race-and gender-conscious action is necessary. *Id.*

The court found through the evidence presented by the Federal Defendants satisfied their burden in showing that the Federal DBE Program stands on a strong basis in evidence. *Id.* at 727. The Midwest expert's suggestion that the studies used in consultant's report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court *quoting Adarand VII*, 228 F.3d at 1173 (10th Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity evidence. *Id*. Midwest failed to present "affirmative evidence" that no remedial action was necessary. *Id.*

Federal DBE Program is narrowly tailored. Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id.* at 727. In determining whether a program is narrowly tailored, courts examine several factors, including (a) the necessity for the relief and efficacy of alternative race-neutral measures, (b) the flexibility and duration of the relief, including the availability of waiver provisions, (c) the relationship of the numerical goals to the relevant labor market, and (d) the impact of the relief on the rights of third parties. *Id.* The court stated that courts may also assess whether a program is "overinclusive." *Id.* at 728. The court found that each of the above factors supports the conclusion that the Federal DBE Program is narrowly tailored. *Id.*

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id.* at 728. The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and

offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program's duration and ensure its flexibility. *Id.* at 728. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id.* at 728. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a "good faith efforts waiver" on an individual contract goal. *Id.*

The court stated the availability of waivers is particularly important in establishing flexibility. *Id.* at 728. The court rejected Midwest's argument that the federal regulations impose a quota in light of the Program's explicit waiver provision. *Id.* Based on the availability of waivers, coupled with regular congressional review, the court found that the Federal DBE Program is sufficiently limited and flexible. *Id.*

Third, the court said that the Federal DBE Program employs a two-step goal-setting process that ties DBE participation goals by recipients of federal funds to local market conditions. *Id.* at 728. The court pointed out that the regulations delegate goal setting to recipients of federal funds who tailor DBE participation to local DBE availability. *Id.* The court found that the Federal DBE Program's goal-setting process requires states to focus on establishing realistic goals for DBE participation that are closely tied to the relevant labor market. *Id.*

Fourth, the federal regulations, according to the court, contain provisions that seek to minimize the Program's burden on non-DBEs. *Id.* at 729. The court pointed out the following provisions aim to keep the burden on non-DBEs minimal: the Federal DBE Program's presumption of social and economic disadvantage is rebuttable; race is not a determinative factor; in the event DBEs become "overconcentrated" in a particular area of contract work, recipients must take appropriate measures to address the overconcentration; the use of race-neutral measures; and the availability of good faith efforts waivers. *Id.*

The court said Midwest's primary argument is that the practice of states to award prime contracts to the lowest bidder, and the fact the federal regulations prescribe that DBE participation goals be applied to the value of the entire contract, unduly burdens non-DBE subcontractors. *Id.* at 729. Midwest argued that because most DBEs are small subcontractors, setting goals as a percentage of all contract dollars, while requiring a remedy to come only from subcontracting dollars, unduly burdens smaller, specialized non-DBEs. *Id.* The court found that the fact innocent parties may bear some of the burden of a DBE program is itself insufficient to warrant the conclusion that a program is not narrowly tailored. *Id.* The court also found that strong policy reasons support the Federal DBE Program's approach. *Id.*

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at 729. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants' evidence. *Id* at 729. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id.* at 729. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

As-applied challenge to IDOT's implementation of the Federal DBE Program. In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id*. at 730. The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT's implementation of the Federal DBE Program. *Id*. Following the Seventh Circuit's decision in *Northern Contracting v. Illinois DOT,* the court said that whether the Federal DBE Program is unconstitutional as applied is a question of whether IDOT exceeded its authority in implementing it. *Id.* at 730*, citing Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7th Cir. 2007). The court, *quoting Northern Contracting,* held that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.*

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. *Id.* at 730. The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. *Id.*

The court pointed out that the Federal DBE Program delegates the narrow tailoring function to the state, and thus, IDOT must demonstrate that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction. *Id.* at 730. Accordingly, the court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2) demonstrate that IDOT's implementation of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. *Id.*

IDOT's evidence of discrimination and DBE availability in Illinois. The evidence that IDOT has presented to establish the existence of discrimination in Illinois included two studies, one that was done in 2004 and the other in 2011. *Id.* at 730. The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study must be read in conjunction with one another. *Id.* The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. *Id.*

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* at 730. The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* at 731. This resulted in a "weighted" DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at 731. The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

The study concluded that there was a statistically significant underutilization of DBEs in the award of both prime and subcontracts in Illinois. *Id.* at 731. For example, the court noted the difference the study found in the percentage of available prime construction contractors to the percentage of prime construction contracts under $500,000, and

the percentage of available construction subcontractors to the amount of percentage of dollars received of construction subcontracts. *Id.*

IDOT presented certain evidence to measure DBE availability in Illinois. The court pointed out that the 2004 study and two subsequent Goal-Setting Reports were used in establishing IDOT's DBE participation goal. *Id.* at 731. The 2004 study arrived at IDOT's 22.77 percent DBE participation goal in accordance with the two-step process defined in the federal regulations. *Id.* The court stated the 2004 study employed a seven-step "custom census" approach to calculate baseline DBE availability under step one of the regulations. *Id.*

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id.* at 731. The industries and counties in which IDOT expends relatively more contract dollars receive proportionately higher weights in the ultimate calculation of statewide DBE availability. *Id.* The study then counts the number of businesses in the relevant markets, and identifies which are minority- and woman-owned. *Id.* To ensure the accuracy of this information, the study provides that it takes additional steps to verify the ownership status of each business. *Id.* Under step two of the regulations, the study adjusted this figure to 27.51 percent based on Census Bureau data. *Id.* According to the study, the adjustment takes into account its conclusion that baseline numbers are artificially lower than what would be expected in a race-neutral marketplace. *Id.*

IDOT used separate Goal-Setting Reports that calculated IDOT's DBE participation goal pursuant to the two-step process in the federal regulations, drawing from bidders lists, DBE directories, and the 2011 study to calculate baseline DBE availability. *Id.* at 731. The study and the Goal–Setting Reports gave greater weight to the types of contract work in which IDOT had expended relatively more money. *Id.* at 732.

The court rejected Midwest arguments as to the data and evidence. The court rejected the challenges by Midwest to the accuracy of IDOT's data. For example, Midwest argued that the anecdotal evidence contained in the 2011 study does not prove discrimination. *Id.* at 732. The court stated, however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may lend support to the government's determination that remedial action is necessary. *Id.* The court noted that anecdotal evidence on its own could not be used to show a general policy of discrimination. *Id.*

The court rejected another argument by Midwest that the data collected after IDOT's implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. *Id.* at 732. The court rejected that argument finding post-enactment evidence of discrimination permissible. *Id.*

Midwest's main objection to the IDOT evidence, according to the court, is that it failed to account for capacity when measuring DBE availability and underutilization. *Id.* at 732. Midwest argued that IDOT's disparity studies failed to rule out capacity as a possible explanation for the observed disparities. *Id.*

IDOT argued that on prime contracts under $500,000, capacity is a variable that makes little difference. *Id.* at 732-733. Prime contracts of varying sizes under $500,000 were distributed to DBEs and non-DBEs alike at approximately the same rate. *Id.* at 733. IDOT also argued that through regression analysis, the 2011 study demonstrated factors other than discrimination did not account for the disparity between DBE utilization and availability. *Id.*

The court stated that despite Midwest's argument that the 2011 study took insufficient measures to rule out capacity as a race-neutral explanation for the underutilization of DBEs, the Supreme Court has

indicated that a regression analysis need not take into account "all measurable variables" to rule out race-neutral explanations for observed disparities. *Id.* at 733, *quoting Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

Midwest criticisms insufficient, speculative and conjecture – no independent statistical analysis; IDOT followed Northern Contracting and did not exceed the federal regulations. The court found Midwest's criticisms insufficient to rebut IDOT's evidence of discrimination or discredit IDOT's methods of calculating DBE availability. *Id.* at 733. First, the court said, the "evidence" offered by Midwest's expert reports "is speculative at best." *Id.* The court found that for a reasonable jury to find in favor of Midwest, Midwest would have to come forward with "credible, particularized evidence" of its own, such as a neutral explanation for the disparity, or contrasting statistical data. *Id.* The court held that Midwest failed to make the showing in this case. *Id.*

Second, the court stated that IDOT's method of calculating DBE availability is consistent with the federal regulations and has been endorsed by the Seventh Circuit. *Id.* at 733. The federal regulations, the court said, approve a variety of methods for accurately measuring ready, willing, and available DBEs, such as the use of DBE directories, Census Bureau data, and bidders lists. *Id.* The court found that these are the methods the 2011 study adopted in calculating DBE availability. *Id.*

The court said that the Seventh Circuit Court of Appeals approved the "custom census" approach as consistent with the federal regulations. *Id.* at 733, *citing* to *Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at 733-734.

The court held that through the 2004 and 2011 studies, and Goal–Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in *Northern Contract v. Illinois DOT*. *Id.* at 734. The court said that in response to the Seventh Circuit decision and IDOT's evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies' result. *Id.*

The court pointed out that although Midwest's expert's reports "cast doubt on the validity of IDOT's methodology, they failed to provide any independent statistical analysis or other evidence demonstrating actual bias." *Id.* at 734. Without this showing, the court stated, the record fails to demonstrate a lack of evidence of discrimination or actual flaws in IDOT's availability calculations. *Id.*

Burden on non–DBE subcontractors; overconcentration. The court addressed the narrow tailoring factor concerning whether a program's burden on third parties is undue or unreasonable. The parties disagreed about whether the IDOT program resulted in an overconcentration of DBEs in the fencing and guardrail industry. *Id.* at 734-735. IDOT prepared an overconcentration study comparing the total number of prequalified fencing and guardrail contractors to the number of DBEs that also perform that type of work and determined that no overconcentration problem existed. Midwest presented its evidence relating to overconcentration. *Id.* at 735. The court found that Midwest did not show IDOT's determination that overconcentration does not exist among fencing and guardrail contractors to be unreasonable. *Id.* at 735.

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary, IDOT is acting within the scope of the federal regulations that requires goals to be set in this manner. *Id.* at 735. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id.* The court held that IDOT carried its burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

Use of race–neutral alternatives. The court found that IDOT identified several race-neutral programs it used to increase DBE participation, including its Supportive Services, Mentor–Protégé, and Model Contractor Programs. *Id.* at 735. The programs provide workshops and training that help small businesses build bonding capacity, gain access to financial and project management resources, and learn about specific procurement opportunities. *Id.* IDOT conducted several studies including zero-participation goals contracts in which there was no DBE participation goal, and found that DBEs received only 0.84 percent of the total dollar value awarded. *Id.*

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at 735. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

Duration and flexibility. The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. Id. at 736. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over $36 million in contracting dollars. Id. The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. Id.

The court held the undisputed facts established that IDOT did not have a "no-waiver policy." *Id.* at 736. The court found that it could not conclude that the waiver provisions were impermissibly vague, and that IDOT took into consideration the substantial guidance provided in the federal regulations. *Id.* at 736-737. Because Midwest's own experience demonstrated the flexibility of the Federal DBE Program in practice, the court said it could not conclude that the IDOT program amounts to an impermissible quota system that is unconstitutional on its face. *Id.* at 737.

The court again stated that Midwest had not presented any affirmative evidence showing that IDOT's implementation of the Federal DBE Program imposes an undue burden on non-DBEs, fails to employ race-neutral measures, or lacks flexibility. *Id.* at 737. Accordingly, the court granted IDOT's motion for summary judgment.

Facial and as–applied challenges to the Tollway Program. The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at 737. Like the Federal and IDOT Defendants, the Tollway was required to show that its compelling interest in remedying discrimination in the Illinois road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a 2006 disparity study, which

examined the disparity between the Tollway's utilization of DBEs and their availability. *Id.*

The study employed a "custom census" approach to calculate DBE availability, and examined the Tollway's contract data to determine utilization. *Id.* at 737. The 2006 study reported statistically significant disparities for all race and sex categories examined. *Id.* The study also conducted an "economy-wide analysis" examining other race and sex disparities in the wider construction economy from 1979 to 2002. *Id.* Controlling for race- and gender-neutral variables, the study showed a significant negative correlation between a person's race or sex and their earning power and ability to form a business. *Id.*

Midwest's challenges to the Tollway evidence insufficient and speculative. In 2013, the Tollway commissioned a new study, which the court noted was not complete, but there was an "economy-wide analysis" similar to the analysis done in 2006 that updated census data gathered from 2007 to 2011. *Id.* at 737-738. The updated census analysis, according to the court, controlled for variables such as education, age and occupation and found lower earnings and rates of business formation among women and minorities as compared to white men. *Id.* at 738.

Midwest attacked the Tollway's 2006 study similar to how it attacked the other studies with regard to IDOT's DBE Program. *Id.* at 738. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. *Id.* The Tollway also argued that the "economy-wide analysis" revealed a negative correlation between an individual's race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. *Id.* at 738.

To successfully rebut the Tollway's evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway's statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at 738-739. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at 739. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

Tollway Program is narrowly tailored. As to determining whether the Tollway Program is narrowly tailored, Midwest also argued that the Tollway Program imposed an undue burden on non-DBE subcontractors. Like IDOT, the Tollway sets individual contract goals as a percentage of the value of the entire contract based on the availability of DBEs to perform particular line items. *Id.* at 739.

The court reiterated that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors, and that the Tollway's method of goal setting is identical to that prescribed by the federal regulations, which the court already found to be supported by strong policy reasons. *Id.* at 739. The court stated that the sharing of a remedial program's burden is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 739. The court held the Tollway Program's burden on non-DBE subcontractors to be permissible. *Id.*

In addressing the efficacy of race-neutral measures, the court found the Tollway implemented race-neutral programs to increase DBE

participation, including a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. *Id.* at 739-740. The court held the Tollway's race-neutral measures are consistent with those suggested under the federal regulations and found that the availability of these programs, which mirror IDOT's, demonstrates serious, good faith consideration of workable race-neutral alternatives. *Id.* at 740.

In considering the issue of flexibility, the court found the Tollway Program, like the Federal DBE Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so. *Id.* at 740. Like IDOT, the court said the Tollway adheres to the federal regulations in determining whether a bidder has made good faith efforts. *Id.* As under the Federal DBE Program, the Tollway Program also allows bidders who have been denied waivers to appeal. *Id.*

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* at 740. Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.*

Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at 740. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants' motion for summary judgment. *Id.*

10. *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. 2014), *affirmed Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015)

In *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and its implementation of the Federal DBE Program, including an alleged unwritten "no waiver" policy, and claiming that the IDOT's program is not narrowly tailored.

Motion to Dismiss certain claims granted. IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

In addition, the other Counts of the Complaint that remained in the case not subject to the Motion to Dismiss, sought declaratory and injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by IDOT. Plaintiff Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on the unwritten no-waiver policy, requiring Dunnet Bay to meet DBE goals and denying Dunnet Bay a waiver of the goals despite its good faith efforts, and based on other allegations. Dunnet Bay sought a declaratory judgment that IDOT's DBE program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois.

Motions for Summary Judgment. Subsequent to the Court's Order granting the partial Motion to Dismiss, Dunnet Bay filed a Motion for Summary Judgment, asserting that IDOT had departed from the federal regulations implementing the Federal DBE Program, that IDOT's implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest, and that therefore, the actions of IDOT could not withstand strict scrutiny. 2014 WL 552213 at * 1. IDOT also filed a Motion for Summary Judgment, alleging that all applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program, and because IDOT is federally mandated and did not abuse its federal authority, IDOT's DBE Program is not subject to attack. *Id.*

IDOT further asserted in its Motion for Summary Judgment that there is no Equal Protection violation, claiming that neither the rejection of the bid by Dunnet Bay, nor the decision to re-bid the project , were based upon Dunnet Bay's race. IDOT also asserted that, because Dunnet Bay was relying on the rights of others and was not denied equal opportunity to compete for government contracts, Dunnet Bay lacked standing to bring a claim for racial discrimination.

Factual background. Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of 22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at *3. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. *Id.* The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to do a part of the work. *Id.* at *4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.* The capacity of the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at *4.

At the bid opening, Dunnet Bay's bid was the lowest received by IDOT. Its low bid was over IDOT's estimate for the project. Dunnet Bay, in its bid, identified 8.2 percent of its bid for DBEs. The second low bidder projected DBE participation of 22 percent. Dunnet Bay's DBE participation bid did not meet the percentage participation in the bid documents, and thus IDOT considered Dunnet Bay's good faith efforts to meet the DBE goal. IDOT rejected Dunnet Bay's bid determining that Dunnet Bay had not demonstrated a good faith effort to meet the DBE goal. *Id*. at *9.

The Court found that although it was the low bidder for the construction project, Dunnet Bay did not meet the goal for participation of DBEs despite its alleged good faith efforts. IDOT contended it followed all applicable guidelines in handling the DBE Program, and that

because it did not abuse its federal authority in administering the Program, the IDOT DBE Program is not subject to attack. *Id*. at *23. IDOT further asserted that neither rejection of Dunnet Bay's bid nor the decision to re-bid the Project was based on its race or that of its owners, and that Dunnet Bay lacked standing to bring a claim for racial discrimination on behalf of others (i.e., small businesses operated by white males). *Id*. at *23.

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. *Id.* at *25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority. The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely "on the federal government's compelling interest in remedying the effects of pass discrimination in the national construction market." *Id.* at *26, *quoting Northern Contracting Co., Inc. v. Illinois*, 473 F.3d 715 at 720-21 (7th Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is "insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority." *Id.* at *26, *quoting Northern Contracting, Inc.*, 473 F.3d at 721. The Court held that accordingly, any "challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at *26, *quoting Northern Contracting, Inc.,* 473. F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay's challenges are foreclosed by *Northern Contracting*. *Id.* at *26.

The Court found that IDOT did in fact employ a thorough process before arriving at the 22 percent DBE participation goal for the Eisenhower Project. *Id.* at *26. The Court also concluded "because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. Any challenge on this factor fails under *Northern Contracting.*" *Id.* at *26. Therefore, the Court concluded there is no basis for finding that the DBE goal was arbitrarily set or that IDOT exceeded its federal authority with respect to this factor. *Id.* at *27.

The "no-waiver" policy. The Court held that there was not a no-waiver policy considering all the testimony and factual evidence. In particular, the Court pointed out that a waiver was in fact granted in connection with the same bid letting at issue in this case. *Id* at *27. The Court found that IDOT granted a waiver of the DBE participation goal for another construction contractor on a different contract, but under the same bid letting involved in this matter. *Id.*

Thus, the Court held that Dunnet Bay's assertion that IDOT adopted a "no-waiver" policy was unsupported and contrary to the record evidence. *Id*. at *27. The Court found the undisputed facts established that IDOT did not have a "no-waiver" policy, and that IDOT did not exceed its federal authority because it did not adopt a "no-waiver" policy. *Id.* Therefore, the Court again concluded that any challenge by Dunnet Bay on this factor failed pursuant to the *Northern Contracting* decision.

IDOT's decision to reject Dunnet Bay's bid based on lack of good faith efforts did not exceed IDOT's authority under federal law. The Court found that IDOT has significant discretion under federal regulations and is often called upon to make a "judgment call" regarding the efforts of the bidder in terms of establishing good faith attempt to meet the DBE goals. *Id.* at *28. The Court stated it was unable to conclude that IDOT

erred in determining Dunnet Bay did not make adequate good faith efforts. *Id.* The Court surmised that the strongest evidence that Dunnet Bay did not take all necessary and reasonable steps to achieve the DBE goal is that its DBE participation was under 9 percent while other bidders were able to reach the 22 percent goal. *Id.* Accordingly, the Court concluded that IDOT's decision rejecting Dunnet Bay's bid was consistent with the regulations and did not exceed IDOT's authority under the federal regulations. *Id.*

The Court also rejected Dunnet Bay's argument that IDOT failed to provide Dunnet Bay with a written explanation as to why its good faith efforts were not sufficient, and thus there were deficiencies with the reconsideration of Dunnet Bay's bid and efforts as required by the federal regulations. *Id.* at *29. The Court found it was unable to conclude that a technical violation such as to provide Dunnet Bay with a written explanation will provide any relief to Dunnet Bay. *Id.* Additionally, the Court found that because IDOT rebid the project, Dunnet Bay was not prejudiced by any deficiencies with the reconsideration. *Id.*

The Court emphasized that because of the decision to rebid the project, IDOT was not even required to hold a reconsideration hearing. *Id.* at *24. Because the decision on reconsideration as to good faith efforts did not exceed IDOT's authority under federal law, the Court held Dunnet Bay's claim failed under the *Northern Contracting* decision. *Id.*

Dunnet Bay lacked standing to raise an equal protection claim. The Court found that Dunnet Bay was not disadvantaged in its ability to compete against a racially favored business, and neither IDOT's rejection of Dunnet Bay's bid nor the decision to rebid was based on the race of Dunnet Bay's owners or any class-based animus. *Id* at *29. The Court stated that Dunnet Bay did not point to any other business that was given a competitive advantage because of the DBE goals. *Id.* Dunnet Bay did not cite any cases which involve plaintiffs that are similarly situated to it - businesses that are not at a competitive disadvantage against minority-owned companies or DBEs - and have been determined to have standing. *Id*. at *30.

The Court concluded that any company similarly situated to Dunnet Bay had to meet the same DBE goal under the contract. *Id.* Dunnet Bay, the Court held, was not at a competitive disadvantage and/or unable to compete equally with those given preferential treatment. *Id.*

Dunnet Bay did not point to another contractor that did not have to meet the same requirements it did. The Court thus concluded that Dunnet Bay lacked standing to raise an equal protection challenge because it had not suffered a particularized injury that was caused by IDOT. *Id.* at *30. Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id.* Also, based on the amount of its profits, Dunnet Bay did not qualify as a small business, and therefore, it lacked standing to vindicate the rights of a hypothetical white-owned small business. *Id*. at *30. Because the Court found that Dunnet Bay was not denied the ability to compete on an equal footing in bidding on the contract, Dunnet Bay lacked standing to challenge the DBE Program based on the Equal Protection Clause. *Id.* at *30.

Dunnet Bay did not establish equal protection violation even if it had standing. The Court held that even if Dunnet Bay had standing to bring an equal protection claim, IDOT still is entitled to summary judgment. The Court stated the Supreme Court has held that the "injury in fact" in an equal protection case challenging a DBE Program is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Id.* at *31. Dunnet Bay, the Court said, implied that but for the alleged "no-waiver" policy and DBE goals which were not narrowly tailored to address discrimination, it would

have been awarded the contract. The Court again noted the record established that IDOT did not have a "no-waiver" policy. *Id.* at *31.

The Court also found that because the gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons, it does not appear Dunnet Bay can assert a viable claim. *Id.* at *31. The Court stated it is unaware of any authority which suggests that Dunnet Bay can establish an equal protection violation even if it could show that IDOT failed to comply with the regulations relating to the DBE Program. *Id.* The Court said that even if IDOT did employ a "no-waiver policy," such a policy would not constitute an equal protection violation because the federal regulations do not confer specific entitlements upon any individuals. *Id*. at *31.

In order to support an equal protection claim, the plaintiff would have to establish it was treated less favorably than another entity with which it was similarly situated in all material respects. *Id*. at *51. Based on the record, the Court stated it could only speculate whether Dunnet Bay or another entity would have been awarded a contract without IDOT's DBE Program. But, the Court found it need not speculate as to whether Dunnet Bay or another company would have been awarded the contract, because what is important for equal protection analysis is that Dunnet Bay was treated the same as other bidders. *Id.* at *31. Every bidder had to meet the same percentage goal for subcontracting to DBEs or make good faith efforts. *Id.* Because Dunnet Bay was held to the same standards as every other bidder, it cannot establish it was the victim of discrimination pursuant to the Equal Protection Clause. *Id.* Therefore, IDOT, the Court held, is entitled to summary judgment on Dunnet Bay's claims under the Equal Protection Clause and under Title VI.

Conclusion. The Court concluded IDOT is entitled to summary judgment, holding Dunnet Bay lacked standing to raise an equal protection challenge based on race, and that even if Dunnet Bay had standing, Dunnet Bay was unable to show that it would have been awarded the contract in the absence of any violation. *Id.* at *32. Any other federal claims, the Court held, were foreclosed by the *Northern Contracting* decision because there is no evidence IDOT exceeded its authority under federal law. *Id.* Finally, the Court found Dunnet Bay had not established the likelihood of future harm, and thus was not entitled to injunctive relief.

11. *M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al*., 2013 WL 4774517 (D. Mont.)(September 4, 2013)

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. ("Weeden") against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of $14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT's DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id*.

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden's bid actually identified only .81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other

five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id*. at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. MDT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id*. at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id*. at *2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id*.

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT's DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at *2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

No proof of irreparable harm and balance of equities favor MDT. First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately $26 million, and that MDT had $50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at *3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id*.

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id*. The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id*. The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id*. The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id*.

No standing. The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id*. at *3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based

barrier in its competition for the prime contract. *Id*. at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id*.

Court applies *AGC v. California DOT* case; evidence supports narrowly tailored DBE program. Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at *4. Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id*., *citing Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013)(holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, "the Ninth Circuit held that California's DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination." *Id*. at 4, *citing Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California – and, by extension, Montana – "is entitled to look at the evidence 'in its entirety' to determine whether there are 'substantial disparities in utilization of minority firms' practiced by some elements of the construction industry." 2013 WL 4774517 at *4, *quoting AGC v. California DOT*, 713 F.3d at 1197. The Court, *also quoting* the decision in *AGC v. California DOT*, said: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id*. at *4, *quoting AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at *4. Therefore, the Court concluded that given the similarities between Weeden's claim and AGC's equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id*. at *4.

Due Process claim. The Court also rejected Weeden's bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at *5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT's decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at *5.

Holding and Voluntary Dismissal. The Court denied plaintiff Weeden's application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

12. *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, U.S.D.C., E.D. Cal. Civil Action No. S-09-1622, Slip Opinion (E.D. Cal. April 20, 2011), appeal dismissed based on standing, on other grounds Ninth Circuit held Caltrans' DBE Program constitutional, *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187 (9th Cir. 2013)

This case involved a challenge by the Associated General Contractors of America, San Diego Chapter, Inc. ("AGC") against the California Department of Transportation ("Caltrans"), to the DBE program adopted by Caltrans implementing the Federal DBE Program at 49 CFR Part 26. The AGC sought an injunction against Caltrans enjoining its use of the DBE program and declaratory relief from the court declaring the Caltrans DBE program to be unconstitutional.

Caltrans' DBE program set a 13.5 percent DBE goal for its federally-funded contracts. The 13.5 percent goal, as implemented by Caltrans, included utilizing half race-neutral means and half race-conscious means to achieve the goal. Slip Opinion Transcript at 42. Caltrans did not include all minorities in the race-conscious component of its goal, excluding Hispanic males and Subcontinent Asian American males. *Id*. at 42. Accordingly, the race-conscious component of the Caltrans DBE program applied only to African Americans, Native Americans, Asian Pacific Americans, and white women. *Id*.

Caltrans established this goal and its DBE program following a disparity study conducted by BBC Research & Consulting, which included gathering statistical and anecdotal evidence of race and gender disparities in the California construction industry. Slip Opinion Transcript at 42.

The parties filed motions for summary judgment. The district court issued its ruling at the hearing on the motions for summary judgment granting Caltrans' motion for summary judgment in support of its DBE program and denying the motion for summary judgment filed by the plaintiffs. Slip Opinion Transcript at 54. The court held Caltrans' DBE program applying and implementing the provisions of the Federal DBE Program is valid and constitutional. *Id*. at 56.

The district court analyzed Caltrans' implementation of the DBE program under the strict scrutiny doctrine and found the burden of justifying different treatment by ethnicity or gender is on the government. The district court applied the Ninth Circuit Court of Appeals ruling in *Western States Paving Company v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005). The court stated that the federal government has a compelling interest "in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." Slip Opinion Transcript at 43, *quoting Western States Paving*, 407 F.3d at 991, *citing City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

The district court pointed out that the Ninth Circuit in *Western States Paving* and the Tenth Circuit Court of Appeals and the Eighth Circuit Court of Appeals have upheld the facial validity of the Federal DBE Program.

The district court stated that based on *Western States Paving*, the court is required to look at the Caltrans DBE program itself to see if there is a strong basis in evidence to show that Caltrans is acting for a proper purpose and if the program itself has been narrowly tailored. Slip

Opinion Transcript at 45. The court concluded that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative, but it does require serious, good-faith consideration of workable race-neutral alternatives." Slip Opinion Transcript at 45.

The district court identified the issues as whether Caltrans has established a compelling interest supported by a strong basis in evidence for its program, and does Caltrans' race-conscious program meet the strict scrutiny required. Slip Opinion Transcript at 51-52. The court also phrased the issue as whether the Caltrans DBE program, "which does give preference based on race and sex, whether that program is narrowly tailored to remedy the effects of identified discrimination…," and whether Caltrans has complied with the Ninth Circuit's guidance in *Western States Paving*. Slip Opinion Transcript at 52.

The district court held "that Caltrans has done what the Ninth Circuit has required it to do, what the federal government has required it to do, and that it clearly has implemented a program which is supported by a strong basis in evidence that gives rise to a compelling interest, and that its race-conscious program, the aspect of the program that does implement race-conscious alternatives, it does under a strict-scrutiny standard meet the requirement that it be narrowly tailored as set forth in the case law." Slip Opinion Transcript at 52.

The court rejected the plaintiff's arguments that anecdotal evidence failed to identify specific acts of discrimination, finding "there are numerous instances of specific discrimination." Slip Opinion Transcript at 52. The district court found that after the *Western States Paving* case, Caltrans went to a racially neutral program, and the evidence showed that the program would not meet the goals of the federally-funded program, and the federal government became concerned about what was going on with Caltrans' program applying only race-neutral alternatives. *Id*. at 52-53. The court then pointed out that Caltrans engaged in an "extensive disparity study, anecdotal evidence, both of which is what was missing" in the *Western States Paving* case. *Id*. at 53.

The court concluded that Caltrans "did exactly what the Ninth Circuit required" and that Caltrans has gone "as far as is required." Slip Opinion Transcript at 53.

The court held that as a matter of law, the Caltrans DBE program is, under *Western States Paving* and the Supreme Court cases, "clearly constitutional," and "narrowly tailored." Slip Opinion Transcript at 56. The court found there are significant differences between Caltrans' program and the program in the *Western States Paving* case. *Id*. at 54-55. In *Western States Paving*, the court said there were no statistical studies performed to try and establish the discrimination in the highway contracting industry, and that Washington simply compared the proportion of DBE firms in the state with the percentage of contracting funds awarded to DBEs on race-neutral contracts to calculate a disparity. *Id*. at 55.

The district court stated that the Ninth Circuit in *Western States Paving* found this to be oversimplified and entitled to little weight "because it did not take into account factors that may affect the relative capacity of DBEs to undertake contracting work." Slip Opinion Transcript at 55. Whereas, the district court held the "disparity study used by Caltrans was much more comprehensive and accounted for this and other factors." *Id*. at 55. The district noted that the State of Washington did not introduce any anecdotal information. The difference in this case, the district court found, "is that the disparity study includes both extensive statistical evidence, as well as anecdotal evidence gathered through surveys and public hearings, which support the statistical findings of the underutilization faced by DBEs without the DBE program. Add to that the anecdotal evidence submitted in support of the

summary judgment motion as well. And this evidence before the Court clearly supports a finding that this program is constitutional." *Id*. at 56.

The court held that because "Caltrans' DBE program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry and because the Court finds that it is narrowly tailored, the Court upholds the program as constitutional." Slip Opinion Transcript at 56.

The decision of the district court was appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit dismissed the appeal based on lack of standing by the AGC, San Diego Chapter, but ruled on the merits on alternative grounds holding constitutional Caltrans' DBE Program. *See discussion above of AGC, SDC v. Cal. DOT.*

13. *Geod Corporation v. New Jersey Transit Corporation, et al.*, 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010)

Plaintiffs, white male owners of Geod Corporation ("Geod"), brought this action against the New Jersey Transit Corporation ("NJT") alleging discriminatory practices by *NJT* in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The plaintiffs alleged that the NJT's DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all Defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id*.

New Jersey Transit Program and Disparity Study. NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id*. at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id*.

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id*. at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id*. All groups other than Asian DBEs were found to be underutilized. *Id*.

The court held that the test utilized by the study, "conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id*. at 649. The court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id*.

For fiscal year 2010, the study consultant followed the "three-step process pursuant to USDOT regulations to establish the NJT DBE goal." *Id*. at 649. First, the consultant determined "the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn." *Id*. In determining the base figure, the consultant (1) defined the geographic marketplace, (2) identified "the relevant industries in which NJ Transit contracts," and (3) calculated "the weighted availability measure." *Id*. at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts

and/or contractors for NJT, and determined that the geographical marketplace for NJT contracts included New Jersey, New York and Pennsylvania. *Id*. at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id*. The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id*.

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id*. at 649-650. The availability rates were then "calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace. *Id*. The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id*.

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id*. at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id*. at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id*. at 650. DBEs were also found to be less likely to be pre-qualified for contracts over $1 million in comparison to similarly situated non-DBEs. *Id*. The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id*. The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id*.

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id*. at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id*. The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id*.

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id*. at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id*. at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id*. The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id*. at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. *Id*. at 652, *citing Geod v. N.J. Transit Corp*., 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." *Id*. at 652 *citing Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7th Cir. 2007).

Applying *Northern Contracting v. Illinois*. The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in *Northern Contracting, Inc. v. Illinois*, that "a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id*. at 652 *quoting Northern Contracting*, 473 F.3d at 721. The district court in *Geod* followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state's program. *Id*. at 652, *citing Northern Contracting*, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation "exceeded its grant of authority under federal law." *Id*. at 652-653, *quoting Northern Contracting*, 473 F.3d at 722 and *citing also Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8th Cir. 2003). *Id*. at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id*. at 653 *citing Sherbrooke Turf*, 345 F.3d 973-74. Therefore, "only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge." *Id*. at 653 *quoting Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and *citing South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id*. at 653.

In analyzing whether NJT's DBE program was constitutionally defective, the district court focused on the basis of plaintiffs' argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id*. at 653. The court found that most of plaintiffs' arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 CFR § 26.45. *Id*. The court held that NJT followed the goal setting process required by the federal regulations. *Id*. The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. *Id*. at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further

focused that information by weighting the industries according to NJT's use. *Id*.

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id*. at 654. The court stated that NJT only utilized one of the examples listed in 49 CFR § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id*.

The district court pointed out, however, the regulations state that the "examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id*. at 654, *citing* 46 CFR § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id*. at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id*. at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT's list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id*. at 654, *citing Northern Contracting*, 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id*. at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id*. at 655, *citing* 49 CFR § 26.45(d). This data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id*. at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id*. at 655.

The district court then analyzed NJT's division of the adjusted goal into race-conscious and race-neutral portions. *Id*. at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id*. at 655. The court agreed with *Western States Paving* that only "when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal." *Id*. at 655, *quoting Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id*. at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 CFR § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. *Id*. at 655. The court held that based on these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT's DBE program did not violate the Constitution as it did not exceed its federal authority. *Id*. at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT

program still was constitutional. *Id*. at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT DBE program under *Western States Paving Co. v. Washington State DOT*. *Id*. at 655-656. The court stated that under *Western States Paving*, a Court must "undertake an as-applied inquiry into whether [the state's] DBE program is narrowly tailored." *Id*. at 656, *quoting Western States Paving*, 407 F.3d at 997.

Applying *Western States Paving*. The district court then analyzed whether the NJT program was narrowly tailored applying Western States Paving. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. *Id. at 656*, *citing Western States Paving*, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31. *Id. at 656*. However, the court found that the plaintiffs' argument failed as the facts in *Western States Paving* were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms. *Id. at 656*. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE Program was assisting with this issue. *Id*. In addition, plaintiff's expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. *Id*.

The plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. *Id*. at 656. The court held this was insufficient to overcome the consultant's determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. *Id*. at 656.

The district court rejected Plaintiffs' argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT's expert identified "prime contracting" as the area in which NJT procurements evidence discrimination. *Id*. at 656. The court held that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative but it does require serious, good faith consideration of workable race-neutral alternatives. *Id*. at 656, *citing Sherbrook Turf*, 345 F.3d at 972 (*quoting Grutter v. Bollinger*, 539 U.S. 306, 339, (2003)). In its efforts to implement race-neutral alternatives, the court found NJT attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department. *Id*. at 656-657.

The district court found NJT satisfied the third prong of the narrowly tailored analysis, the "relationship of the numerical goals to the relevant labor market." *Id*. at 657. Finally, under the fourth prong, the court addressed the impact on third-parties. *Id*. at 657. The court noted that placing a burden on third parties is not impermissible as long as that burden is minimized. *Id*. at 657, *citing Western States Paving*, 407 F.3d at 995. The court stated that instances will inevitably occur where non-DBEs will be bypassed for contracts that require DBE goals. However, TEA-21 and its implementing regulations contain provisions intended to minimize the burden on non-DBEs. *Id*. at 657, *citing Western States Paving*, 407 F.3d at 994-995.

The court pointed out the Ninth Circuit in *Western States Paving* found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well as the net worth limitations, were sufficient to minimize the burden on DBEs. *Id*. at 657, *citing Western States Paving*, 407 F.3d at 955. The court held that the plaintiffs did not provide evidence that NJT was not complying with

implementing regulations designed to minimize harm to third parties. *Id*.

Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJT's DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. *Id*. at 657.

14. *Geod Corporation v. New Jersey Transit Corporation, et. seq.*, 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009)

Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT's DBE program was unconstitutional and in violation of the United States 5th and 14th Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 CFR Part 26.

The parties filed cross Motions for Summary Judgment. The plaintiff Geod challenged the constitutionality of NJT's DBE program for multiple reasons, including alleging NJT could not justify establishing a program using race- and sex-based preferences; the NJT's disparity study did not provide a sufficient factual predicate to justify the DBE Program; NJT's statistical evidence did not establish discrimination; NJT did not have anecdotal data evidencing a "strong basis in evidence" of discrimination which justified a race- and sex-based program; NJT's program was not narrowly tailored and over-inclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT's program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

The district court held that states and their agencies are entitled to adopt the federal governments' compelling interest in enacting TEA-21 and its implementing regulations. 2009 WL 2595607 at *4. The court stated that plaintiff's argument that NJT cannot establish the need for its DBE program was a "red herring, which is unsupported." The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states "inherit the federal governments' compelling interest in establishing a DBE program." *Id*.

The court found that establishing a DBE program "is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so." *Id*. The court concluded that this reasoning rendered plaintiff's assertions that NJT's disparity study did not have sufficient factual predicate for establishing its DBE program, and that no exceedingly persuasive justification was found to support gender based preferences, as without merit. *Id*. The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. *Id*.

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v. Washington State DOT*, 407 F.3d 983(9th Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a demonstration by the recipient of federal funds that the program is narrowly tailored. *Id* at *5. In contrast, the NJT relied primarily on *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7th Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. *Id*.

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have led to the parties distinguishing cases without any substantive difference in the application of law. *Id*.

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id*. at *5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's requirements. The district court stated that the requirement that a recipient must evidence past discrimination "is nothing more than a requirement of the regulation." *Id*.

The court stated that the Seventh Circuit in *Northern Contracting* held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. *Id*., *citing Northern Contracting*, 473 F.3d at 721. The district court held that implicit in *Northern Contracting* is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id*.

The court, therefore, concluded that it must determine first whether NJT's DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in order to determine whether the program, as implemented by NJT, is narrowly tailored. *Id*.

The court pointed out that the Eighth Circuit Court of Appeals in *Sherbrook Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003) found Minnesota's DBE program was narrowly tailored because it was in compliance with TEA-21's requirements. The Eighth Circuit in *Sherbrook*, according to the district court, analyzed the application of Minnesota's DBE program to ensure compliance with TEA-21's requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. *Id*. at *5.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id*. at *6, *citing Western States Paving Company*, 407 F.3d at 983, 988.

First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative availability of DBEs. *Id*. at *6, *citing* 49 CFR § 26.45(c). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable evidence of local market conditions and was designed to be rationally related to the relative availability of DBEs. *Id*. The court pointed out that NJT conducted a disparity study, and the disparity study utilized NJT's DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs' argument that the data used in the disparity study were stale was without merit and had no basis in law. The court found that the disparity study took into account the primary industries,

primary geographic market, and race neutral alternatives, then adjusted its goal to encompass these characteristics. *Id*. at *6.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id*. Also, the court stated that "perhaps more importantly, NJT's DBE goal was approved by the USDOT every year from 2002 until 2008." *Id*. at *6. Thus, the court found NJT appropriately determined their DBE availability, which was approved by the USDOT, pursuant to 49 CFR § 26.45(c). *Id*. at *6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id*.

Also of significance, the court pointed out that plaintiffs did not provide any evidence that NJT did not set a DBE goal based upon 49 C.F. § 26.45(c). The court thus held that genuine issues of material fact remain only as to whether a reasonable jury may find that the method used by NJT to determine its DBE goal was sufficiently narrowly tailored. *Id*. at *6.

The court pointed out that to determine what adjustment to make, the disparity study examined qualitative data such as focus groups on the pre-qualification status of DBEs, working with prime contractors, securing credit, and its effect on DBE participation, as well as procurement officer interviews to analyze, and compare and contrast their relationships with non-DBE vendors and DBE vendors. *Id*. at *7. This qualitative information was then compared to DBE bids and DBE goals for each year in question. NJT's adjustment to its DBE goal also included an analysis of the overall disparity ratio, as well as, DBE utilization based on race, gender and ethnicity. *Id*. A decomposition analysis was also performed. *Id*.

The court concluded that NJT provided evidence that it, at a minimum, examined the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, as well as utilizing the disparity study itself. The court pointed out there were two methods specifically approved by 49 CFR § 26.45(d). *Id*.

The court also found that NJT took into account race neutral measures to ensure that the greatest percentage of DBE participation was achieved through race and gender neutral means. The district court concluded that "critically," plaintiffs failed to provide evidence of another, more perfect, method that could have been utilized to adjust NJT's DBE goal. *Id*. at *7. The court held that genuine issues of material fact remain only as to whether NJT's adjustment to its DBE goal is sufficiently narrowly tailored and thus constitutional. *Id*.

NJT, the court found, adjusted its DBE goal to account for the effects of past discrimination, noting the disparity study took into account the effects of past discrimination in the pre-qualification process of DBEs. *Id*. at *7. The court quoted the disparity study as stating that it found non-trivial and statistically significant measures of discrimination in contract amounts awarded during the study period. *Id*. at *8.

The court found, however, that what was "gravely critical" about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and "unknown," but did not include an analysis of past discrimination for the ethnic group "Iraqi," which is now a group considered to be a DBE by the NJT. *Id*. Because the disparity report included a category entitled "unknown," the court held a genuine issue of material fact remains as to whether "Iraqi" is legitimately within

NJT's defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied both plaintiffs' and defendants' Motions for Summary Judgment as to the constitutionality of NJT's DBE program.

The court also held that because the law was not clearly established at the time NJT established its DBE program to comply with TEA-21, the individual state defendants were entitled to qualified immunity and their Motion for Summary Judgment as to the state officials was granted. The court, in addition, held that plaintiff's Title VI claims were dismissed because the individual defendants were not recipients of federal funds, and that the NJT as an instrumentality of the State of New Jersey is entitled to sovereign immunity. Therefore, the court held that the plaintiff's claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT's Motion for Summary Judgment was granted as to that claim.

15. *South Florida Chapter of the Associated General Contractors v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008)

Plaintiff, the South Florida Chapter of the Associated General Contractors, brought suit against the Defendant, Broward County, Florida challenging Broward County's implementation of the Federal DBE Program and Broward County's issuance of contracts pursuant to the Federal DBE Program. Plaintiff filed a Motion for a Preliminary Injunction. The court considered only the threshold legal issue raised by plaintiff in the Motion, namely whether or not the decision in *Western States Paving Company v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005) should govern the Court's consideration of the merits of plaintiffs' claim. 544 F.Supp.2d at 1337. The court identified the threshold legal issue presented as essentially, "whether compliance with the federal regulations is all that is required of Defendant Broward County." *Id*. at 1338.

The Defendant County contended that as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations, relying on case law from the Seventh Circuit in support of its position. 544 F.Supp.2d at 1338, *citing Northern Contracting v. Illinois*, 473 F.3d 715 (7th Cir. 2007). The plaintiffs disagreed, and contended that the County must take additional steps beyond those explicitly provided for in the federal regulations to ensure the constitutionality of the County's implementation of the Federal DBE Program, as administered in the County, *citing Western States Paving*, 407 F.3d 983. The court found that there was no case law on point in the Eleventh Circuit Court of Appeals. *Id*. at 1338.

Ninth Circuit Approach: *Western States.* The district court analyzed the Ninth Circuit Court of Appeals approach in Western States Paving and the Seventh Circuit approach in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991) and *Northern Contracting*, 473 F.3d 715. The district court in Broward County concluded that the Ninth Circuit in *Western States Paving* held that whether Washington's DBE program is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry, and that it was error for the district court in *Western States Paving* to uphold Washington's DBE program simply because the state had complied with the federal regulations. 544 F.Supp.2d at 1338-1339. The district court in Broward County pointed out that the Ninth Circuit in *Western States Paving* concluded it would be necessary to undertake an as-applied inquiry into whether the state's program is narrowly tailored. 544 F.Supp.2d at 1339, *citing Western States Paving*, 407 F.3d at 997.

In a footnote, the district court in *Broward County* noted that the USDOT "appears not to be of one mind on this issue, however." 544 F.Supp.2d at 1339, n. 3. The district court stated that the "United States

DOT has, in analysis posted on its Web site, implicitly instructed states and localities outside of the Ninth Circuit to ignore the *Western States Paving* decision, which would tend to indicate that this agency may not concur with the 'opinion of the United States' as represented in *Western States*." 544 F.Supp.2d at 1339, n. 3. The district court noted that the United States took the position in the *Western States Paving* case that the "state would have to have evidence of past or current effects of discrimination to use race-conscious goals." 544 F.Supp.2d at 1338, *quoting Western States Paving*.

The Court also pointed out that the Eighth Circuit Court of Appeals in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) reached a similar conclusion as in *Western States Paving*. 544 F.Supp.2d at 1339. The Eighth Circuit in *Sherbrooke*, like the court in *Western States Paving*, "concluded that the federal government had delegated the task of ensuring that the state programs are narrowly tailored, and looked to the underlying data to determine whether those programs were, in fact, narrowly tailored, rather than simply relying on the states' compliance with the federal regulations." 544 F.Supp.2d at 1339.

Seventh Circuit Approach: ***Milwaukee County* and *Northern Contracting*.** The district court in Broward County next considered the Seventh Circuit approach. The Defendants in Broward County agreed that the County must make a local finding of discrimination for its program to be constitutional. 544 F.Supp.2d at 1339. The County, however, took the position that it must make this finding through the process specified in the federal regulations, and should not be subject to a lawsuit if that process is found to be inadequate. *Id*. In support of this position, the County relied primarily on the Seventh Circuit's approach, first articulated in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), then *reaffirmed* in *Northern Contracting*, 473 F.3d 715 (7th Cir. 2007). 544 F.Supp.2d at 1339.

Based on the Seventh Circuit approach, insofar as the state is merely doing what the statute and federal regulations envisage and permit, the attack on the state is an impermissible collateral attack on the federal statute and regulations. 544 F.Supp.2d at 1339-1340. This approach concludes that a state's role in the federal program is simply as an agent, and insofar "as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations." 544 F.Supp.2d at 1340, *quoting Milwaukee County Pavers*, 922 F.2d at 423.

The Ninth Circuit addressed the *Milwaukee County Pavers* case in *Western States Paving*, and attempted to distinguish that case, concluding that the constitutionality of the federal statute and regulations were not at issue in *Milwaukee County Pavers*. 544 F.Supp.2d at 1340. In 2007, the Seventh Circuit followed up the critiques made in *Western States Paving* in the *Northern Contracting* decision. *Id*. The Seventh Circuit in *Northern Contracting* concluded that the majority in *Western States Paving* misread its decision in *Milwaukee County Pavers* as did the Eighth Circuit Court of Appeals in *Sherbrooke*. 544 F.Supp.2d at 1340, *citing Northern Contracting*, 473 F.3d at 722, n.5. The district court in Broward County pointed out that the Seventh Circuit in *Northern Contracting* emphasized again that the state DOT is acting as an instrument of federal policy, and a plaintiff cannot collaterally attack the federal regulations through a challenge to the state DOT's program. 544 F.Supp.2d at 1340, *citing Northern Contracting*, 473 F.3d at 722.

The district court in *Broward County* stated that other circuits have concurred with this approach, including the Sixth Circuit Court of Appeals decision in *Tennessee Asphalt Company v. Farris*, 942 F.2d 969 (6th Cir. 1991). 544 F.Supp.2d at 1340. The district court in *Broward County* held that the Tenth Circuit Court of Appeals took a similar

approach in *Ellis v. Skinner*, 961 F.2d 912 (10th Cir. 1992). 544 F.Supp.2d at 1340. The district court in *Broward County* held that these Circuit Courts of Appeal have concluded that "where a state or county fully complies with the federal regulations, it cannot be enjoined from carrying out its DBE program, because any such attack would simply constitute an improper collateral attack on the constitutionality of the regulations." 544 F.Supp.2d at 1340-41.

The district court in *Broward County* held that it agreed with the approach taken by the Seventh Circuit Court of Appeals in *Milwaukee County Pavers* and *Northern Contracting* and concluded that "the appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program." 544 F.Supp.2d at 1341. It is significant to note that the plaintiffs did not challenge the as-applied constitutionality of the federal regulations themselves, but rather focused their challenge on the constitutionality of Broward County's actions in carrying out the DBE program. 544 F.Supp.2d at 1341. The district court in *Broward County* held that this type of challenge is "simply an impermissible collateral attack on the constitutionality of the statute and implementing regulations." *Id*.

The district court concluded that it would apply the case law as set out in the Seventh Circuit Court of Appeals and concurring circuits, and that the trial in this case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program. 544 F.Supp.2d at 1341.

Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

16. *Western States Paving Co. v. Washington DOT, USDOT & FHWA*, 2006 WL 1734163 (W.D. Wash. June 23, 2006)(unpublished opinion)

This case was before the district court pursuant to the Ninth Circuit's remand order in *Western States Paving Co. Washington DOT, USDOT, and FHWA*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff's claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

Because the WSDOT voluntarily discontinued its DBE program after the Ninth Circuit decision, *supra*, the district court dismissed plaintiff's claim for injunctive relief as moot. The court found "it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in *Western States*," and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed Western States Paving's claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City nor the County acted with the requisite discriminatory intent. The court held the County and the City were merely implementing the WSDOT's unlawful DBE program and their actions in this respect were involuntary and required no independent activity. The court also noted that the County and the City were not parties to the precise discriminatory actions at issue in the case, which occurred due to the conduct of the "State defendants." Specifically, the WSDOT — and not the County or the City — developed the DBE program without sufficient anecdotal and statistical evidence, and improperly relied on the affidavits of contractors seeking DBE certification "who averred that they had been subject to 'general societal discrimination.'"

Third, the court dismissed plaintiff's 42 U.S.C. §§ 1981 and 1983 claims against WSDOT, finding them barred by the Eleventh Amendment sovereign immunity doctrine. However, the court allowed plaintiff's 42 U.S.C. §2000d claim to proceed against WSDOT because it was not similarly barred. The court held that Congress had conditioned the receipt of federal highway funds on compliance with Title VI (42 U.S.C. § 2000d et seq.) and the waiver of sovereign immunity from claims arising under Title VI. Section 2001 specifically provides that "a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of … Title VI." The court held that this language put the WSDOT on notice that it faced private causes of action in the event of noncompliance.

The court held that WSDOT's DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff's claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar plaintiff's §2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff's race when calculating the annual utilization goal. The court held that since the policy was not "facially neutral" — and was in fact "specifically race conscious" — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT's program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT's Motion for Summary Judgment on the §2000d claim. The remedy available to Western States remains for further adjudication and the case is currently pending.

17. *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 (N.D. Ill., 2005), affirmed, 473 F.3d 715 (7th Cir. 2007)

This decision is the district court's order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments' implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

The district court conducted a trial after denying the parties' Motions for Summary Judgment in *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed *infra.* The following summarizes the opinion of the district court.

Northern Contracting, Inc. (the "plaintiff"), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a declaration that federal statutory provisions, the federal implementing regulations ("TEA-21"), the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195 at *1 (N.D. Ill. Sept, 8, 2005).

Under TEA-21, a recipient of federal funds is required to meet the "maximum feasible portion" of its DBE goal through race-neutral means. *Id*. at *4 (citing regulations). If a recipient projects that it cannot meet its overall DBE goal through race-neutral means, it must establish

contract goals to the extent necessary to achieve the overall DBE goal. *Id*. (citing regulation). [The court provided an overview of the pertinent regulations including compliance requirements and qualifications for DBE status.]

Statistical evidence. To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. *Id*. at *6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder's list. *Id*.

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet's *Marketplace*; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id*. at *6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id*. at *7. The study thus calculated a weighted average base figure of 22.7 percent. *Id*.

IDOT then adjusted the base figure based upon two disparity studies and some reports considering whether the DBE availability figures were artificially low due to the effects of past discrimination. *Id*. at *8. One study examined disparities in earnings and business formation rates as between DBEs and their white male-owned counterparts. *Id*. Another study included a survey reporting that DBEs are rarely utilized in non-goals projects. *Id*.

IDOT considered three reports prepared by expert witnesses. *Id*. at *9. The first report concluded that minority- and woman-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. *Id*. The second report concluded, after controlling for relevant variables such as credit worthiness, "that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males." *Id*. The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses' formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. *Id*.

IDOT also conducted a series of public hearings in which a number of DBE owners who testified that they "were rarely, if ever, solicited to bid on projects not subject to disadvantaged-firm hiring goals." *Id*. Additionally, witnesses identified 20 prime contractors in IDOT District 1 alone who rarely or never solicited bids from DBEs on non-goals projects. *Id*. The prime contractors did not respond to IDOT's requests for information concerning their utilization of DBEs. *Id*.

Finally, IDOT reviewed unremediated market data from four different markets (the Illinois State Toll Highway Authority, the Missouri DOT,

Cook County's public construction contracts, and a "non-goals" experiment conducted by IDOT between 2001 and 2002), and considered past utilization of DBEs on IDOT projects. *Id*. at *11. After analyzing all of the data, the study recommended an upward adjustment to 27.51 percent. However, IDOT decided to maintain its figure at 22.77 percent. *Id*.

IDOT's representative testified that the DBE program was administered on a "contract-by-contract basis." *Id*. She testified that DBE goals have no effect on the award of prime contracts but that contracts are awarded exclusively to the "lowest responsible bidder." IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (*e.g.*, where the contractor has been unable to meet the goal despite having made reasonable good faith efforts). *Id*. at *12. Between 2001 and 2004, IDOT received waiver requests on 8.53 percent of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. *Id*.

IDOT implemented a number of race- and gender-neutral measures both in its fiscal year 2005 plan and in response to the district court's earlier summary judgment order, including:

1. A "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;

2. An extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects);

3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;

4. "Unbundling" large contracts; and

5. Allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses.

Id. (internal citations omitted). IDOT was also in the process of implementing bonding and financing initiatives to assist emerging contractors obtain guaranteed bonding and lines of credit, and establishing a mentor-protégé program. *Id*.

The court found that IDOT attempted to achieve the "maximum feasible portion" of its overall DBE goal through race- and gender-neutral measures. *Id*. at *13. The court found that IDOT determined that race- and gender-neutral measures would account for 6.43 percent of its DBE goal, leaving 16.34 percent to be reached using race- and gender-conscious measures. *Id*.

Anecdotal evidence. A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. *Id*. The DBE owners also testified to difficulties in obtaining work in the private sector and "unanimously reported that they were rarely invited to bid on such contracts." *Id*. The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. *Id*. A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. *Id*. at *13-14. One witness acknowledged that all small firms face difficulties in the financing and

insurance markets, but testified that it is especially burdensome for DBEs who "frequently are forced to pay higher insurance rates due to racial and gender discrimination." *Id*. at *14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id*.

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id*. Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they "occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT." *Id*. A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id*. at *15.

Strict scrutiny. The court applied strict scrutiny to the program as a whole (including the gender-based preferences). *Id*. at *16. The court, however, set forth a different burden of proof, finding that the government must demonstrate identified discrimination with specificity and must have a "'strong basis in evidence' to conclude that remedial action was necessary, before it embarks on an affirmative action program … If the government makes such a showing, the party challenging the affirmative action plan bears the 'ultimate burden' of demonstrating the unconstitutionality of the program." *Id*. The court held that challenging party's burden "can only be met by presenting credible evidence to rebut the government's proffered data." *Id*. at *17. To satisfy strict scrutiny, the court found that IDOT did not need to demonstrate an independent compelling interest; however, as part of the narrowly tailored prong, IDOT needed to show "that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction." *Id*. at *16.

The court found that IDOT presented "an abundance" of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id*. at *17. The plaintiff argued that the study was "erroneous because it failed to limit its DBE availability figures to those firms … registered and pre-qualified with IDOT." *Id*. The plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id*. Accordingly, the plaintiff alleged that IDOT's calculation of DBE availability and utilization rates was incorrect. *Id*.

The court found that other jurisdictions had utilized the custom census approach without successful challenge. *Id*. at *18. Additionally, the court found "that the remedial nature of the federal statutes counsels for the casting of a broader net when measuring DBE availability." *Id*. at *19. The court found that IDOT presented "an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets." *Id*. at *21. The court also found that the statistical studies were consistent with the anecdotal evidence. *Id*. The court did find, however, that "there was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This … is [also] supported by the statistical data … which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability." *Id*. at *21, n. 31. Additionally, IDOT did not verify the anecdotal testimony of DBE firm owners who testified to barriers in financing and bonding. However, the court found that such verification was unnecessary. *Id*. at *21, n. 32.

The court further found:

*That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: '[E]xperience and size are not race- and gender-neutral variables … [DBE] construction firms are generally smaller and less experienced because of industry discrimination.' Id. at *21, citing Concrete Works of Colorado, Inc. v. City and County of*

Denver, 321 F.3d 950 (10th Cir. 2003).

The parties stipulated the fact that DBE utilization goals exceed DBE availability for 2003 and 2004. *Id*. at *22. IDOT alleged, and the court so found, that the high utilization on goals projects was due to the success of the DBE program, and not to an absence of discrimination. *Id*. The court found that the statistical disparities coupled with the anecdotal evidence indicated that IDOT's fiscal year 2005 goal was a "'plausible lower-bound estimate' of DBE participation in the absence of discrimination." *Id*. The court found that the plaintiff did not present persuasive evidence to contradict or explain IDOT's data. *Id*.

The plaintiff argued that even if accepted at face value, IDOT's marketplace data did not support the imposition of race- and gender-conscious remedies because there was no evidence of direct discrimination by prime contractors. *Id*. The court found first that IDOT's indirect evidence of discrimination in the bonding, financing, and insurance markets was sufficient to establish a compelling purpose. *Id*. Second, the court found:

[M]ore importantly, plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but pursuant to federal law, which both authorized and required IDOT to remediate the effects of *private* discrimination on federally-funded highway contracts. This is a fundamental distinction … [A] state or local government need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

Id. at *23. The court distinguished *Builders Ass'n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), *aff'd* 256 F.3d 642 (7th Cir. 2001), noting that the program in that case was not federally-funded. *Id*. at *23, n. 34.

The court also found that "IDOT has done its best to maximize the portion of its DBE goal" through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id*. at *24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. *Id*. The small business initiative included: "unbundling" large contracts; allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses; a "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id*.

The court found "[s]ignificantly, plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures." *Id*. at *25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. *Id*. The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. *Id*., *citing Adarand Constructors, Inc. v. Slater "Adarand VII,"* 228 F.3d 1147, 1177 (10th Cir. 2000)(citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT's DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

18. *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004)

This is the earlier decision in *Northern Contracting, Inc.*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), *see* above, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the IDOT. This case involves the challenge to the Federal DBE Program. The plaintiff contractor sued the IDOT and the USDOT challenging the facial constitutionality of the Federal DBE Program (TEA-21 and 49 CFR Part 26) as well as the implementation of the Federal Program by the IDOT (*i.e.*, the IDOT DBE Program). The court held valid the Federal DBE Program, finding there is a compelling governmental interest and the federal program is narrowly tailored. The court also held there are issues of fact regarding whether IDOT's DBE Program is narrowly tailored to achieve the federal government's compelling interest. The court denied the Motions for Summary Judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT's implementation of the Federal DBE Program.

The court in *Northern Contracting*, held that there is an identified compelling governmental interest for implementing the Federal DBE Program and that the Federal DBE Program is narrowly tailored to further that interest. Therefore, the court granted the Federal defendants' Motion for Summary Judgment challenging the validity of the Federal DBE Program. In this connection, the district court followed the decisions and analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000)("*Adarand VII*"), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). The court held, like these two Courts of Appeals that have addressed this issue, that Congress had a strong basis in evidence to conclude that the DBE Program was necessary to redress private discrimination in federally-assisted highway subcontracting. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the evidence presented to Congress is sufficient to establish a compelling governmental interest, and that the contractors had not met their burden of introducing credible particularized evidence to rebut the Government's initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at *34, *citing Adarand VII*, 228 F.3d at 1175.

In addition, the court analyzed the second prong of the strict scrutiny test, whether the government provided sufficient evidence that its program is narrowly tailored. In making this determination, the court looked at several factors, such as the efficacy of alternative remedies; the flexibility and duration of the race-conscious remedies, including the availability of waiver provisions; the relationships between the numerical goals and relevant labor market; the impact of the remedy on third parties; and whether the program is over-or-under-inclusive. The narrow tailoring analysis with regard to the as-applied challenge focused on IDOT's implementation of the Federal DBE Program.

First, the court held that the Federal DBE Program does not mandate the use of race-conscious measures by recipients of federal dollars, but in fact requires only that the goal reflect the recipient's determination of the level of DBE participation it would expect absent the effects of the discrimination. 49 CFR § 26.45(b). The court recognized, as found in the *Sherbrooke Turf* and *Adarand VII* cases, that the Federal Regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting, that although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require "serious, good faith

consideration of workable race-neutral alternatives." 2004 WL422704 at *36, *citing* and *quoting Sherbrooke Turf*, 345 F.3d at 972, *quoting Grutter v. Bollinger*, 539 U.S. 306 (2003). The court held that the Federal regulations, which prohibit the use of quotas and severely limit the use of set-asides, meet this requirement. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the Federal DBE Program does require recipients to make a serious good faith consideration of workable race-neutral alternatives before turning to race-conscious measures.

Second, the court found that because the Federal DBE Program is subject to periodic reauthorization, and requires recipients of Federal dollars to review their programs annually, the Federal DBE scheme is appropriately limited to last no longer than necessary.

Third, the court held that the Federal DBE Program is flexible for many reasons, including that the presumption that women and minority are socially disadvantaged is deemed rebutted if an individual's personal net worth exceeds $750,000.00, and a firm owned by individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. 49 CFR § 26.67(b)(1)(d). The court found other aspects of the Federal Regulations provide ample flexibility, including recipients may obtain waivers or exemptions from any requirements. Recipients are not required to set a contract goal on every USDOT-assisted contract. If a recipient estimates that it can meet the entirety of its overall goals for a given year through race-neutral means, it must implement the Program without setting contract goals during the year. If during the course of any year in which it is using contract goals a recipient determines that it will exceed its overall goals, it must adjust the use of race-conscious contract goals accordingly. 49 CFR § 26.51(e)(f). Recipients also administering a DBE Program in good faith cannot be penalized for failing to meet their DBE goals, and a recipient may terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 CFR § 26.51(f). Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE Participation goals so long as the bidder has made adequate good faith efforts to meet the goals. 49 CFR § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 CFR § 26.43.

Fourth, the court agreed with the *Sherbrooke Turf* court's assessment that the Federal DBE Program requires recipients to base DBE goals on the number of ready, willing and able disadvantaged business in the local market, and that this exercise requires recipients to establish realistic goals for DBE participation in the relevant labor markets.

Fifth, the court found that the DBE Program does not impose an unreasonable burden on third parties, including non-DBE subcontractors and taxpayers. The court found that the Federal DBE Program is a limited and properly tailored remedy to cure the effects of prior discrimination, a sharing of the burden by parties such as non-DBEs is not impermissible.

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every woman and every member of a minority group is disadvantaged. Preferences are limited to small businesses with a specific average annual gross receipts over three fiscal years of $16.6 million or less (at the time of this decision), and businesses whose owners' personal net worth exceed $750,000.00 are excluded. 49 CFR § 26.67(b)(1). In addition, a firm owned by a white male may qualify as socially and economically disadvantaged. 49 CFR § 26.67(d).

The court analyzed the constitutionality of the IDOT DBE Program. The court adopted the reasoning of the Eighth Circuit in *Sherbrooke Turf*, that a recipient's implementation of the Federal DBE Program must be

analyzed under the narrow tailoring analysis but not the compelling interest inquiry. Therefore, the court agreed with *Sherbrooke Turf* that a recipient need not establish a distinct compelling interest before implementing the Federal DBE Program, but did conclude that a recipient's implementation of the Federal DBE Program must be narrowly tailored. The court found that issues of fact remain in terms of the validity of the IDOT's DBE Program as implemented in terms of whether it was narrowly tailored to achieve the Federal Government's compelling interest. The court, therefore, denied the contractor plaintiff's Motion for Summary Judgment and the Illinois DOT's Motion for Summary Judgment.

19. *Klaver Construction, Inc. v. Kansas DOT*, 211 F. Supp.2d 1296 (D. Kan. 2002)

This is another case that involved a challenge to the USDOT Regulations that implement TEA-21 (49 CFR Part 26), in which the plaintiff contractor sought to enjoin the Kansas Department of Transportation ("DOT") from enforcing its DBE Program on the grounds that it violates the Equal Protection Clause under the Fourteenth Amendment. This case involves a direct constitutional challenge to racial and gender preferences in federally-funded state highway contracts. This case concerned the constitutionality of the Kansas DOT's implementation of the Federal DBE Program, and the constitutionality of the gender-based policies of the federal government and the race- and gender-based policies of the Kansas DOT. The court granted the federal and state defendants' (USDOT and Kansas DOT) Motions to Dismiss based on lack of standing. The court held the contractor could not show the specific aspects of the DBE Program that it contends are unconstitutional have caused its alleged injuries.

G. Recent Decisions and Authorities Involving Federal Procurement That May Impact DBE and MBE/WBE Programs

1. *Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al.*, 836 F3d 57, 2016 WL 4719049 (D.C. Cir. 2016), *cert. denied,* 2017 WL 1375832 (Oct. 16, 2017), *affirming on other grounds, Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al.*, 107 F.Supp. 3d 183 (D.D.C. 2015)

In a split decision, the majority of a three judge panel of the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of section 8(a) of the Small Business Act, which was challenged by Plaintiff-Appellant Rothe Development Inc. (Rothe). Rothe alleged that the statutory basis of the United States Small Business Administration's 8(a) business development program (codified at 15 U.S.C. § 637), violated its right to equal protection under the Due Process Clause of the Fifth Amendment. 836 F.3d 57, 2016 WL 4719049, at *1. Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program. *Id.* The court held, however, that Congress considered and rejected statutory language that included a racial presumption. *Id.* Congress, according to the court, chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias. *Id.*

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. *Id* *1. Businesses owned by "socially and economically disadvantaged" individuals are eligible to participate in the 8(a) program. *Id.* The statute defines socially disadvantaged individuals as persons "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.*, *quoting* 15 U.S.C. § 627(a)(5).

The Section 8(a) Statute is race-neutral. The court rejected Rothe's allegations, finding instead that the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race. *Id* *1. The court stated that Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. *Id.* The court said that makes this statute different from other statutes, which expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. *Id.*

In contrast to the *statute*, the court found that the SBA's *regulation* implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups is socially disadvantaged. *Id* *2, *citing* 13 C.F.R. § 124.103(b). This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. *Id.* Rothe's definition of the racial classification it attacks in this case, according to the court, does not include the SBA's regulation. *Id.*

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied rational-basis review. *Id* at *2. The court stated the statute "readily survives" the rational basis scrutiny standards. *Id* *2. The court, therefore, affirmed

the judgment of the district court granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. *Id.*

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. *Id* *2. Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. *Id* *2.

The court found that the definition of the term "socially disadvantaged" does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. *Id* *3. On its face, the court stated the term envisions an individual-based approach that focuses on experience rather than on a group characteristic, and the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias. *Id.* The court said that the statute definition of the term "social disadvantaged" does not provide for preferential treatment based on an applicant's race, but rather on an individual applicant's experience of discrimination. *Id* *3.

The court distinguished cases involving situations in which disadvantaged non-minority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered "socially disadvantaged." *Id* *3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines socially disadvantaged *individuals* as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are *members or groups* that have been subjected to prejudice or bias. *Id.*

The court pointed out that the SBA's implementation of the statute's definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. *Id* *4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA's implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. *Id* *4. The court determined the statutory language does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. *Id* *5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner's experience of discrimination. *Id* *6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. *Id.*

The court noted that the Supreme Court and this court's discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. *Id* *8. The court distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but found in the 8(a) program the Supreme Court has explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged. *Id*. at *7.

The SBA Statute does not trigger strict scrutiny. The court held that the statute does not trigger strict scrutiny because it is race-neutral. *Id* *10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *Id* *9. In the

absence of such a claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. *Id.* The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. *Id.*

Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. *Id* *10. Instead, the court considered whether the statute is supported by a rational basis. *Id.* The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. *Id* *10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *Id.* Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances qualifies as compelling. *Id* *11. The statutory scheme, the court said, is rationally related to that end. *Id.*

The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

Other issues. The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

In addition, the court rejected Rothe's contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id* *11. Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe's alternative argument on delegation also fails. *Id.*

Dissenting Opinion. There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are not facially race-neutral, but contain a racial classification. *Id* *12. The dissenting judge said that the act provides members of certain racial groups an advantage in qualifying for Section 8(a)'s contract preference by virtue of their race. *Id* *13.

The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe's right to equal protection of the laws. *Id* *16. In the view of the dissenting opinion the statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id* *22.

2. *Rothe Development Corp. v. U.S. Dept. of Defense, et al.*, 545 F.3d 1023 (Fed. Cir. 2008)

Although this case does not involve the Federal DBE Program (49 CFR Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In

Rothe, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantages individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense ("DOD") to adjust bids submitted by non-socially and economically disadvantaged firms upwards by 10 percent (the "Price Evaluation Adjustment Program" or "PEA").

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the "analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization." 413 F.3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, "the evidence must be proven to have been before Congress prior to enactment of the racial classification." The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007, the Federal District Court for the Western District of Texas in *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D.Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in *Rothe,* 413 F.3d 1327 (Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals ("SDBs"). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was "stale," that the plaintiff (Rothe) failed to rebut other evidence, which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in *Concrete Works*, *Adarand Constructors*, *Sherbrooke Turf* and *Western States Paving* (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

2007 Order of the District Court (499 F.Supp.2d 775). In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). *Rothe*, 499 F.Supp.2d. at 782. Plaintiff Rothe did not qualify as an SDB because it was owned by a Caucasian female. Although Rothe was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as an SDB, became the "lowest" bidder and was awarded the contract. *Id*. Rothe claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. *Id*. at 782-83. The district court's decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by *Rothe* regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf*, *Western States Paving*, *Concrete Works*, *Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government's burden of production regarding the compelling interest for a race-conscious remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII*, *Sherbrooke Turf*, and *Western States Paving*, also relied on it in support of their compelling interest holding. *Id*. at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10th Cir. 2003), established legal principles that are relevant to the court's strict scrutiny analysis. First, Rothe's claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce "credible, particularized" evidence to rebut the government's initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government's statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id*. at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that

the inference of discriminatory exclusion can arise from statistical disparities. *Id*. at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id*. at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and "they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting." *Id*. at 838-39. The court found that the data used in these six disparity studies is not "stale" for purposes of strict scrutiny review. *Id*. at 839. The court disagreed with Rothe's argument that all the data were stale (data in the studies from 1997 through 2002), "because this data was the most current data available at the time that these studies were performed." *Id*. The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id*. The court declined to adopt a "bright-line rule for determining staleness." *Id*.

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are "stale." *Id*. at n.86. The court also stated that it "accepts the reasoning of the *Appendix*, which the court found stated that for the most part "the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities." *Id*. at 839, *quoting 61 Fed.Reg.* 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id*. at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id*. at 871.

The district court found that the data contained in the Appendix, the Benchmark Study, and the Urban Institute Report were "stale," and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id*. at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the Appendix to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id*. at 872. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id*. at 874.

Although the court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for

purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with "concrete, particularized" evidence to the contrary. *Id*. at 875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id*. at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id*. at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id*.

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government's involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id*. The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id*., *quoting Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;

2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and

3. Over- and under-inclusiveness.

Id. The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id*. The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress' adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id*. The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id*. at 880. Rather, the court found that narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives." *Id*.

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id*. at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id*. at 882. The court then examined

and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

November 4, 2008 decision by the Federal Circuit Court of Appeals. On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a "strong basis in evidence" upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

Strict scrutiny framework. The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is "beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature's decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id*. The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id*.

Compelling interest: strong basis in evidence. The Federal Circuit pointed out that the statistical and anecdotal evidence relief upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, *citing* to *Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study,

and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id*.

Six state and local disparity studies. The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." 545 F.3d at 1037-1038, *quoting Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson's* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson's* evidentiary burden is satisfied. 545 F.3d at 1038, *quoting W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

Staleness. The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, *citing to Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress "should be able to rely on the most recently available data so long as that data is reasonably up-to-date." 545 F.3d at 1039. The Federal Circuit affirmed the district court's conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id*.

Before Congress. The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it "must be proven to have been before Congress prior to enactment of the racial classification." 545 F.3d at 1039, *quoting Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id*. at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD "which Congress was emphatically not required to make." *Id*. at 1040, footnote

11 (emphasis in original). The Federal Circuit cited the *Dean v. City of Shreveport* case that the "government need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy." 545 F.3d at 1040, footnote 11 *quoting Dean v. City of Shreveport*, 438 F.3d 448, 445 (5th Cir. 2006).

Methodology. The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors was one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, "[a] disparity ratio less than 0.80" — *i.e.*, a finding that a given minority group received less than 80 percent of the expected amount — "indicates a relevant degree of disparity," and "might support an inference of discrimination." 545 F.3d at 1041, quoting the district court opinion in *Rothe VI*, 499 F.Supp.2d at 842; and *citing Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 914 (11th Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a "crucial question" in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by Rothe, that the six studies misapplied this "touchstone" of *Croson* and erroneously included minority-owned firms that were deemed willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because "the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists." 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. *Id*.

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. *Id*. However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or "relative capacity," of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher

percentage of total construction dollars awarded than the smaller MWBE firms. 545 F.3d at 1043 *quoting Engineering Contractors Association*, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. *Id*. at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id*. The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. *Id*. at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F.3d at 1044 *citing* to *Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. *Id*. at 1044-1045.

The court stated, to "be clear," that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id*. at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id*. The court recognized that a minority-owned firm's capacity and qualifications may themselves be affected by discrimination. *Id*. The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id*.

Geographic coverage. The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. *Id.* The court stressed, however, that in holding the six studies insufficient in this particular case, "we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest." 545 F.3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id.*

Anecdotal evidence. The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before

Congress. The court did point out, however, that there was no evidence presented of a single instance of alleged discrimination by the DOD in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The court noted this lack of evidence in the context of the opinion in *Croson* that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, *citing Croson*, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in Concrete Works noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, *quoting Concrete Works*, 321 F.3d at 976-977.

In conclusion, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and "should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no 'precise mathematical formula' to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark.'" 545 F.3d at 1049, *quoting W.H. Scott Constr. Co*., 199 F.3d at 218 n. 11.

Narrow tailoring. The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049. Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — i.e., whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination." 545 F.3d at 1049-1050.

3. *Rothe Development, Inc. v. U.S. Dept. of Defense and Small Business Administration*, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. 2015), *affirmed on other* grounds 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016)

Plaintiff Rothe Development, Inc. is a small business that filed this action against the U.S. Department of Defense ("DOD") and the U.S. Small Business Administration ("SBA")(collectively, "Defendants") challenging the constitutionality of the Section 8(a) Program on its face.

The constitutional challenge that Rothe brings in this case is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). The plaintiff in *DynaLantic* sued the DOD, the SBA, and the Department of Navy alleging that Section 8(a) was unconstitutional both on its face and as applied to the military simulation and training industry. *See DynaLantic*, 885 F.Supp.2d at 242. *DynaLantic's* court disagreed with the plaintiff's facial attack and held the Section 8(a) Program as facially constitutional. *See DynaLantic*, 885 F.Supp.2d at 248-280, 283-291. (*See also* discussion of *DynaLantic* in this Appendix below.)

The court in *Rothe* states that the plaintiff Rothe relies on substantially the same record evidence and nearly identical legal arguments as in the *DynaLantic* case, and urges the court to strike down the race-conscious

provisions of Section 8(a) on their face, and thus to depart from *DynaLantic's* holding in the context of this case. 2015 WL 3536271 at *1. Both the plaintiff Rothe and the Defendants filed cross-motions for summary judgment as well as motions to limit or exclude testimony of each other's expert witnesses. The court concludes that Defendants' experts meet the relevant qualification standards under the Federal Rules, and therefore denies plaintiff Rothe's motion to exclude Defendants' expert testimony. *Id.* By contrast, the court found sufficient reason to doubt the qualifications of one of plaintiff's experts and to question the reliability of the testimony of the other; consequently, the court grants the Defendants' motions to exclude plaintiff's expert testimony.

In addition, the court in *Rothe* agrees with the court's reasoning in *DynaLantic*, and thus the court in *Rothe* also concludes that Section 8(a) is constitutional on its face. Accordingly, the court denies plaintiff's motion for summary judgment and grants Defendants' cross-motion for summary judgment.

DynaLantic Corp. v. Department of Defense. The court in *Rothe* analyzed the *DynaLantic* case, and agreed with the findings, holding and conclusions of the court in *DynaLantic*. *See* 2015 WL 3536271 at *4-5. The court in *Rothe* noted that the court in *DynaLantic* engaged in a detailed examination of Section 8(a) and the extensive record evidence, including disparity studies on racial discrimination in federal contracting across various industries. *Id.* at *5. The court in *DynaLantic* concluded that Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money, and also that the government had established a strong basis in evidence to support its conclusion that remedial action was necessary to remedy that discrimination. *Id*. at *5. This conclusion was based on the finding the government provided extensive evidence of discriminatory barriers to minority business formation and minority business development, as well as significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *5, *citing DynaLantic*, 885 F.Supp.2d at 279.

The court in *DynaLantic* also found that DynaLantic had failed to present credible, particularized evidence that undermined the government's compelling interest or that demonstrated that the government's evidence did not support an inference of prior discrimination and thus a remedial purpose. 2015 WL 3536271 at *5, *citing DynaLantic*, at 279.

With respect to narrow tailoring, the court in *DynaLantic* concluded that the Section 8(a) Program is narrowly tailored on its face, and that since Section 8(a) race-conscious provisions were narrowly tailored to further a compelling state interest, strict scrutiny was satisfied in the context of the construction industry and in other industries such as architecture and engineering, and professional services as well. *Id.* The court in *Rothe* also noted that the court in *DynaLantic* found that DynaLantic had thus failed to meet its burden to show that the challenge provisions were unconstitutional in all circumstances and held that Section 8(a) was constitutional on its face. *Id.*

Defendants' expert evidence. One of Defendants' experts used regression analysis, claiming to have isolated the effect in minority ownership on the likelihood of a small business receiving government contracts, specifically using a "logit model" to examine government contracting data in order to determine whether the data show any difference in the odds of contracts being won by minority-owned small businesses relative to other small businesses. 2015 WL 3536271 at *9. The expert controlled for other variables that could influence the odds of whether or not a given firm wins a contract, such as business size, age, and level of security clearance, and concluded that the odds of

minority-owned small firms and non-8(a) SDB firms winning contracts were lower than small non-minority and non-SDB firms. *Id.* In addition, the Defendants' expert found that non-8(a) minority-owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94.0% of contract actions, 93.0% of dollars awarded, and in which 92.2% of non-8(a) minority-owned SDBs are registered. *Id*. Also, the expert found that there is no industry where non-8(a) minority-owned SDBs have a statistically significant advantage in terms of winning a contract from the federal government. *Id.*

The court rejected Rothe's contention that the expert opinion is based on insufficient data, and that its analysis of data related to a subset of the relevant industry codes is too narrow to support its scientific conclusions. *Id.* at *10. The court found convincing the expert's response to Rothe's critique about his dataset, explaining that, from a mathematical perspective, excluding certain NAICS codes and analyzing data at the three-digit level actually increases the reliability of his results. The expert opted to use codes at the three-digit level as a compromise, balancing the need to have sufficient data in each industry grouping and the recognition that many firms can switch production within the broader three-digit category. *Id.* The expert also excluded certain NAICS industry groups from his regression analyses because of incomplete data, irrelevance, or because data issues in a given NAICS group prevented the regression model from producing reliable estimates. *Id.* The court found that the expert's reasoning with respect to the exclusions and assumptions he makes in the analysis are fully explained and scientifically sound. *Id.*

In addition, the court found that post-enactment evidence was properly considered by the expert and the court. *Id.* The court found that nearly every circuit to consider the question of the relevance of post-enactment evidence has held that reviewing courts need not limit themselves to the particular evidence that Congress relied upon when it enacted the statute at issue. *Id.*, *citing DynaLantic*, 885 F.Supp.2d at 257.

Thus, the court held that post-enactment evidence is relevant to constitutional review, in particular, following the court in *DynaLantic*, when the statute is over 30 years old and the evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.*, *citing DynaLantic* at 885 F.Supp.2d at 258. The court also points out that the statute itself contemplates that Congress will review the 8(a) Program on a continuing basis, which renders the use of post-enactment evidence proper. *Id.*

The court also found Defendants' additional expert's testimony as admissible in connection with that expert's review of the results of the 107 disparity studies conducted throughout the United States since the year 2000, all but 32 of which were submitted to Congress. *Id*. at *11. This expert testified that the disparity studies submitted to Congress, taken as a whole, provide strong evidence of large, adverse, and often statistically significant disparities between minority participation in business enterprise activity and the availability of those businesses; the disparities are not explained solely by differences in factors other than race and sex that are untainted by discrimination; and the disparities are consistent with the presence of discrimination in the business market. *Id.* at *12.

The court rejects Rothe's contentions to exclude this expert testimony merely based on the argument by Rothe that the factual basis for the expert's opinion is unreliable based on alleged flaws in the disparity studies or that the factual basis for the expert's opinions is weak. *Id*. The court states that even if Rothe's contentions are correct, an attack on the underlying disparity studies does not necessitate the remedy of exclusion. *Id.*

Plaintiff's expert's testimony rejected. The court found that one of plaintiff's experts was not qualified based on his own admissions regarding his lack of training, education, knowledge, skill and experience in any statistical or econometric methodology. *Id.* at *13. Plaintiff's other expert the court determined provided testimony that was unreliable and inadmissible as his preferred methodology for conducting disparity studies "appears to be well outside of the mainstream in this particular field." *Id.* at *14. The expert's methodology included his assertion that the only proper way to determine the availability of minority-owned businesses is to count those contractors and subcontractors that actually perform or bid on contracts, which the court rejected as not reliable. *Id.*

The Section 8(a) Program is constitutional on its face. The court found persuasive the court decision in *DynaLantic*, and held that inasmuch as Rothe seeks to re-litigate the legal issues presented in that case, this court declines Rothe's invitation to depart from the *DynaLantic* court's conclusion that Section 8(a) is constitutional on its face. *Id.* at *15.

The court reiterated its agreement with the *DynaLantic* court that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest. *Id.* at *17. To demonstrate a compelling interest, the government defendants must make two showings: first the government must articulate a legislative goal that is properly considered a compelling governmental interest, and second the government must demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action was necessary to further that interest. *Id.* at *17. In so doing, the government need not conclusively prove the existence of racial discrimination in the past or present. *Id.* The government may rely on both statistical and anecdotal evidence, although anecdotal evidence alone cannot establish a strong basis in evidence for the purposes of strict scrutiny. *Id.*

If the government makes both showings, the burden shifts to the plaintiff to present credible, particularized evidence to rebut the government's initial showing of a compelling interest. *Id.* Once a compelling interest is established, the government must further show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *Id.*

The court held that the government articulated and established compelling interest for the Section 8(a) Program, namely, remedying race-based discrimination and its effects. *Id.* The court held the government also established a strong basis in evidence that furthering this interest requires race-based remedial action – specifically, evidence regarding discrimination in government contracting, which consisted of extensive evidence of discriminatory barriers to minority business formation and forceful evidence of discriminatory barriers to minority business development. *Id.* at *17, *citing DynaLantic*, 885 F.Supp.2d at 279.

The government defendants in this case relied upon the same evidence as in the *DynaLantic* case and the court found that the government provided significant evidence that even when minority businesses are qualified and eligible to perform contracts in both the private and public sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *17. The court held that Rothe has failed to rebut the evidence of the government with credible and particularized evidence of its own. *Id.* at *17. Furthermore, the court found that the government defendants established that the Section 8(a) Program is narrowly tailored to achieve the established compelling interest. *Id.* at *18.

The court found, citing agreement with the *DynaLantic* court, that the Section 8(a) Program satisfies all six factors of narrow tailoring. *Id.* First,

alternative race-neutral remedies have proved unsuccessful in addressing the discrimination targeted with the Program. *Id.* Second, the Section 8(a) Program is appropriately flexible. *Id.* Third, Section 8(a) is neither over nor under-inclusive. *Id.* Fourth, the Section 8(a) Program imposes temporal limits on every individual's participation that fulfilled the durational aspect of narrow tailoring. *Id.* Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because the evidence presented established that minority firms are ready, willing and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* And six, the fact that the Section 8(a) Program reserves certain contracts for program participants does not, on its face, create an impermissible burden on non-participating firms. *Id.*; *citing DynaLantic*, 885 F.Supp.2d at 283-289.

Accordingly, the court concurred completely with the *DynaLantic* court's conclusion that the strict scrutiny standard has been met, and that the Section 8(a) Program is facially constitutional despite its reliance on race-conscious criteria. *Id.* at *18. The court found that on balance the disparity studies on which the government defendants rely reveal large, statistically significant barriers to business formation among minority groups that cannot be explained by factors other than race, and demonstrate that discrimination by prime contractors, private sector customers, suppliers and bonding companies continues to limit minority business development. *Id.* at *18, *citing DynaLantic*, 885 F.Supp.2d at 261, 263.

Moreover, the court found that the evidence clearly shows that qualified, eligible minority-owned firms are excluded from contracting markets, and accordingly provides powerful evidence from which an inference of discriminatory exclusion could arise. *Id.* at *18. The court concurred with the *DynaLantic* court's conclusion that based on the evidence before Congress, it had a strong basis in evidence to conclude the use of race-conscious measures was necessary in, at least, some circumstances. *Id.* at *18, *citing DynaLantic*, 885 F.Supp.2d at 274.

In addition, in connection with the narrow tailoring analysis, the court rejected Rothe's argument that Section 8(a) race-conscious provisions cannot be narrowly tailored because they apply across the board in equal measures, for all preferred races, in all markets and sectors. *Id*. at *19. The court stated the presumption that a minority applicant is socially disadvantaged may be rebutted if the SBA is presented with credible evidence to the contrary. *Id.* at *19. The court pointed out that any person may present credible evidence challenging an individual's status as socially or economically disadvantaged. *Id.* The court said that Rothe's argument is incorrect because it is based on the misconception that narrow tailoring necessarily means a remedy that is laser-focused on a single segment of a particular industry or area, rather than the common understanding that the "narrowness" of the narrow-tailoring mandate relates to the relationship between the government's interest and the remedy it prescribes. *Id.*

Conclusion. The court concluded that plaintiff's facial constitutional challenge to the Section 8(a) Program failed, that the government defendants demonstrated a compelling interest for the government's racial classification, the purported need for remedial action is supported by strong and unrebutted evidence, and that the Section 8(a) program is narrowly tailored to further its compelling interest. *Id.* at *20.

4. *DynaLantic Corp. v. United States Dept. of Defense, et al*., 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C., 2012), *appeals voluntarily dismissed*, United States Court of Appeals, District of Columbia, Docket Numbers 12-5329 and 12-5330 (2014)

Plaintiff, the DynaLantic Corporation ("DynaLantic"), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense ("DoD"), the Department of the Navy, and the Small Business Administration ("SBA") challenging the constitutionality of Section 8(a) of the Small Business Act (the "Section 8(a) program"), on its face and as applied: namely, the SBA's determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. 2012 WL 3356813, at *1, *37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id*. at *1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD's use of the program, which is reserved for "socially and economically disadvantaged individuals," constitutes an illegal racial preference in violation of the equal protection in violating its right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution and other rights. *Id*. at *1. DynaLantic also claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic's specific industry, defined as the military simulation and training industry. *Id*.

As described in *DynaLantic Corp. v. United States Department of Defense*, 503 F.Supp. 2d 262 (D.D.C. 2007)(*see below*), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

The Section 8(a) Program. The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 CFR § 124. "Socially disadvantaged" individuals are persons who have been "subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities." 13 CFR § 124.103(a); *see also* 15 U.S.C. § 637(a)(5). "Economically disadvantaged" individuals are those socially disadvantaged individuals "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged." 13 CFR § 124.104(a); *see also* 15 U.S.C. § 637(a)(6)(A). *DynaLantic Corp.,* 2012WL 3356813 at *2.

Individuals who are members of certain racial and ethnic groups are presumptively socially disadvantaged; such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities. *Id*. at *2 *quoting* 15 U.S.C. § 631(f)(1)(B)-(c); *see also* 13 CFR § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which requires an individual to show a net worth of less than $250,000 upon entering the program, and a showing that the individual's income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. 2012 WL 3356813 at *3; *see* 13 CFR § 124.104(c)(2).

Congress has established an "aspirational goal" for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of five percent of procurements dollars government wide. *See* 15 U.S.C. § 644(g)(1).

DynaLantic, at *3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. *See Id*. Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id*. DoD has established a goal of awarding approximately two percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at *3. The Section 8(a) program allows the SBA, "whenever it determines such action is necessary and appropriate," to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a "sole source" basis (i.e., reserved to one firm) or on a "competitive" basis (i.e., between two or more Section 8(a) firms). *DynaLantic, at *3-4; 13 CFR 124.501(b).*

Plaintiff's business and the simulation and training industry. DynaLantic performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic at *5.*

Compelling interest. The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *DynaLantic,* at *9. First, the government must "articulate a legislative goal that is properly considered a compelling government interest." *Id*. *quoting Sherbrooke Turf v. Minn. DOT.,* 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, "the government must demonstrate 'a strong basis in evidence' supporting its conclusion that race-based remedial action was necessary to further that interest." *DynaLantic,* at *9, *quoting Sherbrooke*, 345 F.3d 969.

After the government makes an initial showing, the burden shifts to DynaLantic to present "credible, particularized evidence" to rebut the government's "initial showing of a compelling interest." *DynaLantic,* at *10 *quoting Concrete Works of Colorado, Inc. v. City and County of Denver,* 321 F.3d 950, 959 (10th Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at *10, *citing Rothe Dev. Corp. v. U.S. Dep't of Def.* ("*Rothe III* "), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a "passive participant." *DynaLantic*, at *11. The Court rejected *DynaLantic's* argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at *11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at *11, *citing Western States Paving v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority

businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at *11 *quoting City of Richmond v. J. A. Croson Co., 488 U.S. 469, 492 (1995), and Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147, 1167-68 (10th Cir. 2000). In addition, private prejudice may also take the form of "discriminatory barriers" to "fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts." *DynaLantic, at *11, quoting Adarand VII,* 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a "passive participant" in private discrimination in the relevant industries or markets. *DynaLantic,* at *11, *citing Concrete Works IV,* 321 F.3d at 958.

Evidence before Congress. The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic,* at *16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic,* at *17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id*. The Court then followed the 10th Circuit Court of Appeals' approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic,* at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or "old boy" business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic,* at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id*.

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic,* at *21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id*.

State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic,* at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the

contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic,* at *26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic,* at *26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic,* at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic,* at *26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.,* 963 F.2d 420 (D.C. Cir. 1992) "require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination." *DynaLantic,* at *26, n. 10.

Analysis: strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic,* at *29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic,* at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic,* at *31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic,* at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic,* at *31. The Court stated that the government has therefore "established that there are at least some circumstances where it would be 'necessary or appropriate' for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic,* at *31, *citing* 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff's facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic,* at *31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic,* at *31, n. 13.

Rejection of DynaLantic's rebuttal arguments. The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic,* at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the

evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government's initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic,* at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a "passive participant" when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic,* at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic,* at *35, *citing Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id, citing Croson,* 488 U.S. 500. Accordingly, the Court stated that DynaLantic's claim that the government must independently verify the evidence presented to it is unavailing. *Id. DynaLantic,* at *35.

Also in terms of DynaLantic's arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic,* at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id*. The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic,* at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic,* at *35. In short, the Court found that DynaLantic's "general criticism" of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic,* at *35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic,* at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic,* at *36.

Facial challenge: conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different area. First, it provided extensive evidence of discriminatory barriers to

minority business formation. *DynaLantic,* at *37. Second, it provided "forceful" evidence of discriminatory barriers to minority business development. *Id*. Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id*. The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id*.

As-applied challenge. *DynaLantic* also challenged the SBA and DoD's use of the Section 8(a) program as applied: namely, the agencies' determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic,* at *37. Significantly, the Court points out that the federal Defendants "concede that they do not have evidence of discrimination in this industry." *Id.* Moreover, the Court points out that the federal Defendants admitted that there "is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry." *DynaLantic,* at *38. The federal Defendants also admit that they are "unaware of any discrimination in the simulation and training industry." *Id*. In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic,* at *38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic,* at *38. The Court concludes that the federal Defendants' position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court's decision in *Croson,* as well as the Federal Circuit's decision in *O'Donnell Construction Company,* which adopted *Croson's* reasoning. *DynaLantic,* at *38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic,* at *38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson's* evidentiary requirement to show an inference of discrimination. *DynaLantic,* at *39, *citing Croson*, 488 U.S. 501. The Court rejects the federal government's position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic,* at *40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic,* at *40, *citing Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic,* at *40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic,* at *40.

The Court recognized that legislation considered in *Croson, Adarand* and *O'Donnell* were all restricted to one industry, whereas this case presents

a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic,* at *40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id*.

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic,* at *40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic,* at *40.

Narrow tailoring. In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic,* at *41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id*.

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic,* at *41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic,* at *42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic,* at *43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic,* at *44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic,* at *44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic,* at *44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic,* at *45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic,* at *46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than five percent of contract dollars, are facially constitutional. *DynaLantic,* at *46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id*. The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic,* at *47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic,* at *48. The Court concluded that the government is not required to eliminate the burden on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id*. The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds $250,000 regardless of race. *Id.*

Conclusion. The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic,* at *51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United Status and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay plaintiff the sum of $1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

5. *DynaLantic Corp. v. United States Dept. of Defense, et al*., 503 F. Supp.2d 262 (D.D.C. 2007)

DynaLantic Corp. involved a challenge to the DOD's utilization of the Small Business Administration's ("SBA") 8(a) Business Development Program ("8(a) Program"). In its Order of August 23, 2007, the district court denied both parties' Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its 2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp.2d 262, 263 (D.D.C. 2007).

The court first explained that the 8(a) Program sets a goal that no less than 5 percent of total prime federal contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged individuals. *Id*. Each federal government agency is required to establish its own goal for contracting but the goals are not mandatory and there is no sanction for failing to meet the goal. Upon application and admission into the 8(a) Program, small businesses owned and controlled by disadvantaged individuals are eligible to receive technological, financial, and practical assistance, and support through preferential award of government contracts. For the past few years, the 8(a) Program was the primary preferential treatment program the DOD used to meet its 5 percent goal. *Id*. at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings, the D.C. Circuit dismissed the plaintiff's action for lack of standing but granted the plaintiff's motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement but the D.C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the 8(a) program as administered by the SBA and utilized by the DOD. The D.C. Circuit held the plaintiff had standing because of the plaintiff's inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff's injury was imminent due to the likelihood the government would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. *Id*. at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. *Id*. at 265. The district court first held that the plaintiff's complaint could be read only as a challenge to the DOD's implementation of the 8(a) Program [pursuant to 10 U.S.C. § 2323] as opposed to a challenge to the program as a whole. *Id*. at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government's proffered "compelling government interest," the court must consider the evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to *Western States Paving* in support of this proposition. *Id*. The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent *Rothe* decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could not rule on the parties'

Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. *Id*. at 267.

6. *Miller v. Vilsack*, 2021 WL 11115194, Case No. 4:21-cv-595 (N.D. Tex. 2021), U.S. District Court for the Northern District of Texas, Motion for Class Certification and For Preliminary Injunction Granted, July 1, 2021; Case voluntarily dismissed (2022)

Background. Plaintiffs are Texas farmers and ranchers seeking to enjoin the U.S. Department of Agriculture from administering the loan-forgiveness program under section 1005 of the American Rescue Plan Act of 2021 (ARPA). ARPA appropriated funds to the USDA and required the Secretary to "provide a payment in an amount up to 120 percent of the outstanding indebtedness of each socially disadvantaged farmer or rancher as of January 1, 2021," to pay off qualifying Farm Service Agency (FSA) loans. To be eligible, an applicant must be a "socially disadvantaged farmer or rancher." A "'socially disadvantaged farmer or rancher' means a farmer or rancher who is a member of a socially disadvantaged group." It defines "socially disadvantaged group" as "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities."

Plaintiffs held qualifying FSA loans on January 1, 2021 but are white, making them ineligible for the funds under the Act. On April 26, 2021, Plaintiffs filed a class action to enjoin the program as a violation of equal protection under the United States Constitution and a violation of Title VI of the Civil Rights Act of 1964.

Plaintiffs filed their Motion for Class Certification and Motion for Preliminary Injunction on June 2, 2021. The court on July 1, 2021 granted both of Plaintiffs' Motions for Class Certification and for Preliminary Injunction.

Application of strict scrutiny. The Government concedes its prioritization scheme is race based but maintains that it is allowed to use racial classification to remedy the lingering effects of past racial discrimination against minority groups—a "well-established" compelling government interest. The Government also submits that Congress narrowly tailored the law to achieve that compelling interest, considering the history of discrimination against minority farmers and specific gaps in pandemic-related funding for those racial groups. The court disagreed.

As other courts to consider this issue already have, the Court concludes that Plaintiffs are likely to succeed on the merits of their claim that the Government's use of race- and ethnicity based preferences in the administration of the loan-forgiveness program violates equal protection under the Constitution. See *Faust v. Vilsack*, 2021 WL 2409729 (E.D. Wis. June 10, 2021); *Wynn v. Vilsack*, 2021 WL 2580678 (M.D. Fla. June 23, 2021).

The court finds it is the Government's burden to establish that its race-based distribution of taxpayer money is narrowly tailored to achieve a compelling interest. The court concludes that all of the Government's evidence shows disparate impact, but compelling government interest in this case requires an inference of intentional discrimination by the USDA or its agencies. The court holds that the Government puts forward no evidence of intentional discrimination by the USDA in at least the past decade.

In sum, the court found the Government's evidence falls short of demonstrating a compelling interest, as any past discrimination is too attenuated from any present-day lingering effects to justify race-based remedial action by Congress.

Even if the evidence clearly established historical governmental discrimination to give rise to a compelling interest, the court states that the Government must then show its proposed remedy in the race exclusionary program is narrowly tailored. In the racial classifications context, the court concludes that narrowly tailored means explicit use of even narrowly drawn racial classifications can be used only as a last resort. The court found that this requires "serious, good faith consideration of workable race-neutral alternatives."

The Government's claim that new race-based discrimination is needed to remedy past race-based discrimination, according to the court, is unavailing. Namely, the court said, this claim is founded on a faulty premise equating equal protection with equal results. The court held that the Government's evidence does not support the conclusion that these disparities are the result of systemic discrimination justifying the use of race classifications here.

The court found that the loan-forgiveness program is simultaneously overinclusive and underinclusive: overinclusive in that the program provides debt relief to individuals who may never have experienced discrimination or pandemic-related hardship, and underinclusive in that it fails to provide any relief to those who have suffered such discrimination but do not hold a qualifying FSA loan.

In short, the court finds the "statute's check-the-box approach to the classification of applicants by race and ethnicity is far different than the "highly individualized, holistic review" of individuals in a classification system permitted as narrowly tailored" as in the Supreme Court's decisions in the University Admissions cases.

The court concludes the Government has not demonstrated a compelling interest or a narrowly tailored remedy under strict scrutiny, and grants the Plaintiff's motion for a Preliminary Injunction.

Holding. The court on July 1, 2021 enjoined USDA from discriminating of account of race or ethnicity in administering section 1005 of the ARPA, which prohibits considering or using an applicant's race or ethnicity as a criterion in determining loan assistance, forgiveness or payments.

The court also on July 1, 2021 granted the Plaintiff's motion for class certification The court granted motions to intervene as Intervener Defendants be the Federation of Southern Cooperatives/Land Assistance Fund, National Black Farmers Association and the Association of American Indian Farmers as parties to the case.

Subsequently, as a result of the federal government's repeal of ARPA Section 1005, the court in 2022 issued an order of Dismissal of the Class Action in *Miller v. Vilsack.*

7. *Clark Greer's Ranch Café v. Guzman*, 540 F. Supp. 3d 638, 2021 WL 2092995 (N.D. Tex. 5/18/21)

Plaintiff Philip Greer ("Greer") owns and operates Plaintiff Greer's Ranch Café—a restaurant which lost nearly $100,000 in gross revenue during the COVID-19 pandemic (collectively, "Plaintiffs"). Greer sought monetary relief under the $28.6-billion Restaurant Revitalization Fund ("RRF") created by the American Rescue Plan Act of 2021 ("ARPA") and administered by the Small Business Administration ("SBA"). See American Rescue Plan Act of 2021, Pub. L. No. 117-2 § 5003.

Background. Greer prepared an application on behalf of his restaurant, is eligible for a grant from the RRF, but has not applied because he is barred from consideration altogether during the program's first twenty-one days from May 3 to May 24, 2021.

During that window, ARPA directed SBA to "take such steps as necessary" to prioritize eligible restaurants "owned and controlled" by

"women," by "veterans," and by those "socially and economically disadvantaged." ARPA incorporates the definitions for these prioritized small business concerns from prior-issued statutes and SBA regulations.

To effectuate the prioritization scheme, SBA announced that, during the program's first twenty-one days, it "will accept applications from all eligible applicants, but only process and fund priority group applications"—namely, applications from those priority-group applicants listed in ARPA. Priority-group "[a]pplicants must self-certify on the application that they meet [priority-group] eligibility requirements" as "an eligible small business concern owned and controlled by one or more women, veterans, and/or socially and economically disadvantaged individuals.

Plaintiffs sued Defendants SBA and Isabella Casillas Guzman, in her official capacity as administrator of SBA. Shortly thereafter, Plaintiffs moved for a TRO, enjoining the use of race and sex preferences in the distribution of the Fund.

Substantial Likelihood of Success on the Merits; standing.; Equal Protection Claims. The court first held that the Plaintiffs had standing to proceed, and then addressed the likelihood of success on the merits of their equal protection claims. As to race-based classifications, Plaintiffs challenged SBA's implementation of the "socially disadvantaged group" and "socially disadvantaged individual" race-based presumption and definition from SBA's Section 8(a) government-contract-procurement scheme into the RRF-distribution-priority scheme as violative of the Equal Protection Clause. Defendants argued the race-conscious rules serve a compelling interest and are narrowly tailored, satisfying strict scrutiny.

Strict scrutiny applied. The parties agreed strict scrutiny applies where government imposes racial classifications, like here where the RRF prioritization scheme incorporates explicit racial categories from Section 8(a). Under strict scrutiny, the court stated, government must prove a racial classification is "narrowly tailored" and "furthers compelling governmental interests."

Compelling governmental interest. Defendants propose as the government's compelling interest "remedying the effects of past and present discrimination" by "supporting small businesses owned by socially and economically disadvantaged small business owners ... who have borne an outsized burden of economic harms of [the] COVID-19 pandemic." To proceed based on this interest, the court said, Defendants must provide a "strong basis in evidence for its conclusion that remedial action was necessary."

As its strong basis in evidence, Defendants point to the factual findings supporting the implementation of Section 8(a) itself in removing obstacles to government contract procurement for minority-owned businesses, including House Reports in the 1970s and 1980s and a D.C. District Court case discussing barriers for minority business formation in the 1990s and 2000s. The court recognized the "well-established principle about the industry-specific inquiry required to effectuate Section 8(a)'s standards." Thus, the court looked to Defendants' industry specific evidence to determine whether the government has a "strong basis in evidence to support its conclusion that remedial action was necessary."

According to Defendants, "Congress has heard a parade of evidence offering support for the priority period prescribed by ARPA." The Defendants evidence was summarized by the court as follows:

- A House Report specifically recognized that "underlying racial, wealth, social, and gender disparities are exacerbated by the pandemic," that "[w]omen –especially mothers and women of color – are exiting the workforce at

alarming rates," and that "eight out of ten minority-owned businesses are on the brink of closure."

- Expert testimony describing how "[b]usinesses headed by people of color are less likely to have employees, have fewer employees when they do, and have less revenue compared to white-owned businesses" because of "structural inequities resulting from less wealth compared to whites who were able to accumulate wealth with the support of public policies," and that having fewer employees or lower revenue made COVID-related loans to those businesses less lucrative for lenders.

- Expert testimony explaining that "businesses with existing conventional lending relationships were more likely to access PPP funds quickly and efficiently," and that minorities are less likely to have such relationships with lenders due to "pre-existing disparities in access to capital."

- House Committee on Small Business Chairwoman Velázquez's evidence offered into the record showing that "[t]he COVID-19 public health and economic crisis has disproportionally affected Black, Hispanic, and Asian-owned businesses, in addition to women-owned businesses" and that "minority-owned and women-owned businesses were particularly vulnerable to COVID-19, given their concentration in personal services firms, lower cash reserves, and less access to credit."

- Witness testimony that emphasized the "[u]nderrepresentation by women and minorities in both funds and in small businesses accessing capital" and noted that "[t]he amount of startup capital that a Black entrepreneur has versus a White entrepreneur is about 1/36th."

- Other expert testimony noting that in many cases, minority-owned businesses struggled to access earlier COVID relief funding, such as PPP loans, "due to the heavy reliance on large banks, with whom they have had historically poor relationships."

- Evidence presented at other hearing showing that minority and woman-owned business lack access to capital and credit generally, and specifically suffered from inability to access earlier COVID-19 relief funds and also describing "long-standing structural racial disparities in small business ownership and performance."

- A statement of the Center for Responsible Lending describing present-day "overtly discriminatory practices by lenders" and "facially neutral practices with disparate effects" that deprive minority-owned businesses of access to capital.

This evidence, the court found, "largely falters for the same reasoning outlined above—it lacks the industry-specific inquiry needed to support a compelling interest for a government-imposed racial classification." The court, quoting the *Croson* decision, stated that while it is mindful of these statistical disparities and expert conclusions based on those disparities, "[d]efining these sorts of injuries as 'identified discrimination' would give ... governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor."

Thus, the court concluded that the government failed to prove that it likely has a compelling interest in "remedying the effects of past and

present discrimination" in the restaurant industry during the COVID-19 pandemic. For the same reason, the court found that Defendants have failed to show an "important governmental objective" or exceedingly persuasive justification necessary to support a sex-based classification.

Having concluded Defendants lack a compelling interest or persuasive justification for their racial and gender preferences, the court stated it need not address whether the RRF is related to those particular interests. Accordingly, the court held that Plaintiffs are likely to succeed on the merits of their claim that Defendants' use of race-based and sex-based preferences in the administration of the RRF violates the Equal Protection Clause of the Constitution.

Conclusion. The court granted Plaintiffs' motion for temporary restraining order, and enjoined Defendants to process Plaintiffs' application for an RRF grant.

Subsequently, the Plaintiffs filed a Notice of Dismissal without prejudice on May 19, 2021.