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CITY OF ALEXANDRIA LA DISPARITY STUDY

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EXECUTIVE SUMMARY.
City of Alexandria Disparity Study
Keen Independent Research LLC

The City of Alexandria commissioned a disparity study to determine if there is a level playing field for minority- and women-owned firms when competing for City contracts.

The City retained Keen Independent Research LLC (Keen Independent) to perform the disparity study. Subconsultants to Keen Independent were Charbonnet and Associates, Spears Group and Customer Research International (each a minority-owned firm) and the national law firm Holland & Knight. Keen Independent previously completed disparity studies for the cities of New Orleans, Baton Rouge and Shreveport as well as Caddo Parish, Caddo-Bossier Port Commission and BREC, the parks and recreation district in East Baton Rouge Parish.

The study began in 2020. It included collection and analysis of City contract and subcontract data as well as surveys, in-depth interviews, focus groups and other input from hundreds of Central Louisiana businesses, trade associations, City staff and other groups.

Key Study Conclusions

Seven key conclusions from the disparity study are summarized below.

1. Firms across Central Louisiana perform City of Alexandria construction, goods, professional services and other services contracts.

As with other cities, the City of Alexandria makes many of its specialized purchases from a national market. Excluding those procurements, about 77 percent of City contract dollars go to firms with locations in Central Louisiana.

The "local market" for City contracts extends well beyond city limits or Rapides Parish boundaries. Firms throughout the Central Louisiana region are involved in City construction, goods and services purchases.

Any inequities identified in the marketplace are regional and may require region-wide solutions.

Figure ES-1.
Central Louisiana

2. About 30 percent of firms in the region available for City contracts are owned by people of color or by white women (15% people of color, 15% white women).

Minority- and women-owned firms (MBE/WBEs) comprise a large share of Central Louisiana firms, based on results of Keen Independent's survey of construction, professional services, goods and other services firms. The regional economy cannot be healthy if these firms are left behind.

Although MBE/WBEs comprise a large share of total firms, there are specializations in which there are few or no minority- and women-owned firms. There is a need to encourage startups by people of color and women and expand capabilities of existing MBE/WBEs in certain specializations.

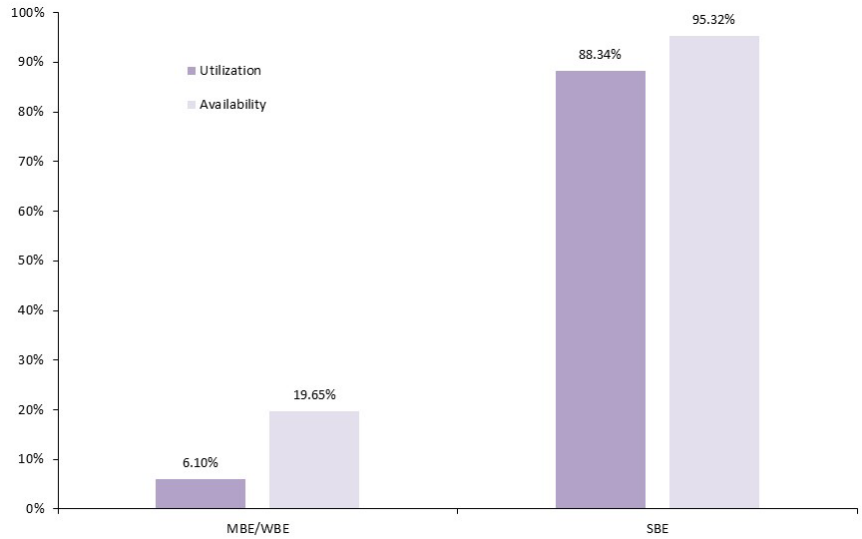
3. There is not a level playing field for companies owned by people of color or women in Central Louisiana.

Based on Census data and the survey conducted for this study, minority- and women-owned firms are underutilized in the Central Louisiana marketplace. It appears that many minority- and women-owned firms, in general, are at a disadvantage competing for work. Barriers include lack of financing.

4. City utilization of minority- and women-owned firms is less than what might be expected based on their availability for City contracts.

Keen Independent identified disparities between the utilization and availability of minority- and women-owned firms in City of Alexandria contracts. Only 6 percent of City contract dollars from 2015 through 2019 went to minority- and women-owned firms, which was substantially below the 20 percent that would be expected based on availability of MBE/WBEs for the types and sizes of City procurements. (This dollar-weighted availability is less than the 30 percent "headcount" availability discussed above.) The left-hand side of Figure ES-2 shows these results.

Figure ES-2.
Utilization and availability of minority- and women-owned firms (MBE/WBEs) and small businesses (SBEs) for City contracts, January 2015–December 2019



Source: Keen Independent utilization and availability analyses for City contracts.

Excluding procurements that went to Hispanic American-owned firms, minority-owned companies received only 1 percent of City contract dollars. White women-owned firms obtained less than 2 percent of City contract dollars. There were substantial disparities between the utilization and availability of African American-, Asian American-, Native American- and white women-owned firms for City contracts. The disparities occurred despite past City efforts to encourage small business and MBE/WBE participation in its contracts.

5. These disadvantages appear to be due to race and gender, not just because MBE/WBEs are small businesses.

Nationally, small businesses face disadvantages when competing with larger firms for public sector contracts. However, almost 90 percent of City procurement dollars during the study period went to small businesses (after excluding purchases primarily made from national markets). This is not surprising as almost all Central Louisiana businesses available for City contracts are small based on federal definitions. The right-hand side of Figure ES-2 shows these utilization and availability results for small businesses ("SBEs" in Figure ES-2).

Disparities for MBE/WBEs occurred because City procurements disproportionately went to white male-owned small businesses and not to MBE/WBE small businesses. If the City enacted a small business program for its contracts, it is likely that those benefits would largely go to the firms already receiving the most City contract dollars. A different type of program is needed.

6. Keen Independent recommends the City design and authorize a program that can increase participation of socially and economically disadvantaged small businesses in its contracts.

New City initiatives should focus on: (1) leveling the playing field for socially and economically disadvantaged businesses in City contracts, and (2) participating with other public, private and nonprofit partners in Central Louisiana to enhance the ability of potential entrepreneurs to start businesses, build capacity and access more procurement opportunities.

Without additional action, the City is at risk of continuing to spend public tax dollars in a marketplace that perpetuates unequal outcomes for minority- and women-owned firms.

7. There are also disparities affecting people of color and women working in Central Louisiana.

Keen Independent identified race and gender inequities beyond the immediate scope of the disparity study. These included entry and advancement of certain minority groups and women as employees in the construction industry and other study industries in Central Louisiana. For example, African Americans comprise 26 percent of all workers in Central Louisiana but just 11 percent of the construction workforce. There was little representation of Hispanic Americans and Native Americans as well. Women held only 8 percent of the jobs in the construction industry, with minimal representation in many individual construction trades.

The observed inequities in employment opportunities suggest that race- and gender-based barriers exist for workers as well as business owners. Additional regional efforts are needed to level the playing field for workers of color and women regarding private sector training, hiring and advancement in Central Louisiana.

Recommendation: Create a Central Louisiana DBE Program

The City has traditionally relied on outreach to promote equity in its procurement. More tools are needed. The City should review the evidence and legal constraints outlined in this study and consider adopting a new program targeting socially and economically disadvantaged businesses in partnership with other government and private sector organizations in Central Louisiana. Keen Independent makes recommendations concerning the following:

- Program focus and name;
- Certification;
- Use of a targeted competition program for small procurements;
- Preference points for CLDBEs for points-based awards;
- Contract goals program for large City construction and professional services contracts;
- Other measures that specifically assist vendors, consultants, prime contractors and others directly bidding on City procurements;
- Tracking and reporting; and
- Participation in regional efforts to increase start-up, growth and success of businesses owned by socially and economically disadvantaged individuals.

Program focus and name. As discussed in Chapter 2 of the full report, Louisiana law affects whether a City can operate its own contract equity program limited to minority- and women-owned firms. The City should instead consider a program for businesses owned by people of color, women and white men in Central Louisiana who can demonstrate both social and economic disadvantage. This program would apply to locally funded contracts (not to federally or state-funded contracts).

The City's program would be similar to the Federal Disadvantaged Business Enterprise (DBE) Program except that there would be no presumption of social disadvantage based on race, ethnicity or gender when determining whether a firm owner is socially disadvantaged. Instead, people of color and women who own businesses would need to demonstrate they are socially disadvantaged as part of their certification application. White men who are socially disadvantaged could also apply, similar to programs at the cities of New Orleans and Baton Rouge.

Keen Independent recommends that the City consider naming the program as follows: Central Louisiana Disadvantaged Business Enterprise program, or "CLDBE program," to emphasize its regional focus and distinguish it from the Federal DBE Program.

The City should consider setting overall annual aspirational goals for CLDBE participation using information from this study.

This effort will require investments of financial resources and staff time by the City and other groups. It will also only be effective over time.

Certification. Because the proposed targeted business program will affect procurement decisions, it must withstand challenges to those decisions, including whether a firm benefiting from the program is legitimately a socially and economically disadvantaged business. Therefore, the City should require certification as a CLDBE for participation in its program.

The City should work with other organizations to develop a shared, regional certification program that can serve multiple public and private entities within Central Louisiana.

The program for Central Louisiana might have similar eligibility criteria as the program used by the City of New Orleans, except that the firm would need to have a presence in Central Louisiana.

- A *socially disadvantaged* individual is one who has been subjected to prejudice or cultural bias because of his or her identity as a member of a group without regard to the person's individual qualities. The potential participant would need to provide information in writing demonstrating evidence of social disadvantage.

- To show *economic disadvantage*, the City could require firms to meet the same eligibility requirements as for the Federal DBE Program, including rules concerning annual revenue, personal net worth and the ability of the owner to accumulate substantial wealth.

Keen Independent recommends that Central Louisiana firms already certified as DBEs under the federal program have streamlined certification for a Central Louisiana program.

Targeted competition program for small purchases for CLDBEs. Keen Independent's review of City purchases between $10,000 and $30,000 found that minority- and women-owned businesses received only 3 percent of the dollars of those purchases from 2015 through 2019, far less than what would be expected from the availability of MBE/WBEs for those procurements.[1]

Because of their small size, public advertisement of these procurements is typically not required. Keen Independent recommends a targeted competition program to ensure that CLDBEs are solicited to provide quotes for small City purchases.

Preference points for CLDBEs for points-based awards. The City solicits proposals for some of its contracts and makes awards based on scoring of different factors. Professional services contracts are often awarded using this system. When a scoring system is used, and when allowed under state law, the City should consider awarding points to certified CLDBEs submitting proposals. Nationally, many state and local government preference point programs award about 5 points out of 100 to certified firms.

Contract goals program for large City construction and professional services contracts. The City should consider implementing a contract goals program for large construction and professional services contracts expected to have subcontract opportunities.

[1] After excluding types of purchases typically made from national markets.

This program for contracts funded by the City would be similar to the DBE contract goals set for U.S. Department of Transportation-funded contracts. The City would:

- Identify eligible contracts;
- Set contract goals based on the types of subcontracting opportunities and availability of targeted businesses to perform that work (flexible goals);
- Require bidders and proposers to meet the specified contract goal or show good faith efforts to do so;
- Evaluate whether the apparent low bidder met the goals or showed sufficient good faith efforts before awarding a contract;
- Monitor the participation of the certified businesses over the course of the contract; and
- Enforce remedies for any non-compliance.

Other measures that specifically assist vendors, consultants, prime contractors and others directly bidding on City procurements. These measures might include:

- Enhanced outreach to small businesses in the region and training on how to register with the City;
- Accelerated payment of prime contractors and subcontractors on City contracts;
- Reconsideration of bonding and insurance requirements on its small contracts;
- Unbundling of its contracts, as practicable; and
- Removal of other requirements that might present barriers to companies with less experience bidding or proposing on City contracts.

Tracking and regular reporting of CLDBE participation in City contracts. The City should develop the information systems for ongoing tracking and at least annual reporting of CLDBE participation in its contracts, by race, ethnicity and gender of the business owner. The City should also periodically review the effectiveness of the program and whether it should continue.

Participation in regional efforts to increase start-up, growth and success of businesses owned by socially and economically disadvantaged individuals. Other regions, including Baton Rouge, have formed regional partnerships to address barriers to disadvantaged business growth and development. Training and access to working capital and bonding are some of the barriers they find in their communities that are also needs in Central Louisiana. The City could lead a consortium of public, private and not-for-profit organizations in Central Louisiana to address barriers to minority- and women-owned businesses identified in this study.

CHAPTER 1.
Introduction

The City of Alexandria seeks to ensure equity in its contracting activities. It commissioned a disparity study to determine if there is a level playing field for minority- and women-owned firms when competing for City contracts and subcontracts. This research examines whether there are any barriers to minority- and women-owned firms seeking work with the City, and if so, actions to be taken. It also helps the City and others in Central Louisiana identify the types of assistance minority- and women-owned companies might need to fully participate in the region-wide economy.

Based on this research, the City can remove barriers and develop new business assistance programs in collaboration with other public, private and nonprofit groups in Central Louisiana.

A. What is a Disparity Study?

A disparity study analyzes the utilization and availability of minority- and women-owned firms as well as other businesses by calculating the share of contract dollars going to those firms. "Utilization" is the percentage of a public agency's contract dollars going to minority- and women-owned firms (MBEs and WBEs). "Availability" refers to the percentage of contract dollars that one might expect to go to MBEs and WBEs given the relative number of MBE/WBEs and other firms available to perform contracts for that public agency.

A "disparity" exists if the share of contract dollars for minority- and women-owned businesses is below what might be expected based on their relative availability to perform that work.

Since a 1989 U.S. Supreme Court decision created the need for public agencies to perform disparity studies to enact or operate a legally defensible MBE program, state and local governments throughout the country have conducted studies of their utilization of MBEs and WBEs. The study team performing the work for the City has been involved in more than 150 of these studies, including recent disparity studies for the cities of New Orleans and Baton Rouge.

This is the first such study for the City, however. At present, its efforts to encourage MBE/WBE in its contracts are limited to outreach. The City does operate federally required programs related to firms certified as Disadvantaged Business Enterprises (DBEs) for certain federally funded contracts.

This study also examined conditions in the Central Louisiana marketplace for minority and women business owners, as well as small business owners in general.

B. Why Conduct a Disparity Study?

The City wishes to ensure that it is not an active or passive participant in discrimination against minority-owned business enterprises or women-owned businesses.

A public agency does not typically collect, maintain and analyze the types of information normally required to fully examine the utilization and availability of those businesses. A study prepared by an

independent researcher may also provide more public trust in the results, and can sometimes collect public input that is more difficult to obtain by the public agency itself.

Any local or state government faces potential legal challenges to its targeted business programs. A disparity study describes the legal framework and provides information for a government agency to assess whether the local evidence supports different types of programs. Chapter 2 of the report summarizes these legal issues and Appendix B provides further supporting information.

Because disparity studies must (1) be based on relevant case law; (2) compile accurate utilization, availability and other information; and (3) make appropriate conclusions from those analyses, they are often performed by independent experts. Members of the study team for the City study have helped successfully defend these programs in court.

C. Introduction to the Study Team

Keen Independent Research LLC (Keen Independent) performed the disparity study with assistance from Louisiana subconsultants and national experts. Subconsultants participating in the study included Charbonnet and Associates and Spears Group in Louisiana, the Texas-based survey firm Customer Research International (CRI) and the national law firm Holland & Knight. Charbonnet and Associates and Spears Group performed in-depth interviews with Central Louisiana business owners and trade association representatives. CRI conducted the availability survey with businesses in the region. Holland & Knight prepared the legal framework for the study. The Keen Independent study team began work in 2020.

D. Involvement of Businesses, Trade Associations and Other Groups in the Study

The study incorporates input from business owners, trade association representatives, staff of other large local public and private organizations concerned with MBE and WBE participation, and members of the general public. Examples of efforts included:

- A telephone and online survey effort that reached businesses in Central Louisiana that asked for information about their companies and comments about the marketplace;
- In-depth interviews with representatives of businesses, trade associations, City departments and other groups; and
- A study website, dedicated email address and telephone hotline that provided opportunities for comments from the interested public.

In total, the study team received qualitative input from nearly 220 businesses, trade association representatives, business assistance providers, City of Alexandria staff and others.

E. Analyses Performed in the Disparity Study and Location of Results

Figure 1-1 outlines the chapters in the report.

Figure 1-1.
Chapters in the City Disparity Study report

Chapter	Description
ES. Executive Summary	Brief summary of study results
1. Introduction	Study purpose, study team, summary of public participation and organization of the report
2. Legal Issues Regarding Business Assistance Programs	Legal standards concerning local government programs for minority-owned firms, women-owned firms and small businesses
3. City Contracts	Contract data collection, analysis of subindustries involved in City contracts and definition of the geographic market area
4. Conditions in the Central Louisiana Marketplace	Conditions for minority- and women-owned and other businesses in the regional marketplace
5. Availability Analysis	Analysis of the availability of minority- and women-owned firms and other businesses to perform City contracts
6. Utilization and Disparity Analysis	Comparison of the utilization and availability of minority- and women-owned firms in City contracts
7. Conclusions and Actions for City Consideration	Conclusions and recommendations based on study results

Legal framework for the study. The law firm Holland & Knight examined federal and state law concerning business assistance programs. Chapter 2 summarizes those results. Appendix A provides definitions of key terms regarding disparity studies and relevant legal decisions. Appendix B discusses guidance from court cases that have considered the legality of MBE/WBE programs and related efforts.

Collection of City contract data. Keen Independent examined information for City purchases from January 1, 2015 through December 31, 2019. Chapter 3 outlines the data collection process and identifies the subindustries and geographic market area that were the focus of the study. Appendix C provides further documentation.

Conditions in the Central Louisiana marketplace. Chapter 4 summarizes information about the conditions within the Central Louisiana marketplace based on the quantitative and qualitative information collected in the study, including the study team's in-depth interviews, availability surveys and other research.

Five appendices provide supporting detail for quantitative analyses:

- Appendix E considers any barriers to entry and advancement into Central Louisiana industries for workers;
- Appendix F examines business ownership;
- Appendix G reviews information about access to capital;
- Appendix H analyzes outcomes for businesses in the local marketplace; and
- Appendix I discusses data sources for the quantitative analyses.

Appendix J presents comments from business owners and other individuals compiled through in-depth interviews and other research. Appendix K discusses existing business assistance available to firms in Central Louisiana. Appendix L provides the methodology for analysis of the local private sector construction market.

Availability analysis. Chapter 5 presents results of the survey of Central Louisiana businesses ("availability survey"). Appendix D includes additional documentation, including the survey instrument.

Utilization and disparity analyses for City contracts. Chapter 6 estimates the percentage of City contract dollars that went to different groups of businesses during the study period and compares those results to the availability benchmarks discussed in Chapter 5. Keen Independent presents results of this disparity analysis for minority-owned firms (by race and ethnicity) and for white women-owned companies.

The study team also reports utilization and availability results for all small businesses.

Conclusions and recommendations. Study conclusions and recommended actions for City consideration are provided in Chapter 7.

CHAPTER 2.
Legal Issues Regarding Business Assistance Programs

Throughout the country, state and local governments have enacted minority- and women-owned business enterprise programs for reasons including (a) to ensure that they are not engaged in active discrimination in their contracting; (b) to remedy specific identified past discrimination or its present effects in their marketplace based on a compelling governmental interest; and (c) to take affirmative steps to dismantle a system in which they were passive participants in private marketplace discrimination. Such programs can be subject to legal challenge.

In its *Croson* decision, the U.S. Supreme Court held the City of Richmond's "set-aside" action plan violated the Equal Protection Clause of the Fourteenth Amendment.[1] The U.S. Supreme 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 or its present effects, 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 City of Alexandria wishes to ensure that it is not an active or passive participant in discrimination against minority-owned or women-owned businesses.

A. Potential Legal Challenges to Government Programs to Assist Minority- and Women-Owned Firms

Any local or state government faces potential legal challenges to its targeted business programs. Different standards of legal review apply to MBE, WBE and SBE programs.

Federal court decisions concerning MBE programs. In 1989, the U.S. Supreme Court established substantial limitations on the ability of state and local governments to have MBE programs or any other programs benefitting a group based on race. The U.S. Supreme Court in City of *Richmond v. J.A. Croson Company* established "strict scrutiny" as the standard of review for race-conscious programs adopted by state and local governments.[2]

[1] 488 U.S. 469 (1989).

[2] *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

The strict scrutiny standard is the most stringent legal burden and threshold for satisfying and evaluating the validity of race-conscious programs under the U.S. Constitution short of prohibiting them altogether.

- A local government such as the City must thoroughly examine evidence to determine whether there is a *compelling governmental interest* in remedying specific past identified discrimination or its present effects in its marketplace.

  Based on court decisions, a governmental entity can enact a race-conscious program to remedy past or present specific identified discrimination in its marketplace only where it has actively discriminated in its award of contracts or has been a "passive participant" in a system of racial exclusion practiced, for example, by elements of the local construction industry.

  Without a finding of a compelling governmental interest and a strong basis in evidence of specific identified discrimination, local governments can only adopt measures for disadvantaged businesses if race is not the basis for any preferential treatment or considered in the eligibility for a program or for the award of contracts.

- A local government must also ensure that any program adopted is *narrowly tailored* to achieve the goal of remedying the identified discrimination.

  Courts consider several factors when determining whether a program is narrowly tailored. First, whether the local government has seriously considered workable "race-neutral measures," such as small business programs to remedy discrimination or address any barriers, is one of the factors considered by the courts.

Disparity studies examine the types of evidence approved by the U.S. Supreme Court and lower courts that have reviewed public programs to assist minority-owned businesses since the *Croson* decision. Federal courts have reviewed and approved the methodology used by Mr. Keen, which is the same as what is used in the City of Alexandria study.[3]

Federal court decisions concerning WBE programs. Some courts apply a more easily met standard of legal review — "intermediate scrutiny" — to gender-conscious programs.[4] However, this legal standard can vary among courts, as explained below.

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[3] *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199.

[4] See generally, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *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 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); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) ("exceedingly persuasive justification"); *Geyer Signal, Inc.*, 2014 WL 1309092; *Progressive Sec. Ins. Co. v. Foster*, 711 So. 2d 675 (La. 1998). (A classification that involves discrimination based on certain classes such as gender or illegitimacy will generally receive intermediate scrutiny. Under this level of review, to be upheld the classification must be substantially related to a legitimate state interest.)

The federal court system is composed of district courts, each within one of thirteen circuits that hear appeals of decisions from courts in their jurisdiction. Louisiana is within the Fifth Circuit Court of Appeals. Certain Federal Courts of Appeal, including the Fifth Circuit, apply intermediate scrutiny to gender-conscious programs.[5] Restrictions subject to intermediate scrutiny are permissible so long as they are narrowly tailored to serve a significant governmental interest.[6] 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.[7]

In sum, the types of analyses relevant to supporting a WBE program are similar to those for an MBE program. Keen Independent's utilization, availability, disparity and marketplace analyses for white women-owned firms in the City of Alexandria study parallel those for minority-owned firms.

Constraints in the State Constitution. Article I, Section 3 of the Louisiana Constitution provides that no law shall discriminate against a person because of race or sex.[8] The Louisiana Constitution, according to the courts, provides greater equal protection rights than that of the United States Constitution.[9] Therefore, any race- or gender-conscious programs enacted by state and local governments in Louisiana could also be challenged based on the Louisiana Constitution.

The Louisiana Supreme Court held that pursuant to the Louisiana Constitutional provision by its very terms, "It is irrelevant whether there is arguably a compelling state interest that justifies the racially discriminatory law, and once it is determined that a law discriminates against persons on the basis of race, there is no further inquiry."[10]

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[5] *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); *Progressive Sec. Ins. Co. v. Foster*, 711 So. 2d 675 (La. 1998). (A classification that involves discrimination based on certain classes such as gender or illegitimacy will generally receive intermediate scrutiny. Under this level of review, to be upheld the classification must be substantially related to a legitimate state interest.)

[6] *Serv. Emp. Int'l Union, Local 5 v. City of Hous*., 595 F.3d 588, 596 (5th Cir. 2010); *see, e.g., State v. Granger*, 982 So. 2d 779, 787-788 (La. 2008).

[7] *Id.; See generally, 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"); *Progressive Sec. Ins. Co. v. Foster*, 711 So. 2d 675 (La. 1998). (A classification that involves discrimination based on certain classes such as gender or illegitimacy will generally receive intermediate scrutiny. Under this level of review, to be upheld the classification must be substantially related to a legitimate state interest.)

[8] La. Const., Art. I, Sec. 3.

[9] *La. Associated Gen. Contractors, Inc. v. State of Louisiana, et al.*, 669 So. 2d 1185 (La. 1996).

[10] *Id.* (See discussion in Appendix B, Section D.3 of this report).

According to the Louisiana Supreme Court, when a law discriminates against a person by classifying him or her on the basis of race, it shall be "forbidden completely," regardless of the justification behind the racial discrimination.[11]

Federal courts interpreting the Louisiana Constitution are in accord. The Fifth Circuit Court of Appeals addressed this interplay between federal and state constitutions and held that "[u]nder the United States Constitution, classifications based on race are permissible if they are narrowly tailored to serve a compelling government interest. However, under the Louisiana Constitution, classifications based on race shall be repudiated completely, regardless of the justification."[12]

B. Legal Issues Concerning SBE Programs

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.[13] 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."[14]

Therefore, state and local governments can more easily defend programs for small businesses than programs focusing on minority- or women-owned firms, as eligibility for such programs is not based on race, ethnicity or gender of the business owner. When examining the constitutionality of programs, it appears that courts would presume such a law to be constitutional unless it fails the "rational basis test." A plaintiff challenging the statute has the burden of proving that there is no conceivable legitimate purpose, or that the law is not rationally related to it.

There appears to be no prohibitions on SBE programs in the state constitution.

C. Further Information

The law firm Holland & Knight LLP prepared a review of relevant legal standards and court cases for this study, which is provided in Appendix B of this report.

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[11] *Id.* at 1198; *see Louisiana Associated General Contractors, Inc. v. New Orleans Aviation Board*, 764 So. 2d 31, 32 (La. 1999).

[12] *Dean v. City of Shreveport*, 438 F.3d 448, 464 (5th Cir. 2006) (internal citations and quotations omitted).

[13] *See, e.g., Heller v. Doe*, 509 U.S. 312, 320 (1993); *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); *State v. Granger*, 982 So. 2d 779, 787-788 (La. 2008); *La. Associated Gen. Contractors, Inc. v. State of Louisiana, et al.*, 669 So. 2d 1185 (La. 1996).

[14] *See, e.g., Heller v. Doe*, 509 U.S. 312, 320 (1993); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988); *see also La. Associated Gen. Contractors, Inc. v. State of Louisiana, et al.*, 669 So. 2d 1185 (La. 1996).

CHAPTER 3.
City Contracts

Many components of the disparity study require data on City contracts and subcontracts as building blocks. As a first step in the availability research, for example, Keen Independent examined contracts and subcontracts to identify the geographic area from which the City draws contractors and vendors and the types of work involved in City contracts. The study team selected the geographic area and industries to be included in the availability survey and marketplace analyses based on this information. Keen Independent then used the contract data to perform the utilization and disparity analyses for the City.

Chapter 3 describes the study team's process for compiling and merging City contract and subcontract data. Chapter 3 consists of four parts:

A. Overview of City contracts;
B. Collection and analysis of City contract data;
C. Types of work involved in City contracts; and
D. Location of businesses receiving City contracts.

Appendix C provides additional detail concerning collection and analysis of contract data. (Unless otherwise specified, Keen Independent uses the terms "contracts," "procurements" and "purchases" interchangeably in this report.)

A. Overview of City Contracts

The disparity study analyzes City purchases of construction, professional services, goods and other services. Keen Independent obtained information about these procurements from Banner, the City's procurement financial system. City departments and consulting engineers retained by the City provided subcontract data on large construction and professional services contracts.

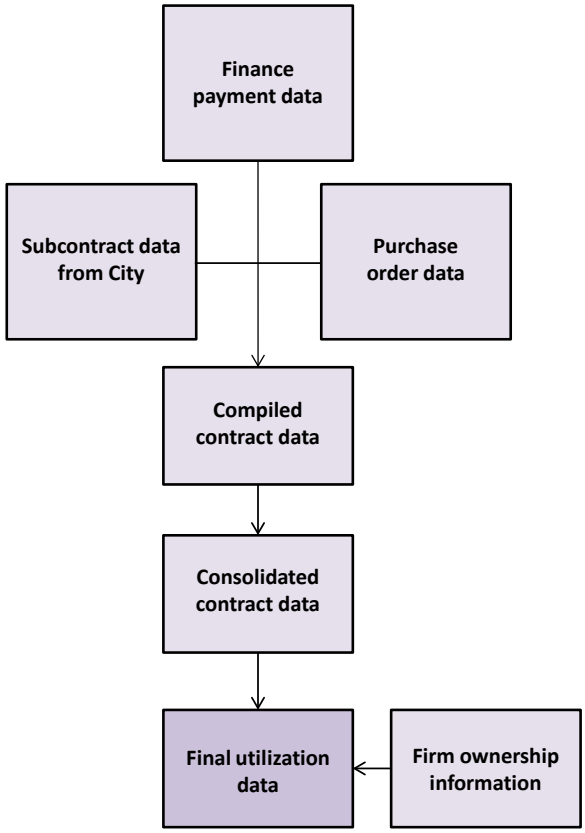
Keen Independent examined information for City purchases from January 1, 2015 through December 31, 2019.

Keen Independent focused on procurements paid through City funds and sought to exclude contracts using federal funds from agencies such as the U.S. Department of Transportation (USDOT) and the U.S. Department of Housing and Urban Development (HUD). Contracts awarded using funds from these federal agencies follow federal regulations that encourage use of minority- and women-owned firms (through the USDOT DBE Program, for example). Disparity studies for local governments typically exclude contracts for which such federal programs apply.

B. Collection and Analysis of City Contract Data

Figure 3-1 provides an overview of how Keen Independent developed data to determine the share of City contracts going to different groups of businesses.

Figure 3-1.
Collection of City contract data



Contracts. The City of Alexandria maintains contract information using its Banner system. Keen Independent examined information for contracts during the January 1, 2015 through December 31, 2019 study period.

Subcontracts. The City of Alexandria has no centralized electronic systems for compiling subcontract information. Those data came from individual City departments or consulting engineers retained by the City for specific projects.

Appendix C describes the contract data collection process in detail.

As shown at the bottom of Figure 3-1, Keen Independent also sought information about each individual firm receiving City contracts and subcontracts, including the race, ethnicity and gender of the business owner.

- Some of these data on firm characteristics came from information reported by individual City contractors and vendors in its vendor registration system.

- Because the analysis of minority- and women-owned firms include certified and non-certified companies, directories of certified MBEs, WBEs and disadvantaged business enterprises (DBEs) comprised only one source ownership information. Most of the data on firm characteristics were compiled through additional study team research. Appendix C describes sources of information on firm ownership.

Total procurements. Keen Independent received data for $164 million of City procurements for the January 1, 2015 through December 31, 2019 study period.

The study team only examined purchases that totaled more than $10,000 in payments for an individual purchase order (PO). Procurements below this amount were not included in the final database as they accounted for a very small portion of total contract dollars.

Types of procurements not included in a disparity study. Some types of purchases are typically outside the scope of a disparity study as they relate to non-businesses, regulated utilities, financial and insurance services, federally funded contracts or other atypical services. Non-businesses, including not-for-profit and membership organizations, are excluded as they have no "ownership"; the concept of whether they are minority- or majority-owned does not apply.

In addition, equipment and supplies typically purchased from a national market are not included as there are sometimes no local vendors available for such goods or service. Fire department vehicles, for example, are highly specialized and are often only provided by a few national companies.

For the above reasons, the study team made certain exclusions for purchases related to:

- Government agencies;
- Not-for-profits;
- Utilities;
- Banks;
- Colleges and universities;
- Insurance companies; and
- Products related to national markets (e.g., electrical equipment, police equipment supplies, firefighting equipment and office supplies).

Appendix C discusses these steps in more detail.

Calculation of retained prime contract dollars for each contract that involved subcontractors. The study team separated the dollars for a contract into those going to subcontractors and dollars retained by the prime contractor (sometimes referred to as "self-performed"). For professional services contracts, dollars were similarly separated into those going to subconsultants and those going to the prime consultant.

Keen Independent calculated the total dollars retained by the prime contractor by subtracting subcontractor dollars from the total contract value. For example, on a $10 million construction contract that had $4 million in subcontracts, the retained dollars for the prime contractor would be $6 million. This step is necessary to avoid double counting the subcontract dollars in the study team's utilization analyses.

Coding the type of construction, good or service provided. Keen Independent coded the primary type of work involved in each contract and subcontract. To do so, the study team:

- Examined the description of the work in the contract records; and

- Researched the primary type of work performed by the contractor or vendor.

When a contract or subcontract pertained to multiple types of work, Keen Independent coded it based on what appeared to be the predominant type of work or goods provided in that procurement.

C. Types of Work Involved in City Contracts

There were 1,680 contracts and subcontracts totaling $109 million in the utilization data for the City after exclusions discussed on the previous page. Figure 3-2 presents the final number and dollar value of City contracts included in the disparity study.

Figure 3-2.
Number and dollars of City procurements, January 2015–December 2019

Type of work	Number of procurements	Dollars ($1,000s)
Construction	442	$ 59,602
Professional services	180	12,887
Goods	641	22,958
Other services	417	13,833
Total	1,680	$ 109,280

Note: Numbers may not add due to rounding.
Source: Keen Independent from City contract data.

Construction contract dollars. Figure 3-3 presents information about contract dollars for different types of work on City construction contracts. General road construction, electrical work and underground utilities represent more than the 50 percent of City construction contract dollars.

Dollars for prime contractors are based on the portion of the contract that is self-performed (i.e., not subcontracted out). As previously mentioned, the construction contracts examined in Figures 3-3 through 3-6 do not include those using USDOT or HUD funds.

Figure 3-3.
City construction contract dollars by type of work, January 2015–December 2019

Type of work	Total Dollars (1,000s)	Total Percent
General road construction and widening	$ 12,174	20.4 %
Electrical work	11,570	19.4
Underground utilities (water, sewer and utilities lines)	8,288	13.9
Office and public building construction	4,804	8.1
Water well drilling and servicing	4,645	7.8
Excavation, site prep, grading and drainage	3,892	6.5
Plumbing, heating and air conditioning	1,568	2.6
Bridge and elevated highway construction	1,532	2.6
Concrete flatwork (including sidewalk, curb and gutter)	999	1.7
Painting work	756	1.3
Sports and recreational facility construction	717	1.2
Wrecking and demolition	634	1.1
Concrete work	573	1.0
Roofing	415	0.7
Pavement marking	404	0.7
Other - construction	6,633	11.1
Total	$ 59,602	100.0 %

Source: Keen Independent from City contract data.

Professional services contract dollars. As shown in Figure 3-4, architecture and engineering represented most dollars of City professional services contracts.

Figure 3-4.
City professional services contract dollars by type of work,
January 2015–December 2019

Type of work	Total Dollars (1,000s)	Total Percent
Architecture and engineering	$ 12,091	93.8 %
Surveying and mapping	643	5.0
Construction management	84	0.7
Other - professional services	69	0.5
Total	$ 12,887	100.0 %

Source: Keen Independent from City contract data.

Goods procurement dollars. Petroleum and petroleum products, cars and trucks, and heavy construction equipment purchases accounted for the most dollars of City goods purchases, as displayed in Figure 3-5. Purchases typically made from national markets were excluded.

Figure 3-5.
City goods contract dollars by type of work, January 2015–December 2019

Type of work	Total Dollars (1,000s)	Total Percent
Petroleum and petroleum products	$ 7,923	34.5 %
Cars and trucks	7,293	31.8
Heavy construction equipment	4,882	21.3
Tires	1,075	4.7
Clothing and uniforms	388	1.7
Office equipment	232	1.0
Signs and advertising specialties	213	0.9
Lighting equipment	147	0.6
Horticultural materials and supplies	50	0.2
Building materials and supplies	8	0.0
Food	8	0.0
Other goods	740	3.2
Total	$ 22,958	100.0 %

Source: Keen Independent from City contract data.

Other services procurement dollars. Figure 3-6 examines purchases of services other than professional services. These other services procurements totaled about $14 million. Staffing services and equipment repair services were the largest areas of City spending during the study period.

Figure 3-6.
City other services contract dollars by type of work, January 2015–December 2019

Type of work	Total Dollars (1,000s)	Total Percent
Staffing services	$ 5,002	36.2 %
Equipment repair services	2,676	19.3
Tree trimming services for public utility lines	2,419	17.5
Vehicle repair services	1,951	14.1
Landscape contracting and maintenance	996	7.2
Building cleaning and maintenance	287	2.1
Other - services	502	3.6
Total	$ 13,833	100.0 %

Source: Keen Independent from City contract data.

D. Location of Businesses Receiving City Contracts

The marketplace and availability analyses in this study focus on businesses located within the "relevant geographic market area" for City contracts. Keen Independent used the federally defined Kisatchie Delta Regional Planning & Development District, which the study team refers to as "Central Louisiana," as a preliminary definition of the relevant geographic market area. This area includes Avoyelles, Catahoula, Concordia, Grant, La Salle, Rapides, Vernon and Winn parishes, as shown in Figure 3-7

Keen Independent then determined whether firms with locations in Central Louisiana accounted for most of the dollars of City spending, after the exclusions discussed on page 3 of this chapter.

Keen Independent examined the geographic distribution of vendors receiving City dollars for construction, professional services, goods and other services contracts and subcontracts. The study team used the following steps:

- For each prime contractor and subcontractor, the study team determined whether the company had a business establishment in the Central Louisiana area based upon City vendor records and additional research.
- Keen Independent then added the dollars for firms with Central Louisiana locations and compared that sum with dollars for all companies.

Figure 3-7.
Central Louisiana

The analysis described above found that 77 percent of combined City contract dollars went to firms with locations in the Central Louisiana area (after excluding purchases typically made from a national market). Figure 3-8 presents results by industry.

Note that for "other construction," "other professional services," "other goods" and "other services" contracts, only those purchases made with firms that had locations in Central Louisiana were included in the procurements examined in this study.

Figure 3-8.
Dollars of City prime contracts and subcontracts by location of firm, January 2015–December 2019

Note:

Numbers may not add due to rounding.

Source:

Keen Independent from City contract data.

	Dollars ($1,000s)	Percent of dollars
Construction		
Central Louisiana	$ 46,507	78 %
Other regions	13,095	22
Total	$ 59,602	100 %
Professional services		
Central Louisiana	$ 8,693	67 %
Other regions	4,194	33
Total	$ 12,887	100 %
Goods		
Central Louisiana	$ 17,788	77 %
Other regions	5,171	23
Total	$ 22,958	100 %
Other services		
Central Louisiana	$ 11,592	84 %
Other regions	2,241	16
Total	$ 13,833	100 %
Total		
Central Louisiana	$ 84,579	77 %
Other regions	24,701	23
Total	$ 109,280	100 %

Based on these results, Keen Independent determined that Central Louisiana is an appropriate definition of the relevant geographic market area for City construction, goods, professional services and other services contracts.

CHAPTER 4.
Conditions in the Central Louisiana Marketplace

Keen Independent analyzed conditions in the Central Louisiana marketplace to examine whether there are disparities in outcomes for businesses owned by people of color and women and whether any barriers might affect opportunities for contracting with the City of Alexandria.

The study team analyzed quantitative and qualitative information about the Central Louisiana marketplace.[1] The study team focused on the construction, professional services, goods and other services industries, as those sectors are most involved in City contracts ("study industries").[2]

Keen Independent organized Chapter 4 to provide an overview of different aspects of market conditions in Central Louisiana:

A. Composition of the Central Louisiana workforce and business owners;
B. Entry and advancement within study industries;
C. Business ownership;
D. Access to capital, bonding and insurance;
E. Success of businesses; and
F. Conclusions concerning the Central Louisiana marketplace.

Quantitative information in Chapter 4 comes from U.S. Census Bureau data, other federal sources and the availability survey conducted as part of this study. Appendices E through I provide supporting information.

The study team conducted in-depth interviews, an availability survey and other research that obtained comments from business owners and other individuals. Keen Independent also received input through the study website, dedicated email address and a telephone hotline. Appendix J provides a summary of the qualitative information collected in the study.

[1] In Chapter 4, "Central Louisiana marketplace" refers to the relevant geographic market area for this study, based on Keen Independent research about where firms obtaining City contracts are located. This area includes Avoyelles, Catahoula, Concordia, Grant, La Salle, Rapides, Vernon and Winn parishes.

[2] Appendix I identifies the types of businesses grouped into each study industry when using American Community Survey data.

A. Composition of the Central Louisiana Workforce and Business Owners

Keen Independent examined the number of businesses owned by women and people of color.

Census data on business ownership. Census Bureau data from the American Community Survey show representation of minorities and women among study industry business owners and overall composition of the Central Louisiana workforce. Study industries are construction, professional services, goods and other services. (See Appendices E and F for more information.)

People of color. The study team examined the representation of minorities among workers and business owners in the Central Louisiana marketplace based on data from the U.S. Census Bureau. Figure 4-1 presents demographic characteristics of the labor force as a whole, for business owners in the study industries and for business owners in study industries and all other industries. Based on the ACS data, people of color were about 32 percent of workers in Central Louisiana:

- African Americans were 25 percent;
- Asian Americans were 1 percent;
- Hispanic Americans were 4 percent; and
- Native Americans and other minorities were 1 percent of total workers.

The ACS data also include information about whether an individual is a business owner. Based on these data, people of color were about 22 percent of Central Louisiana construction, professional services, goods and other services business owners. African Americans and Asian Americans made up a much smaller share of business owners in these industries than what might be expected based on their representation in the overall workforce.

Figure 4-1.
Demographic distribution of business owners and the workforce in Central Louisiana, 2014–2018

Central Louisiana	Workforce in all industries	Business owners in study industries	Business owners in all other industries
Race/ethnicity			
African American	25.2 %	14.5 % **	9.0 % **
Asian American	1.4	0.9 **	2.7 **
Hispanic American	3.9	3.9	1.5 **
Native American or other minority	1.1	2.1 **	1.2
Non-Hispanic white	68.4	78.5 **	85.6 **
Total	**100.0 %**	**100.0 %**	**100.0 %**
Gender			
Female	47.2 %	40.1 % **	33.9 % **
Male	52.8	59.9 **	66.1 **
Total	**100.0 %**	**100.0 %**	**100.0 %**

Note: ** Denotes that the difference in proportions between workforce and business owners in the specified industries for the given race/ethnicity/gender group is statistically significant at the 95% confidence level.

"All other industries" includes all industries other than construction, professional services, goods and other services.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata Sample (PUMS). The 2014–2018 raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

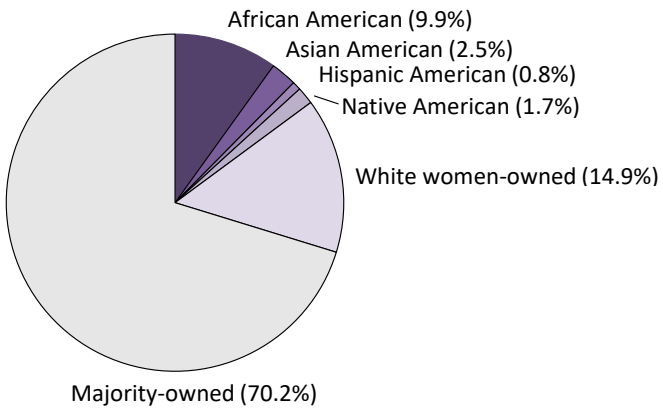
Women. Figure 4-1 also shows that women comprised 47 percent of the Central Louisiana marketplace workforce, but only 40 percent of study industry business owners.

Firms available for City contracts. Keen Independent conducted a survey of businesses located in the Central Louisiana marketplace that performed the types of construction, professional services and other services and supplied the types of goods accounting for most of the dollars of City contracts during the study period. The study team attempted to contact each company in the Central Louisiana area, successfully reaching 601 businesses.[3]

Of the companies in Central Louisiana indicating qualifications and interest in City contracts, about 30 percent were minority- or women-owned businesses. (Chapter 5 and Appendix D further explain these results.) The MBE/WBE availability in the Central Louisiana area indicates a somewhat smaller MBE/WBE business community than in nearby areas.[4]

Figure 4-2.
Number of businesses in the Central Louisiana marketplace available for City contracts

Source:
Keen Independent 2020 availability survey.



B. Entry and Advancement within Study Industries

The analysis of the Central Louisiana workforce discussed above was for all industries in the area. The study team also examined the representation of minorities and women among workers in the construction, professional services, goods and other services industries. Additional data for the construction industry allowed Keen Independent to review whether people of color and women were employed in specific trades and advanced into supervisory and managerial roles. Appendix E presents detailed results.

Importance of work experience in an industry to business ownership. In general, certain minority groups and women were underrepresented among workers in certain study industries.

[3] The study team attempted to reach each firm on the list. Because there was no sampling of firms when preparing the list of firms to be contacted in the availability survey, this approach is sometimes called a "custom census." The study team contacted companies via email and through telephone calls. Companies could also complete the survey through a link on the disparity study website (which allowed any firm to be surveyed). Through these methods, the study team successfully contacted more than 600 establishments in the marketplace. After screening firms for qualifications and interest in City procurement and other factors, there were 121 firms included in the availability analysis.

[4] For example, the share of local firms that are MBE/WBEs in the Baton Rouge metropolitan area is about 41 percent based on Keen Independent's 2019 disparity study for the City of Baton Rouge/Parish of East Baton Rouge. Availability results include certified and non-certified firms.

Additionally, people of color and women appear to face barriers regarding advancement to supervisory or managerial positions in the Central Louisiana construction industry.

Because individuals who form businesses typically work in their respective industries before starting businesses, any barriers related to entry or advancement may result in fewer minorities and women owning businesses in those industries.

Quantitative information concerning entry into construction, professional services, goods and other services industries. People of color accounted for about 32 percent of the Central Louisiana workforce and women represented about 47 percent of the Central Louisiana workforce. Opportunities for employment did not appear to be equal across industries, however.

Research concerning the construction industry provides some examples.

- The Central Louisiana construction workforce was disproportionately white and male.

- African Americans, Hispanic Americans, Native Americans and women were underrepresented in the Central Louisiana construction workforce compared to the overall workforce. African Americans comprised just 11 percent of the Central Louisiana construction workforce compared to 26 percent of all workers. In the local construction industry, Hispanic Americans (3%) and Native Americans (less than 1%) made up a smaller share than their portion of workers in all other industries (4% and 1%, respectively). About 8 percent of construction workers were women compared with the 50 percent of workers in all other industries who were women.

- The representation of people of color in certain construction trades was especially low compared to representation in the construction industry as a whole. Electricians and construction supervisors had especially low minority representation, for example. Additionally, most construction trades appear to be at least 95 percent men.

Keen Independent identified underrepresentation of women and racial minorities in other study industries. For example, women constituted a much smaller portion of the Central Louisiana professional services and other services workforces when compared to their representation among workers in all other industries. African Americans were underrepresented in the other services industry.

The quantitative results indicate that there is not a level playing field for minorities and women to enter and try to advance as employees in the construction and other services industries in Central Louisiana. Women in the professional services industry might face similar barriers. This reduces the number of women and people of color who are potential business owners.

Underrepresentation of certain minority groups and women as employees in an industry — particularly in supervisory and managerial roles — may also perpetuate any beliefs or stereotypical attitudes that minority- or female-owned businesses may not be as qualified as majority-owned businesses. Any such beliefs may also be making it more difficult for minority and female business owners to win work in the Central Louisiana marketplace.

C. Business Ownership

Even if there were no barriers to entering certain industries as an employee, there may be unequal opportunity for people of color and women to start a business. Research studies across the country have found that the race, ethnicity and gender of someone working in an industry affects opportunities for business ownership. Figure 4-3 summarizes how courts have used such information — particularly in a form of statistical examination called "regression analysis" — when considering the evidentiary support for a public agency's race- or gender-conscious business assistance program.

Quantitative information about business ownership. The study team used 2014–2018 ACS data to examine whether there were differences in business ownership rates between minorities and non-minorities and between women and men in the Central Louisiana construction, professional services, goods and other services industries.

People of color in the goods industry and women in the other services industry were less likely to own a business than non-Hispanic whites and men. These differences were not statistically significant after controlling for factors such as education, age and home ownership. However, some of the factors that affect the likelihood of business ownership are related to race and gender, such as home ownership.

Figure 4-3.
Use of regression analyses of business ownership in defense of targeted business programs

State and federal courts have considered differences in business ownership rates between minorities and women and non-Hispanic whites and males when reviewing the constitutionality of race- and gender-conscious programs. For example, disparity studies in California, Illinois and Minnesota used regression analyses to examine the impact of race, ethnicity and gender on business ownership in the construction and engineering industries. Results from those analyses helped determine whether differences in business ownership exist between minorities and women and non-Hispanic white males after statistically controlling for race- and gender-neutral characteristics. Those analyses, which were based on Census data, were included in materials submitted to the courts in subsequent litigation concerning the implementation of the Federal DBE Program.

Appendix F presents detailed results from the quantitative analyses of business ownership rates.

Qualitative information about business ownership. Appendix J includes comments from many firm owners regarding the difficulties starting and sustaining a business, including from female business owners. Factors contributing to business owners' successful entry and advancement in their respective industries include their prior experience in the field, business acumen, access to capital, cash flow, quality employees and other factors relating to business entry, growth and sustainability. For example:

- A white female owner of a specialty services firm reported that there was a "learning curve" to understanding the operations and purchasing side of the industry. She added that she prepared herself for what she described as "a man's world." She remarked, "You don't get any training … [it's] sink or swim."

- An African American male co-owner of a special services firm commented that the start-up process was difficult, particularly as an African American owner of a small business. He attributed these race-based barriers to the dynamics of American society that continue to systemically disadvantage minorities and women. "It's two different processes," he remarked, referring to the disparities between how white men and minority people are treated.

- An African American male part owner of a construction-related firm reported, "This is a small market. For the volume of work here, there is an abundance of competition."

- The representative of a chamber commented, "The biggest challenge for a business owner would be their access to capital, which is mostly the case for minority-owned businesses."

D. Access to Capital, Bonding and Insurance

Access to capital is one of the key factors examined when researchers study business formation and success. Capital is required to start companies, so barriers to accessing capital can affect the number of minorities and women who are able to go into business. Such barriers may also affect the likelihood of business survival or expansion.

There is evidence that people of color and women face certain disadvantages in accessing the capital necessary to start, operate and expand businesses. In addition, minorities and women start business with less capital (based on national data). Studies have demonstrated that lower start-up capital adversely affects prospects for those businesses.

Keen Independent examined whether minority and female business owners (and potential business owners) have access to capital that is comparable to that of non-minorities and men. The study team also reviewed information about whether minority- and women-owned construction firms face any barriers in obtaining bonding, which is closely related.

Quantitative information about homeownership and mortgage lending. Wealth created through homeownership can be an important source of funds to start or expand a business. Barriers to homeownership or home equity can affect business opportunities by limiting the availability of funds for new or expanding businesses.

Keen Independent analyzed 2014–2018 American Community Survey data to determine if there were any differences in homeownership in the Central Louisiana marketplace by racial and ethnic groups. The study team also examined the potential impact of race and ethnicity on mortgage lending in Central Louisiana based on Home Mortgage Disclosure Act (HMDA) data for 2013, 2017 and 2018.

Key results include:

- Fewer people of color in Central Louisiana owned homes when compared with non-minorities. African American and Native American homeowners also tended to have lower home values than non-Hispanic white homeowners.

- High-income African American, Hispanic American and Native American households applying for conventional home mortgages in the Central Louisiana area were more likely than high-income non-Hispanic whites to have their applications denied.

- In 2018, some racial and ethnic minority groups were about twice as likely as non-Hispanic whites to have subprime mortgage loans, a form of potential predatory lending and a barrier to business startup and long-term growth.

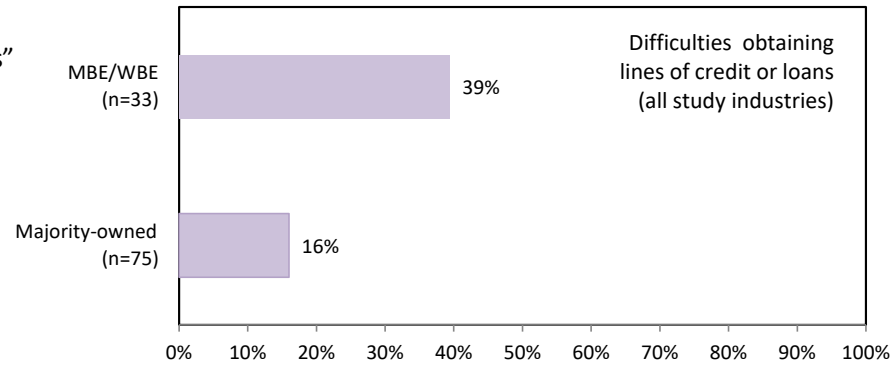
Quantitative evidence indicates disparities in homeownership and home mortgage lending for people of color. Any past discrimination against minorities that affected the ability to purchase and stay in homes could have long-term impacts on the home equity available to start and expand businesses, access to business credit for business owners and access to bonding for construction business owners.

Quantitative information about business credit. Any race- or gender-based barriers in the application or approval processes of business loans could also affect the formation and success of minority- and women-owned businesses.

As part of the availability surveys with Central Louisiana businesses conducted in 2020, Keen Independent asked questions related to potential barriers in the local marketplace. The interviewer introduced these questions with the following: "Finally, we're interested in whether the company has experienced barriers or difficulties associated with business start-up or expansion, or with obtaining work. Think about your experiences in the past five years in Central Louisiana as you answer these questions." Respondents were then asked about specific potential barriers or difficulties. For each potential barrier, the study team examined whether responses differed between minority-, women- and majority-owned firms.

The first question was, "Has your company experienced any difficulties in obtaining lines of credit or loans?" Due to small sample size, responses from minority- and women-owned firms were combined into a single category. As shown in Figure 4-4, 39 percent of MBEs and WBEs reported difficulties accessing business credit compared with only 16 percent of majority-owned firms.

Figure 4-4.
Percent responding "yes" to, "Has your company experienced any difficulties in obtaining lines of credit or loans?" for MBEs, WBEs and majority-owned firms qualified and interested in public sector work



Source: Keen Independent, 2020 availability surveys.

Qualitative information about access to capital and bonding. Keen Independent collected qualitative information about access to capital and bonding for businesses through in-depth interviews, an availability survey and other means.

Many firm owners reported that obtaining financing was important in establishing and growing their businesses (including financing for working capital and for equipment) and surviving poor market conditions. Small business owners indicated that access to financing was a barrier in general and especially when starting and initially growing.

- For example, a representative of a chamber of commerce commented, "Having access to capital and or a loan can be difficult for a small business to gain unless they have a solid business plan and good credit."

- A white woman business owner indicated that access to financial backing is an advantage for larger businesses. "I don't have the ability to go to the bank and borrow as much money," she remarked.

Some comments pertained to how bonding limits opportunities for construction companies:

- A white owner of a construction-related firm indicated that bonding was the primary issue for his firm. His firm cannot afford to bond projects over $1 million, and therefore does not bid on City projects.

- In another instance, a representative of a trade organization reported that there was a lack of assistance with bonding. He suggested municipality/agency owned/sponsored insurance to make bonding easier. He urged the City to "forego the bonding requirement altogether …."

Effects of unequal access to capital and bonding. Potential barriers associated with access to capital and bonding may affect outcomes for MBE/WBEs compared to majority-owned firms.

- Well-capitalized businesses are, in general, more successful than other businesses.

- For state and local government construction contracts and certain other contracts, bonding is required to bid as a prime contractor.

- A company must also have considerable working capital to complete certain types of public sector contracts or subcontracts, especially if there are delays in payment.

- Any barriers to accessing capital can affect a company's ability to obtain a bond of a certain size. There is evidence that MBE/WBEs do not have the same access to capital as other firms.

- There is quantitative evidence that, on average, people of color in the Central Louisiana marketplace do not have the same personal access to capital as non-minorities. Personal net worth and financial history can affect access to business loans and bonding in the Central Louisiana marketplace.

E. Success of Businesses

Keen Independent completed quantitative and qualitative analyses that assessed whether the success of MBE/WBEs differs from that of majority-owned businesses in the Central Louisiana construction, professional services, goods and other services industries. The study team examined:

- Rates of business closures, expansion and contraction;
- Business receipts and earnings;
- Relative bid capacity; and
- The proportion of MBEs, WBEs and majority-owned firms in the marketplace indicating that they have experienced specific barriers in the marketplace (from the 2020 availability survey).

The study team also compiled qualitative information (see Appendix J).

Quantitative analysis of business closure, expansion and contraction. Based on U.S. Small Business Administration analyses of Louisiana for 2002 and 2006, African American-, Hispanic American- and Asian American-owned firms were more likely to close than non-Hispanic white-owned businesses. African American- and Asian American-owned firms were less likely to expand than firms owned by non-Hispanic whites. In Louisiana, Asian American-owned business were most likely to contract.

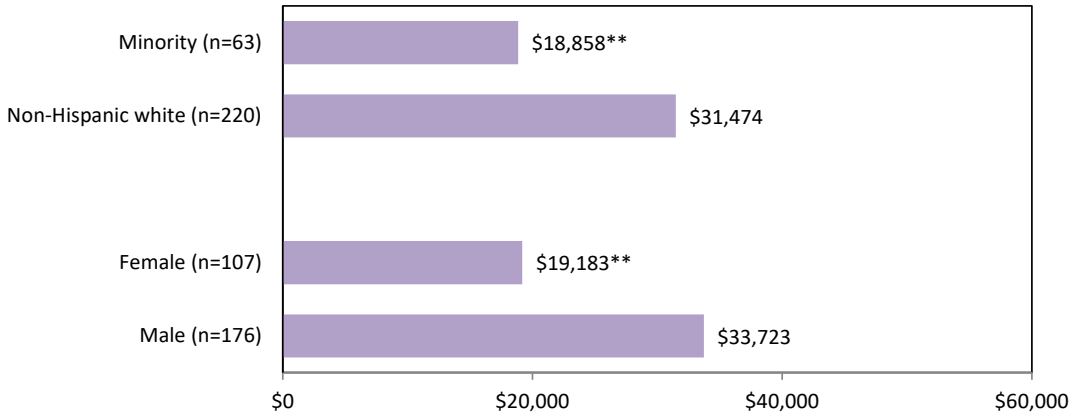
Quantitative analysis of business receipts and earnings. Keen Independent examined business earnings from federal data sources and the 2020 availability surveys with Central Louisiana businesses. Most data sources indicated disparities in annual revenue for minority- and women-owned firms compared with majority-owned firms.

As an example, Figure 4-5 shows average earnings for minority and female business owners in the Central Louisiana study industries using 2014 through 2018 data from the American Community Survey. On average, earnings among people of color who owned businesses ($18,858) were less than non-minority business owners ($31,474). This difference was statistically significant.[5]

Using the same data, the study team found that women business owners earned less than businesses owned by men in the Central Louisiana study industries ($19,183 compared with $33,723). This difference was also statistically significant.

[5] "Statistically significant" means that one can be confident that random chance in the sampling of the data can be rejected as the cause of the apparent difference.

Figure 4-5.
Mean annual business owner earnings in all study industries in Central Louisiana, 2014–2018



Note: ** Denotes statistically significant differences between groups at the 95% confidence level.
The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2018 dollars.

Source: Study team from 2014–2018 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

The study team further examined whether education, age or other personal characteristics compiled in the American Community Survey could explain the large differences in business earnings between different groups of business owners. Regression analysis is a statistical technique that can isolate the relationships between multiple characteristics and some quantity of interest, such as business earnings, at the same time. This analysis was used to research whether racial and gender differences in earnings remained after accounting for other personal characteristics such as age and education.

After controlling for race- and gender-neutral factors, people of color earned less than similarly situated non-Hispanic whites and women earned less than similarly situated men in the Central Louisiana study industries (see Appendix H for detailed results).

Data from availability surveys conducted for this study showed that across the Central Louisiana study industries, MBEs and WBEs were more likely to be low-revenue firms (annual revenue less than $500,000) when compared with majority-owned firms.

Quantitative analysis of telephone survey results concerning potential barriers. As described previously in this chapter, Keen Independent's availability survey with Central Louisiana businesses included questions about whether firms had experienced barriers or difficulties associated with starting or expanding a business. Relatively more minority- and women-owned businesses than majority-owned firms faced difficulties related to the following:

- Being prequalified for work;
- Insurance requirements;
- Large project size;
- Learning about bid opportunities with the City of Alexandria;
- Learning about bid opportunities in the private sector;
- Learning about subcontracting opportunities;
- Receiving prompt payment from the City of Alexandria; and
- Receiving payment from other customers.

Majority-owned businesses were more likely than MBE/WBEs to report difficulties in receiving payment from prime contractors and difficulties obtaining approval from inspectors or prime contractors.

Quantitative analysis of the utilization of MBEs and WBEs as contractors and design firms on non-City contracts. The study team compiled data on use of MBE/WBE construction firms as contractors and design firms on non-City construction projects in Central Louisiana. Keen Independent purchased data from Dodge Data & Analytics on construction and design projects in the local marketplace between 2017 and 2019.

The analysis of these data are as follows:

- The analysis indicated that 9 percent of the prime contracts dollars for private sector and non-City public sector construction contracts similar to City construction went to minority-owned firms, above the availability of MBEs to perform this work (0.2%).
- About 0.2 percent of the prime contracts dollars for private and other public sector construction contracts went to women-owned firms, well below the availability of WBEs to perform this work (15%).
- None of the design contract dollars for these projects went to MBE/WBEs, below what might be expected based on the availability of minority- and women-owned design firms to complete this work (12.5%).

Qualitative information about success of businesses. In-depth personal interviews, comments from the availability survey and other information sources provided information about the success of businesses in the Central Louisiana marketplace and any barriers that business owners face.

Importance of business relationships. Long-standing relationships are an important factor in finding opportunities to bid on work according to many business owners. Older firms' relationships cause barriers for some new firms. Comments include the following:

- One representative of a trade organization reported that, "the more contacts and relationships, the better chance of the prime calling on the sub to submit a bid and contract with them."

- Several interviewees also reported that having strong relationships directly affected other factors that influence firms' ability to bid on work, such as financing.

The effects of "good ol' boy" networks in the marketplace. Many minority, female and white male interviewees reported the presence of a "good ol' boy" network in the Central Louisiana marketplace that negatively affects opportunities for minority- and women-owned firms. For example:

- One white woman representative of a firm commented that when a business within the "good ol' boy" network bids on a contract, "there is no reason to bid on it, or you could waste time and money bidding on that project." She later indicated that it may even be possible for those firms to receive insider information during bids, such as the budget that the client is looking for.

- An African American co-owner of a specialty services firm indicated that businesses within the "good ol' boy" network were also "automatically included" and "treated different" when seeking work with the City of Alexandria. He added that these firms are automatically given jobs without the need for the bidding process and are favored regarding paperwork and contract renewals.

Disadvantages working with larger prime contractors. For many of the reasons discussed above, small businesses including MBE/WBEs said that it was difficult to establish good working relationships with prime contractors. For example:

- Numerous firm representatives reported that primes usually know who they want to work with from the beginning based on their established relationships, making it harder for smaller and younger firms to subcontract on public projects.

- Some firm representatives also indicated that they tend to look at a limited pool of firms to subcontract based on their previous work experience with them.

In addition, business owners and managers reported that public agency contracting processes and requirements often put small businesses at a disadvantage when competing for public sector work.

- One white male owner of a specialty services firm remarked that, although licensing is necessary, the City has overly restrictive licensing requirements that create barriers to working with the City.

- Many firms also indicated that certain City requirements, such insurance and bonding, are the biggest issues they run into when seeking contracts with the City of Alexandria.

Evidence of stereotyping and other race and gender discrimination. In the in-depth interviews, availability survey and other information the study team analyzed as part of the study, some interviewees indicated difficulties for minorities and women other than those associated with being a small business. For example, there was some evidence that some prime contractors or customers held negative stereotypes concerning minority- and women-owned firms.

- In one specific case, a Hispanic woman owner of a construction-related firm commented that she did face direct discrimination and harassment in the workplace due to her gender while she was on the job.

- When asked to describe his experiences, an African American owner of a specialty services firm reported that the same issues of racial discrimination that affect the nation "trickle down" to the marketplace in Alexandria. He added that even if his firm had better qualifications, it was more likely for a firm owned by a white man to get a contract.

There were also instances in which firm representatives reported that they were not aware of discrimination within the marketplace or had never experienced it first-hand.

F. Conclusions Concerning the Central Louisiana Marketplace

As discussed in this chapter and supporting appendices, there is quantitative and qualitative information suggesting that there is not a level playing field for minority- and women-owned businesses in the Central Louisiana construction, professional services, goods and other services industries. Some of these disadvantages appear to be common across small businesses, but there is evidence of additional barriers for people of color and women.

This context is important when considering results of the availability analysis for City contracts (Chapter 5) and utilization and disparity analyses for City contracts (Chapter 6).

CHAPTER 5.
Availability Analysis

Disparity analyses compare the percentage of a public agency's contract dollars going to different groups of firms with what might be anticipated given the relative availability of those groups for those contracts. Chapter 5 provides the availability benchmarks for City of Alexandria procurements. These availability results are then used in Chapter 6 when comparing utilization and availability of minority- and women-owned firms in City contracts.

Chapter 5 describes the study team's availability analysis in seven parts:

A. Overview;
B. Definitions of MBEs, WBEs, majority-owned firms and small businesses;
C. Information collected about businesses and their availability for City contracts;
D. Businesses included in the availability database;
E. Availability calculations on a contract-by-contract basis;
F. Overall availability results; and
G. Strengths of the Keen Independent approach to calculating availability benchmarks.

Appendix D provides supporting information.

A. Overview

Keen Independent performed a survey of firms in Central Louisiana[1] to conduct the availability analysis. Keen Independent surveyed firms that were identified on business lists in lines of work relevant to City contracts. There was no "sampling" of firms when preparing the list of firms to be contacted in the availability survey. The study team produced a database of 121 firms expressing qualifications and interest in City contracts after screening all businesses responding to the survey.

To develop the overall availability benchmarks, Keen Independent analyzed the number of MBEs, WBEs and other firms available for each City contract examined during the study period. The study team used information collected in the availability survey to conduct this contract-by-contract analysis. For example, if there were 10 firms available for a specific procurement and one was a white woman-owned company, WBE availability for that procurement would be 10 percent.

[1] As discussed in Chapter 3, "Central Louisiana" for purposes of this study is defined as Avoyelles, Catahoula, Concordia, Grant, La Salle, Rapides, Vernon and Winn parishes. These parishes correspond to the Kisatchie-Delta Regional Planning and Development District (State Planning District 6) that is recognized by the State and the federal government.

After performing the availability analysis for each contract, Keen Independent aggregated the results into overall benchmarks for each group. One could not simply add up the results and divide by the number of procurements to determine an "average availability" since some procurements were very large (and more important in the calculation) and some were very small. Instead, Keen Independent calculated a "weighted average" of MBE/WBE availability (for each race, ethnicity group and gender) where the weight was the relative size of the individual procurement compared with the total procurement dollars examined.

Using this approach to calculating MBE/WBE availability for City procurements is more supportable than using a simple "head count" of MBE/WBEs (i.e., simply calculating the percentage of all Central Louisiana businesses that are owned by people of color and women). The balance of Chapter 5 explains each step in the analysis and the results.

Keen Independent's method of examining availability is sometimes referred to as a "custom census," which has been accepted in federal court. The study team added considerable sophistication to the custom census approaches that have been favorably reviewed in court cases (see Appendix B). Figure 5-1 summarizes characteristics of Keen Independent's approach to examining availability.

Figure 5-1.
Summary of the strengths of
Keen Independent's "custom census" approach

Federal courts have reviewed and upheld "custom census" approaches to examining availability, as described in Appendix B.

Compared with some other previous court-reviewed custom census approaches, Keen Independent added several layers of screening to determine which businesses were potentially available for State procurements.

For example, the Keen Independent analysis included discussions with businesses about interest in public sector work with the City, whether they had bid on or performed similar work in the past and contract role — items not included in some of the previous court-reviewed custom census approaches.

Keen Independent also analyzed the sizes of contracts and subcontracts that businesses have bid on or performed in the past (referred to as "bid capacity" in this analysis).

B. Definitions of MBEs, WBEs, Majority-Owned Firms and Small Businesses

The following definitions of MBEs, WBEs and majority-owned firms are useful background before explaining the steps to the availability analysis. Keen Independent also examined availability of small businesses of any ownership. The definition of "small business" is also described below.

MBE, WBE and majority-owned firms. The availability benchmarks use the same definitions of minority- and women-owned firms (MBE/WBEs) as other components of the disparity study (see Chapter 1 for a discussion of racial and ethnic groups included in minority-owned firms). A majority-owned firm is a business that is not minority- or women-owned.

All MBE/WBEs, not only certified firms. When availability results are used as a benchmark in the disparity analysis, all minority- and women-owned firms are counted as such whether or not they are certified.

- Analyzing the availability and utilization of minority- and women-owned firms regardless of certification status allows one to assess whether there are disparities affecting all MBE/WBEs and not just certified companies.

- Moreover, the study team's analyses of whether MBE/WBEs face disadvantages should include the most successful, highest-revenue MBE/WBEs, which might not be eligible for some types of certifications because of their size.[2]

- Courts that have reviewed disparity studies have accepted analyses based on the race, ethnicity and gender of business ownership rather than on certification status.

Firms owned by minority women. Businesses owned by minority women are included with the results for each minority group. "WBEs" in this report refers to non-Hispanic white women-owned businesses. This definition of WBEs gives the City of Alexandria information to answer questions such as whether the work that goes to MBE/WBEs disproportionately goes to businesses owned by non-Hispanic white women. Keen Independent's approach is consistent with court decisions that have considered this issue, as discussed in Appendix B of this report.

Small businesses. Keen Independent also performed availability analysis for small businesses. A small business is a firm with revenue below the U.S. Small Business Administration size standards. The U.S. SBA sets revenue ceilings for each six-digit NAICS code (or, for some industries, a total number of employees that is below the U.S. SBA size standard). For example, at the time of this report, an electrical contractor was considered a small business if it had average annual revenue of no more than $16.5 million.

C. Information Collected about Businesses and their Availability for City Contracts

Keen Independent's availability analysis focused on firms with locations in Central Louisiana that work in fields related to City construction, professional services, goods and other services contracts (including subcontracts). Below, we describe how the study team compiled the list of firms to be surveyed and the steps to the survey effort.

List of firms to be surveyed. The City of Alexandria does not maintain a comprehensive list of firms that have identified themselves to the City as interested in learning about future work. Therefore, Keen Independent compiled the list of firms to be contacted in the availability survey from the Dun & Bradstreet (D&B) Hoover's business establishment database. Keen Independent obtained listings for companies that D&B identified as both:

- Having a location in Central Louisiana; and

- Performing work or providing goods the study team determined was potentially related to City procurement.

More than 1,000 business establishments were on this initial list. Only some of the firms were determined to be qualified and interested in City contracts, as described below.

[2] An analogous situation concerns analysis of possible wage discrimination. A disparity analysis that would compare wages of minority employees to wages of all employees should include both low- and high-wage minorities in the statistics for minority employees. If the analysis removed high-wage minorities from the analyses, any comparison of wages between minorities and non-minorities would more likely show disparities in wage levels.

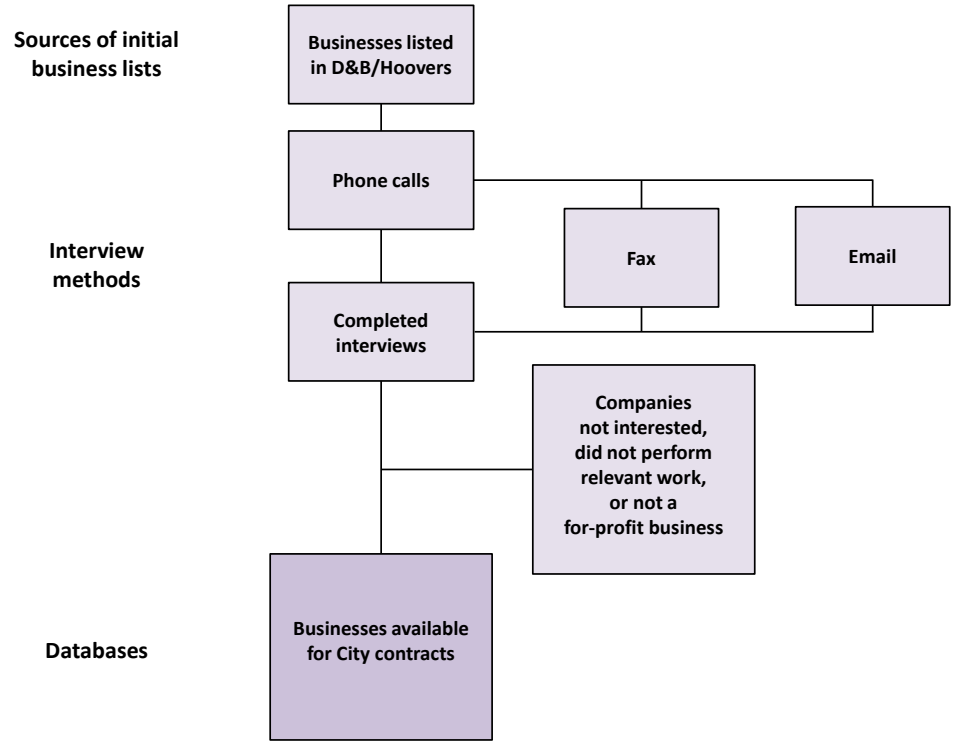
Availability surveys. The study team conducted telephone surveys with business owners and managers of businesses on the D&B list to determine whether they were available for City contracts. Customer Research International (CRI) performed the surveys under Keen Independent's direction. Surveys began in August of 2020 and were completed in September 2020. CRI used the following steps to complete telephone surveys with business establishments:

- CRI contacted firms by telephone.[3]
- Interviewers indicated that the calls were made on behalf of the City of Alexandria for purposes of expanding its list of companies interested in performing work for the City.
- Some firms indicated in the phone calls that they did not perform relevant work or had no interest in work with the City, so no further survey questions were necessary. (Such surveys were treated as complete at that point.)
- Up to five phone calls were made at different times of day and different days of the week to attempt to reach each company.

If a company was not directly contacted by the study team, it could complete a survey through a link from the disparity study website. No businesses used this method to complete the survey.

Figure 5-2 shows the process for identifying businesses, contacting them and completing the surveys.

Figure 5-2. Availability survey process



[3] The study team offered business representatives the option of completing surveys via fax or email if they preferred not to complete surveys via telephone.

Information collected. Availability survey questions covered topics including:

- Status as a private business (as opposed to a public agency or not-for-profit organization);
- Status as a subsidiary or branch of another company;
- Types of work performed or goods supplied;
- Qualifications and interest in performing work or supplying goods for public entities;
- Qualifications and interest in performing work as a prime contractor or as a subcontractor (or prime consultant/subconsultant);
- Largest prime contract or subcontract bid on or performed in Central Louisiana in the previous five years;
- Year of establishment; and
- Race/ethnicity and gender of firm owners.

Appendix D explains the survey process, discusses the number of responses and provides an availability survey instrument.

Screening of firms for the availability database. Keen Independent considered businesses to be potentially available for City contracts or subcontracts if they reported possessing all of the following characteristics:

a. Were a private business (as opposed to a public agency or not-for-profit organization);

b. Performed work relevant to public sector contracts; and

c. Reported qualifications and interest in work with the City of Alexandria (and for some types of work, whether they were interested in prime contracts or subcontracts or both).

D. Businesses Included in the Availability Database

Data from the availability surveys allowed Keen Independent to develop a representative depiction of businesses that are qualified and interested in the highest dollar volume areas of the City's locally funded contracts, but it should not be considered an exhaustive list of every business that could potentially participate in those contracts (see Appendix D).

The study team successfully contacted 601 businesses in Central Louisiana as part of the availability survey. Many of these firms indicated that they were not interested in working with the City.

The study team reviewed responses of those businesses that did indicate qualifications and interest to develop a database of companies potentially available for City work. Keen Independent identified 121 businesses reporting that they were available for specific types of City contracts and subcontracts. Of those businesses:

- 18 were minority-owned (15% of the total); and
- 18 were white women-owned (also 15% of the total).

Figure 5-3 presents the number of businesses that the study team included in the availability database for each racial/ethnic and gender group. Because these results are based on a simple count of firms with no analysis of availability for specific contracts, they only reflect the first step in the availability analysis.

All but one of the firms in the final availability database appeared to be a small business based on U.S. SBA guidelines (99% were small businesses).

Figure 5-3.
Number of businesses included in the availability database

Note:
Percentages may not add to totals due to rounding.

Source:
Keen Independent Research
2020 availability survey.

	Number of firms	Percent of all firms
African American-owned	12	9.92 %
Asian American-owned	3	2.48
Hispanic American-owned	1	0.83
Native American-owned	2	1.65
Total MBE	18	14.88 %
WBE (white women-owned)	18	14.88
Total MBE/WBE	**36**	**29.75 %**
Majority-owned	85	70.25
Total	**121**	**100.00 %**
Small business	120	99.17 %

E. Availability Calculations on a Contract-by-Contract Basis

Keen Independent analyzed information from the availability database to develop dollar-weighted availability estimates for each MBE/WBE group for use as a benchmark in the disparity analysis.

- Dollar-weighted availability estimates represent the percentage of City procurement dollars that MBEs and WBEs might be expected to receive based on their availability for specific types and sizes of City construction, professional services, goods and other services prime contracts and subcontracts.

- Keen Independent's approach to calculating availability is a bottom up, contract-by-contract process of "matching" available firms to specific prime contracts and subcontracts.

Steps to calculating availability. Only a portion of the businesses in the availability database were considered potentially available for any given City contract or subcontract (referred to collectively as "procurements"). The study team first examined the characteristics of each specific procurement, including type of work, location of work, contract size and contract date. The study team then identified businesses in the availability database that perform work of that type, in that location, of that size, in that role (i.e., prime contractor or subcontractor), and that were in business in the year that the procurement was awarded.

Steps to the availability calculations. The study team identified the specific characteristics of each of the 1,680 City procurements included in the analysis and then took the following steps to calculate availability for each procurement (including subcontracts):

1. For each procurement, the study team identified businesses in the availability database that reported in the telephone survey that they:

    - Perform that specific type of work (based on one of 29 types of construction, professional services, goods and other services contracts that accounted for most City procurement dollars);

    - Are qualified and interested in performing work with the City of Alexandria in that particular role (prime contractor/subcontractor if a construction contract, or prime consultant/subconsultant if a professional services contract); and

    - Were in business in the year that the contract or subcontract was awarded.

2. For the specific procurement, the study team then counted the number of MBEs and WBEs by group among all businesses in the availability database that met the criteria specified in step 1 above.

3. The study team translated the numeric availability of businesses for the contract element into percentage availability (as described in Figure 5-4).

The study team repeated those steps for each procurement examined in the disparity study for the City. The study team multiplied the percentage availability for a procurement by the dollars associated with the procurement, added results across all procurements, and divided by the total dollars for all procurements. The result was a dollar-weighted estimate of overall availability of each type of MBE/WBE. Figure 5-4 provides an example of how the study team calculated availability for a specific contract in the study period.

Figure 5-4.
Example of an availability calculation

One of the prime contracts examined was for architecture and engineering work ($14,378) on a 2019 contract. To determine the number of MBE/WBEs and majority-owned firms available for that subcontract, the study team identified businesses in the availability database that:

a. Were in business in 2019;
b. Indicated that they performed architecture and engineering work;
c. Indicated qualifications and interest in such prime contracts; and
d. Reported bidding on work of similar or greater size in the past five years in Central Louisiana.

There were 8 businesses in the availability database that met those criteria. Of those businesses, 1 was an MBE/WBE. Therefore, MBE/WBE availability for the subcontract was 13 percent (i.e., 1/8 = 12.5%).

The weight applied to this contract was $14,378 ÷ $109 million = 0.013% (equal to its share of total procurement dollars). Keen Independent made this calculation for each prime contract and subcontract.

Special considerations for supply contracts. Firms that provide equipment, supplies and other goods are typically not "subcontractors" on a contract, even if they are involved in a project that does involve subcontractors (such as a construction contract). When calculating availability for a particular type of goods purchase, the study team counted as available all firms supplying those goods that reported qualifications and interest in that work for the City. Further, because those firms often bid on a unit price basis without a known specific quantity, bid capacity was not considered in availability calculations for goods firms.

F. Overall Availability Results

Keen Independent used the approach described above to estimate the relative availability of MBEs and WBEs for City procurements awarded during the study period.

Figure 5-5 presents overall dollar-weighted availability estimates by MBE/WBE group for those procurements. One might expect MBE/WBEs to receive 20 percent of City procurement dollars based on Keen Independent's dollar-weighted availability analysis. This result is lower than the 30 percent of available firms that are MBEs/WBEs in Figure 5-3.

Figure 5-5 also shows that small businesses were available for 95 percent of City of Alexandria contract dollars during the study period.[4]

Figure 5-5.
Dollar weighted MBE/WBE availability for City of Alexandria procurements, 2015-2019

Note:
Percentages may not add to totals due to rounding.

Source:
Keen Independent Research
from 2020 availability survey and analysis of City procurements 2015-2019.

	Total
African American-owned	3.15 %
Asian American-owned	0.14
Hispanic American-owned	0.28
Native American-owned	3.23
Total MBE	6.81 %
WBE (white women-owned)	12.84
Total MBE/WBE	**19.65 %**
Majority-owned	80.35 %
Total	**100.00 %**
Small business	95.32 %

Using a contract-by-contract analysis of availability based on the size, type and other characteristics of each procurement is a more refined way to calculate availability benchmarks than approaches such as simply counting MBEs, WBEs and total firms (a "headcount" approach).

The contract-by-contract, dollar-weighted approach sometimes results in lower MBE/WBE availability benchmarks than a headcount approach due in large part to:

- Keen Independent's consideration of types and sizes of work performed when measuring availability; and
- Dollar-weighting availability results for each procurement (i.e., a large prime contract has a greater weight in calculating overall availability than a small one).

[4] A disparity study analysis regarding small businesses is usually not performed in a disparity study because, unlike MBEs and WBEs, small businesses are pre-classified as "small" due their annual revenue. If a firm received many millions of dollars of City contracts annually, it might no longer be "small" and would not be counted in the utilization of small businesses.

G. Strengths of the Keen Independent Approach to Calculating Availability Benchmarks

There are several important ways in which Keen Independent's contract-by-contract, dollar-weighted approach to measuring availability is more precise than completing a simple head count approach sometimes used in disparity studies.

Accounting for type of work involved in a procurement. The study team took type of work into account by examining 29 different subindustries related to construction, professional services, goods and other services procurements as part of estimating availability for City work.

Accounting for qualifications and interest in public sector work. The study team collected information on whether businesses are qualified and interested in working as prime contractors, subcontractors, or both on City procurements, in addition to the consideration of factors such as type, size and location of the procurement. This was based on responses to survey questions, supplemented by review of actual contract performance in the contract and subcontract data.

- Only businesses that indicated qualifications and interest in bidding as a prime contractor on public agency contracts were counted as available for City prime contracts; and

- Only businesses that reported being qualified for and interested in working as subcontractors on public agency contracts were counted as available for City subcontracts.

Accounting for the size of prime contracts and subcontracts. The study team considered the size — in terms of dollar value — of the procurements that a business bid on or received in the previous five years (i.e., bid capacity) when determining whether to count that business as available for a particular procurement. When determining whether businesses would be counted as available for a particular prime contract or subcontract, the study team considered whether businesses had previously bid on or received at least one procurement of an equivalent or greater dollar value in Central Louisiana in the previous five years. Keen Independent asked firms about the sizes of contracts they had performed or bid on in the previous five years (roughly 2015 through 2019) as that time period best matched the years for which City contracts were examined (January 1, 2015 through December 31, 2019).

Keen Independent's approach is consistent with many recent, key court decisions that have found relative capacity measures to be important to measuring availability, as discussed in Appendix B.

Using dollar-weighted results. Keen Independent examined availability on a contract-by-contract basis and then dollar-weighted the results for different sets of contract elements. Thus, the results of relatively large contract elements contributed more to overall availability estimates than those of relatively small contract elements.

CHAPTER 6.
Utilization and Disparity Analysis

The disparity analysis compares utilization of different groups of firms with the participation that might be expected for City contracts based on the availability analysis. Chapter 3 and Appendix C explain the contracts examined in this study and the methods used to collect firm ownership data. Chapter 6 presents results of the utilization and disparity analysis in seven parts:

A. Overview of the utilization analysis;
B. Utilization of MBE/WBEs in City contracts;
C. Disparity analysis for City procurement;
D. Results by industry;
E. Results for construction subcontracts;
F. Small procurements; and
G. Statistical significance of disparity analysis results.

A. Overview of the Utilization Analysis

Keen Independent analyzed participation of minority- and women-owned firms in City procurement from January 2015 through December 2019. Keen Independent's utilization analysis included 1,680 procurements totaling $109 million over this time period. The utilization results are for types of purchases typically made from the local market and do not include goods and services usually made from a national market. The data also did not include USDOT- and HUD-funded contracts.

Keen Independent collected information about the race, ethnicity and gender of the business owner for firms receiving City contracts, including but going beyond certification records (see Appendix C).

Calculation of "utilization." MBE/WBE "utilization" is measured as the percentage of procurement dollars awarded to MBE/WBEs during the study period (see Figure 6-1). Keen Independent calculated MBE/WBE utilization by dividing the dollars going to MBE/WBEs by the procurement dollars for all firms.

Figure 6-1.
Defining and measuring "utilization"

"Utilization" of MBE/WBEs (and other groups) refers to the share of procurement dollars the City awarded to MBE/WBEs during a particular time period. Keen Independent measures the utilization of all MBE/WBEs regardless of certification. The study team reports utilization for firms owned by different racial, ethnic and gender groups.

Keen Independent measures MBE/WBE utilization as a percentage of total contract dollars. For example, if 5 percent of contract dollars went to WBEs during the study period, WBE utilization would be 5 percent.

To avoid double-counting contract dollars and to more accurately gauge utilization of different types of firms, Keen Independent based the utilization of prime contractors on the amount of the contract that is self-performed by the prime after deducting subcontract amounts. In other words, a $1 million contract that involved $400,000 in subcontracting only counts as $600,000 to the prime contractor in the utilization analysis.

B. Utilization of MBE/WBEs in City Contracts

Figure 6-2 presents the utilization of minority- and women-owned firms for City contracts during the study period. Figure 6-2 shows:

- Total number of contracts awarded to the group of businesses (e.g., 38 prime contracts, subcontracts and other contracts to white women-owned firms);
- Combined dollars of contracts going to the group (e.g., $2 million to white women-owned firms); and
- The percentage of combined contract dollars for the group (e.g., white women-owned firms received 1.87 percent of the City procurement dollars examined in the study).

As shown in Figure 6-2, Hispanic American-owned firms received $3.5 million in contract and subcontract dollars, or about 3 percent of total dollars over this time period. About 1 percent of City contract dollars went to African American-owned firms. White women-owned firms received about 2 percent of City contract dollars. In total, minority- and women-owned firms received 6 percent of City contract dollars examined in the study.

The bottom portion of Figure 6-2 presents the number of procurements and contract dollars going to small businesses. Small businesses received about $96 million (88%) of City contract dollars examined in this study.

Figure 6-2.
Utilization of MBE/WBE in City procurements,
January 2015–December 2019

	Number of procurements*	$1,000s	Percent of dollars
Business ownership			
African American-owned	23	$ 1,100	1.01 %
Asian American-owned	0	0	0.00
Hispanic American-owned	4	3,521	3.22
Native American-owned	0	0	0.00
Total MBE	27	$ 4,622	4.23 %
WBE (white women-owned)	38	2,048	1.87
Total MBE/WBE	**65**	**$ 6,669**	**6.10 %**
Majority-owned	1,615	102,611	93.90
Total	**1,680**	**$ 109,280**	**100.00 %**
Small business	1,512	96,543	88.34 %

Note: *Number of prime contracts, subcontracts and other procurements.
Numbers rounded to nearest tenth of 1 percent. Numbers may not add to totals due to rounding.
Source: Keen Independent from City contract data.

C. Disparity Analysis for City Procurement

To conduct the disparity analysis, Keen Independent compared the actual utilization of MBE/WBEs on City contracts with the percentage of contract dollars that those groups might be expected to receive based on their availability for that work. Keen Independent made those comparisons for individual MBE/WBE groups. Chapter 5 and Appendix D explain how the study team developed availability benchmarks.

To make results directly comparable, Keen Independent expressed both utilization and availability as percentages of the total dollars associated with a particular set of contracts (e.g., 2% utilization compared with 4% availability benchmark). Keen Independent then calculated a "disparity index" to easily compare utilization and availability results among MBE/WBE 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 MBE/WBE availability 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 6-3 describes how Keen Independent calculated disparity indices.

Figure 6-3.
Calculation of disparity indices

The disparity index provides a straightforward way of assessing how closely actual utilization of a 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:

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

For example, if actual utilization of MBEs on a set of City contracts was 2 percent and the availability of MBEs for those contracts was 4 percent, then the disparity index would be 2 percent divided by 4 percent, which would then be multiplied by 100 to equal 50.

In this example, MBEs have actually received 50 cents of every dollar that they might be expected to receive based on their availability for the contracts.

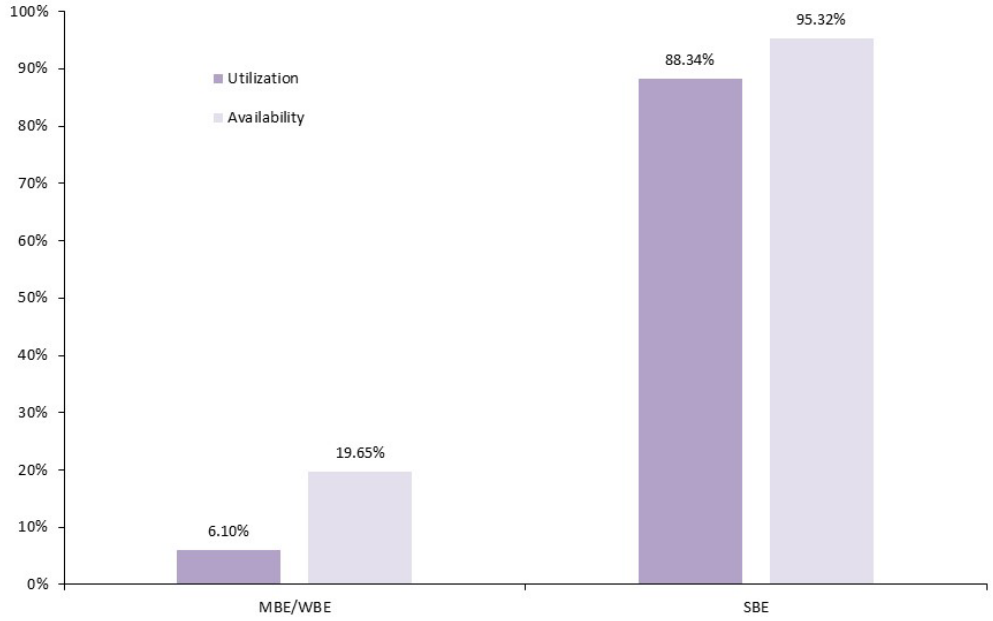
[1] Some courts deem a disparity index below 80 as being "substantial," and have accepted it as evidence of adverse impacts against MBE/WBEs. For example, see *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F. 3d 1187, 2013 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.

Results for minority-, women-owned firms and small businesses on City contracts. Figure 6-4 presents overall results from the disparity analysis.

The utilization of minority- and women-owned firms in City procurement during the study period — about 6 percent of total contract dollars — was substantially below the 20 percent that might be expected from the availability analysis. The disparity index for MBE/WBEs was 31.

Figure 6-4 shows that small businesses (SBEs) would be expected to receive 95 percent of City contract dollars during the study period and actually received about 88 percent of the contract dollars.[2]

Figure 6-4.
Utilization and availability of minority- and women-owned firms for City contracts, January 2015–December 2019



Source: Keen Independent utilization and availability analyses for City contracts.

[2] Note that a disparity analysis regarding small business is not usually performed in a disparity study because, unlike MBEs and WBEs, small businesses are pre-classified as "small" due their annual revenue. If a firm received many millions of dollars of City contracts annually, it might no longer be "small" and would not be counted in the utilization of small businesses.

Figure 6-5 shows utilization, availability and disparity results by group.

African American-owned firms. African American-owned firms received 1.01 percent of contract dollars, substantially less than what might be expected in the availability analysis (3.15%). The disparity index for this group was 32.

Hispanic American-owned firms. From January 2015 through December 2019, Hispanic American-owned firms obtained 3.22 percent of City procurement dollars, which was more than the availability benchmark (0.28%). There was no disparity for Hispanic American-owned firms overall. The disparity index was more than 200.

Asian American- and Native American-owned firms. No City contracts or subcontracts in the data obtained by Keen Independent went to firms owned by Asian Americans or Native Americans. There was a substantial disparity between utilization and availability for both of these groups.

White women-owned firms. The 1.87 percent of City procurement dollars that went to white women-owned firms was less than availability benchmark for this group (12.84%). The disparity index for these businesses was 15, indicating a substantial disparity.

Figure 6-5.
Disparity analysis for City contracts, January 2015–December 2019

	Utilization	Availability	Disparity index
African American-owned	1.01 %	3.15 %	32
Asian American-owned	0.00	0.14	0
Hispanic American-owned	3.22	0.28	200+
Native American-owned	0.00	3.23	0
Total MBE	4.23 %	6.80 %	62
WBE (white women-owned)	1.87	12.84	15
Total MBE/WBE	**6.10 %**	**19.64 %**	**31**
Small business	88.34 %	95.32 %	93

Note: Disparity index = 100 x Utilization/Availability.
Numbers may not add to totals due to rounding.
Source: Keen Independent utilization and availability analyses for City contracts.

D. Results by Industry

Keen Independent also compared MBE/WBE utilization in City contracts with what might be expected from the availability analysis for each industry.

Utilization results for each industry. Keen Independent reports the share of contract dollars going to MBEs and WBEs by industry in the following four tables.

Construction. Figure 6-6 examines City construction contracts (including subcontracts). Hispanic American-owned firms received $3.5 million in contract and subcontract dollars or about 6 percent of total construction dollars from January 2015 to December 2019. Most of this utilization is related to one Hispanic American-owned company that received a $2.4 million prime contract.

About 1.4 percent of City construction dollars went to African American-owned firms. Three tenths of 1 percent of construction contract dollars went to white women-owned firms.

In total minority- and women-owned firms received 7.6 percent of City construction contract dollars examined during the study period.

Small businesses accounted for 89.2 percent of City construction contract dollars.

Figure 6-6.
Utilization of MBE/WBE in City construction contracts, January 2015–December 2019

	Number of procurements*	$1,000s	Percent of dollars
Business ownership			
African American-owned	9	$ 822	1.38 %
Asian American-owned	0	0	0.00
Hispanic American-owned	4	3,521	5.91
Native American-owned	0	0	0.00
Total MBE	13	$ 4,343	7.29 %
WBE (white women-owned)	8	180	0.30
Total MBE/WBE	**21**	**$ 4,524**	**7.59 %**
Majority-owned	420	55,078	92.41
Total	**441**	**$ 59,602**	**100.00 %**
Small business	390	$ 53,158	89.19 %

Note: *Number of prime contracts, subcontracts and other procurements.
Numbers may not add to totals due to rounding.
Source: Keen Independent from City contract data.

Professional services. Figure 6-7 examines City professional services procurements (which includes construction when the prime was a construction management company). In total, minority- and women-owned firms received 1 percent of professional services contract dollars.

Small businesses received 80 percent of professional services contracts.

Figure 6-7.
Utilization of MBE/WBE in City professional services contracts, January 2015–December 2019

	Number of procurements*	$1,000s	Percent of dollars
Business ownership			
African American-owned	1	$ 146	1.13 %
Asian American-owned	0	0	0.00
Hispanic American-owned	0	0	0.00
Native American-owned	0	0	0.00
Total MBE	1	$ 146	1.13 %
WBE (white women-owned)	1	2	0.02
Total MBE/WBE	**2**	**$ 148**	1.15 **%**
Majority-owned	179	12,739	98.85
Total	**181**	**$ 12,887**	**100.00 %**
Small business	152	$ 10,327	80.13 **%**

Note: *Number of prime contracts, subcontracts and other procurements.
Numbers may not add to totals due to rounding.

Source: Keen Independent from City contract data.

Goods. Figure 6-8 provides utilization results for City goods purchases. MBE/WBE participation was less than 1 percent for City goods procurements for the five years ending December 2019. MBEs received 0.09 percent and WBE received 0.20 percent of goods procurement dollars.

Small businesses accounted for 92 percent of the dollars of goods purchases examined in this study.

Note that the results for goods purchases are limited to those typically made from the Central Louisiana market area rather than a national market. (As discussed in Chapter 3, purchases typically made from a national market are not included in the utilization analyses for any industry.)

Figure 6-8.
Utilization of MBE/WBE firms in City goods contracts, January 2015-December 2019

	Number of procurements	$1,000s	Percent of dollars
Business ownership			
African American-owned	2	$ 20	0.09 %
Asian American-owned	0	0	0.00
Hispanic American-owned	0	0	0.00
Native American-owned	0	0	0.00
Total MBE	2	$ 20	0.09 %
WBE (white women-owned)	3	46	0.20
Total MBE/WBE	**5**	**$ 66**	**0.29 %**
Majority-owned	636	22,893	99.71
Total	**641**	**$ 22,958**	**100.00 %**
Small business	612	$ 21,204	92.36 %

Note: Numbers may not add to totals due to rounding.
Source: Keen Independent from City contract data.

Other services. Figure 6-9 examines other services procurements at the City (services other than professional services). MBE/WBE utilization was 13.97 percent for other services procurements. Most of this participation was from white women-owned firms (13.15%). There were six WBEs that received 26 contracts, two of which were more than $0.5 million.

African American-owned firms received 0.82 percent of other services contract dollars.

Small businesses obtained 86 percent of the other services contract dollars during the study period.

Figure 6-9.
Utilization of MBE/WBE in City other services contracts, January 2015-December 2019

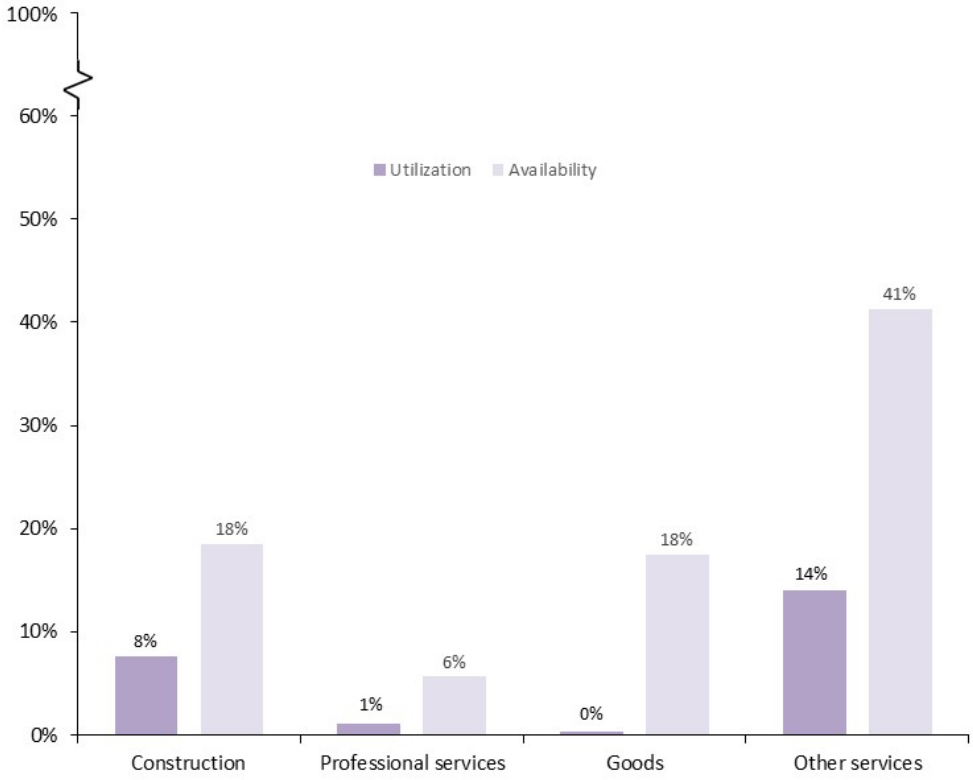
	Number of procurements	$1,000s	Percent of dollars
Business ownership			
African American-owned	11	$ 113	0.82 %
Asian American-owned	0	0	0.00
Hispanic American-owned	0	0	0.00
Native American-owned	0	0	0.00
Total MBE	11	$ 113	0.82 %
WBE (white women-owned)	26	1,819	13.15
Total MBE/WBE	**37**	**$ 1,932**	**13.97 %**
Majority-owned	380	11,900	86.03
Total	**417**	**$ 13,833**	**100.00 %**
Small business	358	$ 11,853	85.69 %

Note: Numbers may not add to totals due to rounding.

Source: Keen Independent from City contract data.

Disparity analyses for each industry. Overall MBE/WBE utilization was below availability for each of the four study industries, as shown in Figure 6-10.

Figure 6-10.
MBE/WBE utilization and availability on City contracts, by industry,
January 2015–December 2019



Source: Keen Independent utilization and availability analyses for City contracts.

E. Results for Construction Subcontracts

Keen Independent analyzed the utilization and availability of prime contracts and subcontracts.

The study team did not find MBE/WBE participation as subcontractors on the City's locally funded construction contracts.

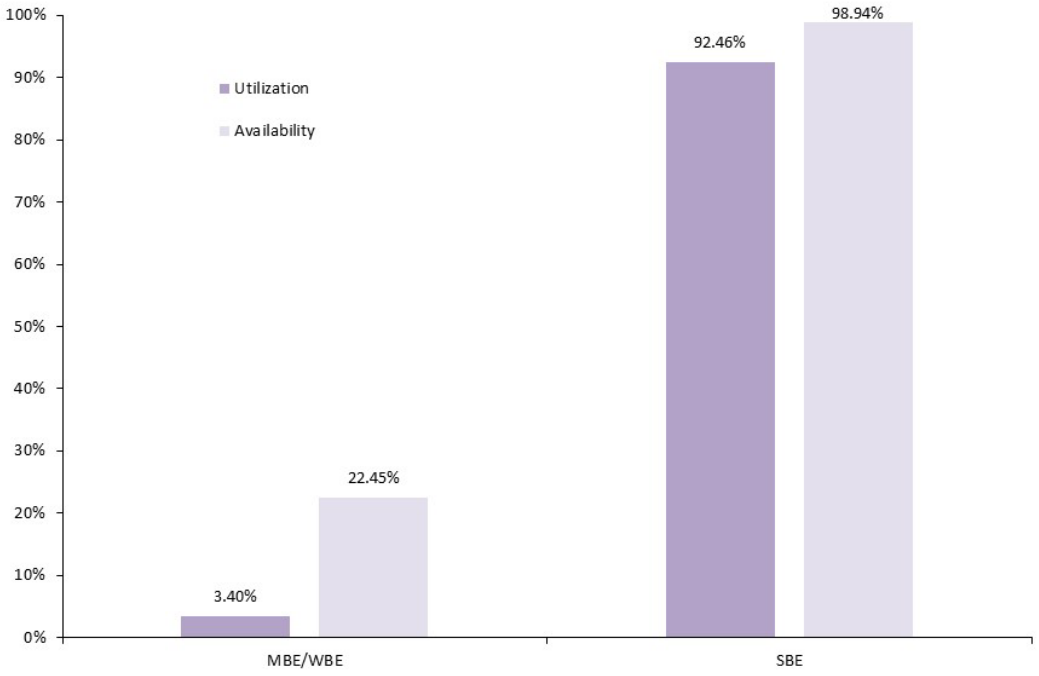
F. Small Procurements

Keen Independent examined MBE/WBE and small business participation in the City's small procurements (purchases between $10,000 and $30,000).

Figure 6-11 shows that MBE/WBEs received 3.4 percent of the dollars of small procurements. This level of participation was about one-half of what was found for contracts of all sizes (6.1%) and was considerably below the 22 percent participation anticipated from the availability analysis for small procurements.

Small businesses accounted for 92 percent of small procurement dollars, which was somewhat below the 99 percent that might be expected from the availability analysis.

Figure 6-11.
MBE/WBE and small business participation on City small procurements ($10,000–$30,000), January 2015–December 2019



Note: Number of small procurements analyzed is 829.
Source: Keen Independent from City contracts data.

G. Statistical Significance of Disparity Analysis Results

Analysis of 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. As both the availability and the utilization analyses attempted to obtain information for populations of firms and contracts rather than samples, this opportunity for an alternative explanation of any disparity is minimized.

Figure 6-12.
Confidence interval for availability results

Keen Independent telephone survey effort successfully reached 601 business establishments — a very large number of firms for this type of research. Of those businesses, 121 were available for participating entity contracts. If the results are treated as a sample, the reported 29.75 percent representation of MBE/WBEs among all available firms is accurate within about +/-1.5 percentage points. By comparison, many survey results for proportions reported in the popular press are accurate within +/- 5 percentage points. (Keen Independent applied a 95 percent confidence level and a finite population correction factor when determining this confidence interval.)

Statistical confidence in availability results. Keen Independent did not draw a sample of companies to research in the availability analysis. The study team attempted to reach each firm in the relevant geographic market area identified by participating entities or by Dun & Bradstreet as possibly doing business within relevant subindustries (as described in Appendix D).

Keen Independent examined the accuracy of the initial list of potentially available firms and the number of firms successfully reached from that list in the availability survey effort.

- The study team examined how many of the potentially available firms were successfully contacted in the availability survey. Keen Independent was able to reach 601 businesses on the list of potentially available companies, a very large number of responses. The "response rate" to the survey was very high: 39 percent of the businesses on the initial list that were in business were successfully contacted. Figure 6-12 explains the high level of statistical confidence in the availability results due to the number of responses and the high response rate.

- The second issue is whether there was any indication that availability results would differ if 100 percent of the firms the study team attempted to contact were successfully reached.

  - The very high response rate reduces this possibility.

  - The survey approach also minimizes this possibility. There were multiple callbacks at different times of day and different days of the week to reach companies that didn't respond to the first contact, and interviewees were given multiple ways to complete a survey (phone, online, fax, email). Interviewers clearly identified that they were calling as part of a City - sponsored study. Efforts to address potential language barriers also minimized the possibility of under-reaching certain groups.

In sum, it is reasonable to view the quality of the availability data as approaching that of a "population" of available firms.

Statistical confidence in utilization results. Keen Independent also attempted to compile a complete "population" of City contracts for the study period above $10,000. The study team successfully examined each contract in the study period included in the City data and was able to code firms receiving those contracts as minority-owned (by group), white women-owned or majority-owned. There was no sampling of the contract data.

The study team performed in-depth research on ownership status of all firms obtaining at least $100,000 of City contracts during the study period. Keen Independent also coded ownership of firms below this threshold but did not perform in-depth research on every firm. The City also reviewed firm ownership information. Although inaccuracies in ownership information are possible, it is extremely unlikely that they could materially affect utilization results.

In sum, it is appropriate to use the utilization results as highly accurate information reflecting a population of City contracts.

Therefore, one might consider any disparity identified when comparing overall utilization with availability to be "statistically significant." The primary limitation in the utilization analysis is somewhat incomplete information for the subcontracts involved in City construction contracts. It was not possible to report the share of subcontracts for which data were obtained as the City does not maintain a list of these subcontracts.

Additional analysis of statistical confidence in results of the disparity analysis. As outlined below, the study team also used a sophisticated statistical simulation tool to examine whether there were a sufficient number of contracts and subcontracts examined to be confident that results indicating disparities could not be easily replicated by chance in contract awards.

Monte Carlo analysis. One can be more confident in making certain interpretations from the disparity results if they are not easily replicated by chance in contract awards. For example, if there were only 10 City contracts examined in the disparity study, one might be concerned that any resulting disparity might be explained by random chance in the award of those contracts.

Figure 6-13 describes Keen Independent's use of Monte Carlo analysis to statistically examine this issue.

Results. Figure 6-14 presents the results from the Monte Carlo analysis as they relate to the statistical significance of disparity analysis results for MBEs and WBEs for all contracts.

The Monte Carlo simulations did not replicate the disparity for MBEs in any of the 10,000 simulation runs (note the "0" simulations that replicated the disparity in the third row of Figure 6-14). The disparity for MBEs is statistically significant, and one can reject chance in contract awards as the explanation of the disparity.

None of the 10,000 simulations replicated the disparity for white women-owned firms (also a "0" in the third row of Figure 6-14).

It is important to note that this test may not be necessary to establish statistical significance of results (see discussion elsewhere in this chapter), and it may not be appropriate for very small populations of firms.[3]

Figure 6-13.
Monte Carlo analysis

The study team began the Monte Carlo analysis by examining individual procurements, including subcontracts. For each procurement, Keen Independent's availability database provided information on individual businesses that were available for that procurement, based on type of work, contract role, procurement size and location of the work.

The study team assumed that each available firm had an equal chance of "receiving" that procurement. For example, the odds of an MBE receiving that procurement were equal to the number of MBEs available for the procurement divided by the total number of firms available for the work. The Monte Carlo simulation then randomly chose a business from the pool of available businesses to "receive" that procurement.

The Monte Carlo simulation repeated the above process for all City procurements. The output of a single simulation represented simulated percentage of City procurement dollars going to MBEs.

The entire Monte Carlo simulation for City procurements was then repeated 10,000 times. The combined output from all 10,000 simulations represented a probability distribution of the overall utilization of MBEs and utilization of WBEs if procurements were awarded randomly based on the availability of businesses working in relevant City of Alexandria industries.

Keen Independent could then determine the probability that the observed disparities in MBE and in WBE utilization could be replicated by chance in procurement awards.

[3] Even if there were zero utilization of a particular group, Monte Carlo simulation might not reject chance in contract awards as an explanation for that result if there were a small number of firms in that group or a small number of contracts and subcontracts included in the analysis. Results can also be affected by the size distribution of contracts and subcontracts.

Figure 6-14.
Monte Carlo results for MBEs/WBEs for City procurements,
January 2015-December 2019

	MBE	WBE
Disparity index	62	15
Utilization	4.23 %	1.87 %
Number of simulations less than or equal to observed utilization	0	0
Percentage of simulations less than or equal to observed utilization	0 %	0 %
Reject chance as an explanation	Yes	Yes

Source: Keen Independent from Monte Carlo model for City contracts.

CHAPTER 7.
Conclusions and Actions for City Consideration

Chapter 7 presents Keen Independent conclusions followed by recommendations.

A. Conclusions

The first three pages of this chapter highlight seven key study conclusions. Under each conclusion, Keen Independent outlines its implications.

1. Firms across Central Louisiana perform City of Alexandria construction, goods, professional services and other services contracts. As with other cities, the City of Alexandria makes many of its specialized purchases from a national market. Excluding those procurements, about 77 percent of City contract dollars go to firms with locations in Central Louisiana.

- The "local market" for City contracts extends well beyond city limits or Rapides Parish boundaries. Firms throughout the Central Louisiana region (Avoyelles, Catahoula, Concordia, Grant, La Salle, Rapides, Vernon and Winn parishes) are involved in construction, goods, professional services and other services contract with the City.

- Any inequities identified in the marketplace are regional and may require region-wide solutions.

2. About 30 percent of the Central Louisiana firms available for City contracts are owned by people of color or women. Based on the availability survey for this study, 15 percent of firms in the region available for City contracts are owned by people of color and 15 percent are owned by white women. In total, MBE/WBEs account for 30 percent of available firms.

- Minority- and women-owned firms comprise an important share of the firms in Central Louisiana that perform the types of construction, professional services, goods and other services procured by the City.

- The regional economy cannot be healthy if these firms are left behind.

- Although MBE/WBEs comprise a large share of total firms in these industries, there are specializations in which there are few or no minority- and women-owned firms. Greater efforts to include MBE/WBEs in public sector procurement will not be effective if those firms simply do not exist. There is a need to encourage startups by people of color and women and expand capabilities of existing MBE/WBEs in certain specializations.

3. There is not a level playing field for companies owned by people of color or women in Central Louisiana. Based on Census data and the business survey conducted for this study, minority- and women-owned firms are underutilized in the Central Louisiana marketplace as a whole. It appears that many minority- and women-owned firms, in general, are at a disadvantage competing for work, including public sector contracts. Barriers that place minority- and women-owned firms at a disadvantage include obtaining financing.

- The disadvantages and opportunities for MBE/WBEs found in this study are regional and will require regional solutions.

- The evidence of disadvantages across the region provides context when examining disparities in City of Alexandria contracts.

4. City utilization of minority- and women-owned firms is less than what might be expected based on their availability. Similar to overall outcomes in the Central Louisiana marketplace, there were disparities between the utilization and availability of minority- and women-owned firms in City of Alexandria contracts. Only 6 percent of City contract dollars from 2015 through 2019 went to minority- and women-owned firms, which was substantially below the 20 percent that would be expected based on availability of minority- and women-owned firms for the types and sizes of City procurements.

Excluding procurements that went to Hispanic American-owned firms (representing 3 percent of total spending), minority-owned companies received only 1 percent of City contract dollars. White women-owned firms obtained less than 2 percent of City contract dollars. There were substantial disparities between the utilization and availability of African American-, Asian American-, Native American- and white women-owned firms for City contracts.

- Results indicate that the playing field for City contracts is not level for African American-, Asian American-, Native American- and white women-owned companies.

- These disparities occurred despite past City efforts to encourage small business and MBE/WBE participation in its contracts.

5. These disadvantages appear to be due to race and gender, not just because MBE/WBEs are small businesses. Nationally, small businesses face disadvantages when competing with larger firms for public sector contracts. However, almost 90 percent of City procurement dollars during the study period went to small businesses (after excluding purchases primarily made from national markets). This is not surprising as almost all of the Central Louisiana businesses available for City contracts are small based on federal definitions.

Disparities occurred because City procurements disproportionately went to majority-owned small businesses and not to MBE/WBE small businesses.

- When making purchases from contractors and vendors within the region, the City and other Central Louisiana organizations depend on small businesses.

- The fact that MBE/WBEs are often small businesses cannot explain away the disparities identified in City contracts.

- If the City enacted a small business program for its contracts, it is likely that those benefits would largely go to the firms already receiving most City contract dollars: majority-owned small businesses. A different type of program is needed.

6. Keen Independent recommends the City design and authorize a program that can increase participation of socially and economically disadvantaged small businesses in its contracts. These initiatives should be two-pronged: (1) leveling the playing field for socially and economically disadvantaged businesses in City contracts, and (2) participating with other public, private and nonprofit partners in Central Louisiana to enhance the ability of socially and economically disadvantaged entrepreneurs to start businesses, build capacity and access more procurement opportunities.

Without additional action, the City is at risk of continuing to spend public tax dollars in a marketplace that perpetuates unequal outcomes for minority- and women-owned firms.

- **There is a need for a program to level the playing field for disadvantaged firms in the City's and other organizations' procurement in the region.** This effort will require (a) identifying and certifying disadvantaged firms, (b) providing opportunities for those companies to compete against like firms for procurements, and (c) assisting disadvantaged firms when competing against more successful companies. Other organizations in the region might consider adopting a program similar to what Keen Independent proposes for the City.

- **A disadvantaged business program requires financial resources from the City and its partners.** This effort will require financial resources from the City and its partners for regional certification and investments in staff time and technology to operate the program and monitor compliance.

- **To be successful, this effort requires long-term commitment from the City and its partners.** Improving equity in City spending and in the regional marketplace can occur through these efforts given time to be effective.

7. There are also disparities affecting people of color and women working in Central Louisiana. Keen Independent identified race and gender inequities beyond the immediate scope of the disparity study. These included entry and advancement of certain minority groups and women as employees in the construction industry and other study industries in Central Louisiana. For example, African Americans comprise 26 percent of all workers in Central Louisiana but just 11 percent of the construction workforce. There was little representation of Hispanic Americans and Native

Americans as well. Women held only 8 percent of the jobs in the construction industry, with minimal representation in many individual construction trades.

- The observed inequities in employment opportunities suggest that race- and gender-based barriers exist for workers as well as business owners.

- Any discrimination that reduces employment opportunities for people of color and women in an industry also depresses the number of minority and women business owners in that industry, as most business owners have previous work experience in an industry before starting a business.

- Additional regional efforts are needed to level the playing field for workers of color and women regarding private sector training, hiring and advancement in Central Louisiana.

B. Recommendation: Create a Central Louisiana DBE Program

The City has traditionally relied on outreach to promote equity in its procurement. More tools are needed. The City should review the evidence and legal constraints outlined in this study and consider adopting a new program targeting socially and economically disadvantaged businesses in partnership with other government and private sector organizations in Central Louisiana.

1. Program focus and name. As discussed in Chapter 2, Louisiana law affects whether a City can operate its own race- and gender-based contract equity program. The City should consider a program for businesses owned by people of color, women and white men in Central Louisiana who can demonstrate both social and economic disadvantage. This program would apply to the City's locally funded contracts (not to federally or state-funded contracts).

The program would be similar to the Federal Disadvantaged Business Enterprise (DBE) Program except that there would be no presumption of social disadvantage based on race, ethnicity or gender when determining whether a firm owner is socially disadvantaged. Instead, people of color and women who own businesses would need to demonstrate they are socially disadvantaged as part of their certification application. This is similar to programs at the City of New Orleans and the City of Baton Rouge for their locally funded contracts.

Keen Independent recommends that the City consider naming the program as follows:
Central Louisiana Disadvantaged Business Enterprise program, or "CLDBE program," to emphasize its regional focus.

The City should consider setting overall annual aspirational goals for CLDBE participation using information from this study.

2. Certification. Because the proposed targeted business program will affect procurement decisions, it must withstand challenges to those decisions, including whether a firm benefiting from the program is a legitimate socially and economically disadvantaged business. Therefore, the City should require certification as a CLDBE for participation in its program.

Organization to perform certification. The City should work with other organizations to develop a shared, regional certification program that can serve multiple public and private entities within Central Louisiana.

Criteria to show social and economic disadvantage. The City of New Orleans and other local governments in New Orleans operate a State and Local Disadvantaged Business Enterprise (SLDBE) Program. The program for Central Louisiana might have similar eligibility criteria, except that the firm would need to have a presence in Central Louisiana.

- A *socially disadvantaged* individual is one who has been subjected to prejudice or cultural bias because of his or her identity as a member of a group without regard to the person's individual qualities. The potential participant would need to provide information in writing demonstrating evidence of social disadvantage. Unlike the Federal DBE Program, there would be no presumption of social disadvantage for business owners who are people of color or women. Each applicant must demonstrate how they are socially disadvantaged in their applications, even if already certified under as a DBE under the federal program. Companies owned by white men can apply for certification as well.

- To show *economic disadvantage*, the City would require firms to meet the same eligibility requirements as for the Federal DBE Program, including rules concerning annual revenue, personal net worth and the ability of the owner to accumulate substantial wealth as outlined under Title 49 of the Code of Federal Regulations (CFR) Section 26.67. The City could consider adopting this portion of the DBE certification application.

Although the name of the New Orleans program starts with "State and Local," it focuses on firms doing business in the New Orleans metropolitan area. Similarly, the City of Alexandria program should focus on Central Louisiana companies. The City could adopt certification procedures similar to the New Orleans program or even contract with the City of New Orleans or with the emerging regional certification agency in Baton Rouge for some parts of the certification program, but firms certified under the New Orleans or Baton Rouge programs would not be eligible for the Alexandria program without having a Central Louisiana presence or other documentation of activity in the regional marketplace.

Reciprocity of certifications. Under any of the above programs, Central Louisiana firms already certified as DBEs under the Louisiana Uniform Certification Program (UCP) would have streamlined certification for a Central Louisiana program.

- Those firms would need to show their DBE certifications and also demonstrate that they are socially disadvantaged.

- Since the certification standards for economic disadvantage for DBEs would be the same as for the City CLDBE program, there would be no need for those firms to complete that portion of the certification application for the City program.

Certification renewals. Certification as a CLDBE would expire after a certain number of years (perhaps three) unless renewed by the certified company.

3. Targeted competition program for small purchases for CLDBEs. The City can reach out to individual firms to provide quotes without public advertisement for its small procurements (typically under $30,000). This provides an opportunity to ensure that MBE/WBEs are included in the bidding process and increase the amount of purchases going to MBE/WBEs.

However, Keen Independent's review of City purchases between $10,000 and $30,000 from 2015 through 2019 found that MBE/WBEs received only 3 percent of the dollars of those purchases, far less than what was expected from the availability of MBE/WBEs for those procurements.[1] Therefore, the City should consider a targeted competition program focusing on CLDBEs for purchases where it does not need to advertise for formal sealed bids.

For example, for goods and services procurements between $10,000 and $30,000, the City requires three informal written quotations. The City might consider focusing on certified CLDBEs for most or all of those quotes.

For purchases under $5,000, the City is not required to solicit bids and can just solicit a quote from a single source. The City might encourage staff to make direct purchases from CLDBEs. The City would need to develop, maintain and distribute a vendor list of CLDBEs that are available for those purchases.

4. Preference points for CLDBEs for points-based awards. The City solicits proposals for some of its contracts and makes awards based on scoring of different factors. Professional services contracts are often awarded using this system. When a scoring system is used, and when allowed under state law, the City should consider awarding points to certified CLDBEs submitting proposals.

The points would be awarded to a prime consultant that is a certified CLDBE as long as that firm proposes to perform a substantial portion of the work. Nationally, many state and local government preference point programs award about 5 points out of 100 to certified firms.

Some preference programs also award points for certified business participation as subconsultants. The City could consider this as well, or separately apply a subcontract goals program to those professional services contracts (discussed below).

[1] After excluding types of purchases typically made from national markets.

5. Contract goals program for its large construction and professional services contracts. The City should consider implementing a contract goals program for large construction and professional services contracts expected to have subcontract opportunities. This program for contracts funded by the City would be similar to the DBE contract goals set for USDOT-funded contracts. The City would:

- Identify eligible contracts;
- Set contract goals based on the types of subcontracting opportunities and availability of targeted businesses to perform that work (flexible goals);
- Require bidders and proposers to meet the specified contract goal or show good faith efforts to do so;
- Evaluate whether the apparent low bidder met the goals or showed sufficient good faith efforts before awarding a contract;
- Monitor the participation of the certified businesses over the course of the contract; and
- Enforce remedies for any non-compliance.

6. Other measures that specifically assist vendors, consultants, prime contractors and others directly bidding on City procurements. These measures might include:

- Enhanced outreach to small businesses in the region and training on how to register with the City;
- Accelerated payment of prime contractors and subcontractors on City contracts;
- Reconsideration of bonding and insurance requirements on its small contracts;
- Unbundling of its contracts, as practicable; and
- Removal of other requirements that might present barriers to companies with less experience bidding or proposing on City contracts.

7. Tracking and regular reporting of CLDBEs in City contracts. The City should develop the information systems for ongoing tracking and at least annual reporting of CLDBE participation in its contracts, by race, ethnicity and gender of the business owner.

Every five to seven years, the City should review the effectiveness of the program and whether it continues to be needed.

8. Participation in regional efforts to increase start-up, growth and success of businesses owned by socially and economically disadvantaged individuals. Other regions, including Baton Rouge, have formed regional partnerships to address barriers to disadvantaged business growth and development. Training and access to working capital and bonding are some of the barriers they find in their communities that are also needs in Central Louisiana. The City could lead a consortium of public, private and not-for-profit organizations in Central Louisiana to address barriers to minority- and women-owned businesses identified in this study.

APPENDIX A.
Definition of Terms

Appendix A provides explanations and definitions useful to understanding the 2021 City of Alexandria Disparity Study. The following definitions are only relevant in the context of this report.

A&E. "A&E" refers to architecture and engineering (i.e., "A&E contracts"). Architectural and engineering services are classified as part of "professional services."

Anecdotal evidence. Anecdotal or "qualitative" evidence includes personal accounts and perceptions of incidents, including any incidents of discrimination, told from each individual interviewee's or participant's perspective.

Availability analysis. The availability analysis examines the number of minority-, women- and majority-owned businesses ready, willing and able to perform specific types of construction, professional services, goods and other services contracts for the City of Alexandria.

"Availability" is often expressed as the percentage of contract dollars that might be expected to go to minority- or women-owned firms based on analysis of the specific type, location, size and timing of each contract and subcontract and the relative number of minority- and women-owned firms available for that work.

Business. A business is a for-profit enterprise, including all of its establishments (synonymous with "firm" and "company").

Business establishment. A business establishment (or simply, "establishment") is a place of business with an address and working phone number. One business can have many business establishments in different locations.

Business listing. A business listing is a record in the Dun & Bradstreet (D&B) database (or other database) of business information. A D&B record is a "listing" until the study team determines it to be an actual business establishment with a working phone number.

Certified MBE or WBE. A firm certified as a minority- or woman-owned business. Without the word "certified" in front of "MBE" or "WBE," Keen Independent is referring to a minority- or woman-owned firm that might or might not be certified as such.

Code of Federal Regulations or CFR. Code of Federal Regulations ("CFR") is a codification of the federal agency regulations. An electronic version can be found at http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR.

Contract. A contract is a legally binding agreement between the purchaser and seller of goods or services.

Contract element. A contract element is either a prime contract or subcontract that the study team included in its analyses.

Consultant. A consultant is a business performing professional services contracts.

Contractor. A contractor is a business performing construction contracts.

Controlled. Controlled means exercising management and executive authority for a business.

Disadvantaged Business Enterprise (DBE). A "DBE" is a firm certified as such. A small business that is 51 percent or more owned and controlled by one or more individuals who are both socially and economically disadvantaged according to the guidelines in the Federal DBE Program (49 CFR Part 26) can be certified as a DBE. Members of certain racial and ethnic groups identified under "minority-owned business enterprise" in this appendix may meet the presumption of social and economic disadvantage. Women are also presumed to be socially and economically disadvantaged. Examination of economic disadvantage also includes investigating the three-year average gross revenues and the business owner's personal net worth (at the time of this report, a maximum of $1.32 million excluding equity in the business and primary personal residence).

Some minority- and women-owned businesses do not qualify as DBEs because of gross revenue or net worth limits.

A business owned by a non-minority male may also be certified as a DBE on a case-by-case basis if the enterprise meets its burden to show it is owned and controlled by one or more socially and economically disadvantaged individuals according to the requirements in 49 CFR Part 26.

Disparity. A disparity is an inequality, difference, or gap between an actual outcome and a reference point or benchmark. For example, a difference between an outcome for one racial or ethnic group and an outcome for non-minorities may constitute a disparity.

Disparity analysis. Disparity analysis compares actual outcomes with what might be expected based on other data. Analysis of whether there is a "disparity" between the utilization and availability of minority- and women-owned businesses is one tool used to examine whether there is evidence consistent with discrimination against such businesses.

Disparity index. A disparity index is a measure of the relative difference between an outcome, such as percentage of contract dollars received by a group, and a corresponding benchmark, such as the percentage of contract dollars that might be expected given the relative availability of that group for those contracts. In this example, it is calculated by dividing percent utilization (numerator) by percent availability (denominator) and then multiplying the result by 100. A disparity index of 100 indicates "parity" or utilization "on par" with availability. Disparity index figures closer to 0 indicate larger disparities between utilization and availability. For example, the disparity index would be "50" if the utilization of a particular group was 5 percent of contract dollars and its availability was 10 percent.

Dun & Bradstreet (D&B). D&B is the leading global provider of lists of business establishments and other business information (see www.dnb.com). Hoovers is the D&B company that provides these lists. Obtaining a DUNS number, a unique nine-digit identifier for businesses, and being listed by D&B are free to listed companies. Companies are not required to pay to be listed in its database.

Employer firms. Employer firms are firms with paid employees other than the business owner and family members.

Enterprise. An enterprise is an economic unit that is a for-profit business or business establishment, not-for-profit organization or public sector organization.

Establishment. See business establishment.

Federal Disadvantaged Business Enterprise (DBE) Program. Federal DBE Program refers to the Disadvantaged Business Enterprise Program established by the United States Department of Transportation after enactment of the Transportation Equity Act for the 21st Century (TEA-21) as amended in 1998. The regulations for the Federal DBE Program are set forth in 49 CFR Part 26.

Federally funded contract. A federally funded contract is any contract or project funded in whole or in part (a dollar or more) with U.S. Department of Transportation, U.S. Environmental Protection Agency, U.S. Department of Housing and Urban Development or other federal financial assistance, including loans.

Firm. See business.

Fiscal year. The City's fiscal year is the time period from May 1 through April 30 of the following year. For example, FY 2021 is the twelve-month period ending on April 30, 2021.

Hudson Initiative (SE). Louisiana Department of Economic Development provides the Hudson Initiative SE certification to assist small businesses in the state to gain access to purchasing and contracting opportunities that are available at the state level. Eligible firms are located in Louisiana, are independently owned and operated, and meet certain financial criteria.

Industry. For the purpose of this study, an industry is a broad group of businesses in one of the following economic sectors: construction, professional services, goods and other services.

Legal framework. Legal framework is the review of relevant case law used as the basis for study methodology.

Local agency. A local agency is a city, parish, town or other public sector entity that is a political subdivision of the state government.

Louisiana Unified Certification Program (LA UCP DBE). The Louisiana Department of Transportation, Louis Armstrong International Airport, New Orleans Regional Transit Authority and Orleans Levee Board provide certification to Disadvantaged Business Enterprises (DBEs), which are small businesses owned and controlled by socially and economically disadvantaged individuals who

are eligible for the program. A firm certified as a DBE by one entity is recognized as a DBE by any entity in Louisiana for purposes of the Federal DBE Program.

Majority-owned business. A majority-owned business is a for-profit business that is not owned and controlled by minorities or women (see definition of "minorities" below).

Market area. The market area is the geographic area from which the City makes most of its purchases, based on dollars. Also, see "relevant geographic market area."

MBE. Minority-owned business enterprise. See minority-owned business.

Minorities. Minorities are individuals who belong to one or more of the racial/ethnic groups identified in the federal regulations in 49 CFR Section 26.5:

- Black Americans (or "African Americans" in this study), which include persons having origins in any of the black racial groups of Africa.
- Hispanic Americans (Latinos), which include persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race.
- Native Americans, which include persons who are American Indians, Eskimos, Aleuts or Native Hawaiians.
- Asian Americans, which include persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia or Hong Kong. Asian Americans also include persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka.

Minority-owned business (MBE). An MBE, sometimes referred to as a minority owned business, is a business that is at least 51 percent owned and controlled by one or more individuals that belong to a minority group. Minority groups in this study are those listed in 49 CFR Section 26.5. For purposes of this study, a business need not be certified as such to be counted as a minority-owned business. Businesses owned by minority women are also counted as MBEs in this study (where that information is available). In this study, "MBE-certified businesses" are those that have been certified by a government agency as a minority-owned company.

Neutral remedy. Actions that remove barriers, open opportunities, and strengthen businesses without regard to race, ethnicity, or gender.

Non-response bias. Non-response bias occurs when the observed responses to a survey question differ from what would have been obtained if all individuals in a population, including non-respondents, had answered the question.

North American Industry Classification System (NAICS) codes. NAICS codes identify the primary line of business of a business enterprise. See http://www.census.gov/epcd/www/naics.html.

Owned. Owned indicates at least 51 percent ownership of a company. For example, a "minority-owned" business is at least 51 percent owned by one or more minorities.

Prime consultant. A prime consultant is a professional services firm that performs a prime contract for a client such as the City of Alexandria.

Prime contract. A prime contract is a contract between a prime contractor or a prime consultant and the client such as the City of Alexandria.

Prime contractor. A prime contractor is a firm that performs a prime contract for a client such as the City of Alexandria.

Procurement. A direct purchase, consulting agreement, prime contract, subcontract or other acquisition of construction, professional services, goods or other services. This term is intended to encompass all types of government purchasing and contracting.

Professional services. Professional services are fields in the service sector requiring special training. Some professional services require holding professional licenses such as architects, accountants, engineers and lawyers.

Project. A project refers to a City of Alexandria construction and/or engineering endeavor. A project could include one or multiple prime contracts and corresponding subcontracts.

Race-and gender-conscious measures. Race- and gender-conscious measures are programs in which businesses owned by certain minority groups or women may participate but majority-owned firms typically may not. An MBE/WBE contract goal program is one example of a race- and gender-conscious measure.

Note that the term is a shortened version of "race-, ethnicity-, and gender-conscious measures." For ease of communication, the study team has truncated the term to "race- and gender-conscious measures."

Race- and gender-neutral measures. Race- and gender-neutral measures apply to businesses regardless of the race/ethnicity or gender of firm ownership. Race- and gender-neutral measures may include assistance in overcoming bonding and financing obstacles, simplifying bidding procedures, providing technical assistance, establishing programs to assist start-up firms, and other methods open to all businesses or any disadvantaged business regardless of race or gender of ownership. A broader list of examples can be found in 49 CFR Section 26.51(b).

Note that the term is more accurately "race-, ethnicity-, and gender-neutral" measures. However, for ease of communication, the study team has shortened the term to "race- and gender-neutral measures."

Racial or ethnic minority group. See minorities.

Relevant geographic market area. The relevant geographic market area is the geographic area in which the businesses receiving most City of Alexandria procurement dollars are located. The relevant geographic market area is also referred to as the "local marketplace." Case law related to race- and gender-conscious programs requires disparity analyses to focus on the "relevant geographic market area."[1] Also, see "market area."

Remedial measure. A remedial measure, sometimes shortened to "remedy," is a program designed to address barriers to full participation of minorities or women, or minority- or women-owned firms.

Remedy. See remedial measure.

SBA. See Small Business Administration.

SBA 8(a). SBA 8(a) is a U.S. Small Business Administration business assistance program for small disadvantaged businesses owned and controlled by at least 51 percent socially and economically disadvantaged individuals.

Service-Disabled Veteran-Owned Small Business (SDVOSB). A firm certified as a service-disabled veteran-owned small business according to the criteria of the federal Service-Disabled Veteran-Owned Small Business Concern (SDVOSBC) Program.

Small business. A small business is a business with low revenues or size (based on revenue or number of employees) relative to other businesses in the industry. "Small business" does not necessarily mean that the business is certified as such.

Small Business Administration (SBA). The SBA refers to the United States Small Business Administration, which is an agency of the United States government that assists small businesses.

Small Business Enterprise (SBE). A firm certified as a small business enterprise according to the size criteria of the certifying agency.

Small and Emerging Business Development Program (SEBD). The Louisiana Department of Economic Development's Small and Emerging Business Development (SEBD) Program provides managerial, technical assistance and training needed to grow and sustain a small business for firms whose principal place of business is Louisiana, 51 percent of the ownership is by a small and emerging business person, the net worth of the firm is less than $1.5 million and the firm owner anticipates creating full-time jobs. SEBD-certification is not race conscious or gender conscious.

State- or locally funded contract. A state-funded contract is any City contract or project that is entirely or partially funded with State of Louisiana funds (and not federally funded). A locally funded contract has City funds but no state or federal funds.

Statistically significant difference. A statistically significant difference refers to a quantitative difference for which there is a high probability that random chance can be rejected as an explanation for the difference. This has applications when analyzing differences based on sample data such as

[1] *See*, e.g., *Croson*, 448 U.S. at 509; 49 CFR Section 26.35; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995.

most U.S. Census datasets (could chance in the sampling process for the data explain the difference?), or when simulating an outcome to determine if it can be replicated through chance. Often a 95 percent confidence level is applied as a standard for when chance can reasonably be rejected as a cause for a difference.

Subconsultant. A subconsultant is a professional services firm that performs services for a prime consultant as part of the prime consultant's contract for a client such as the City of Alexandria.

Subcontract. A subcontract is a contract between a prime contractor or prime consultant and another business selling goods or services to the prime contractor or prime consultant as part of the prime contractor's contract for a client such as the City of Alexandria.

Subcontract goals program. A program in which a public agency sets a percent goal for participation of DBEs, MBE/WBEs, small businesses or another group on a contract. These programs typically require that a bidder either meet the percentage goal with members of the group or show good faith efforts to do so as part of its bid or proposal.

Subcontractor. A subcontractor is a firm that performs services for a prime contractor as part of a larger project.

Subindustry. For this study, a specialized component of one of four broader economic sectors: construction, professional services, goods and other services. Electrical work is a subindustry within the construction industry, for example.

Subrecipient. A subrecipient is a local agency receiving financial assistance passed through another agency. For example, if the City of Alexandria receives USDOT funds through the State, it is a subrecipient of those monies.

Substantial disparity. Several courts have held that a "substantial disparity" is one where the disparity index is less than "80," which indicates evidence of discrimination affecting the outcome.

Supplier. A supplier is a firm that sells supplies to a prime contractor as part of a larger project (or in some cases sells supplies directly to the City of Alexandria).

United States Environmental Protection Agency (EPA). In addition to administering federal regulations regarding environmental protection, the EPA provides funds that support state and local infrastructure projects and other contracts. The EPA has certain requirements regarding participation of minority- and women-owned businesses, small businesses and other targeted businesses in EPA-assisted contracts for construction, equipment, services and supplies.

United States Department of Housing and Urban Development (HUD). HUD is the federal department that administers Community Development Block Grants (CDBG funds), certain federal housing programs and related programs. State and local governments that receive money from HUD must comply with HUD requirements regarding minority- and women-owned business participation in HUD-funded contracts, as well as participation of project residents in those contracts.

United States Department of Transportation (USDOT). USDOT refers to the United States Department of Transportation, which includes the Federal Highway Administration, the Federal Transit Administration and the Federal Aviation Administration. Note that the Federal DBE Program does not apply to contracts solely using funds from the Federal Rail Administration (at the time of this report).

Utilization. Utilization refers to the percentage of total contract dollars of a particular type of work going to a specific group of businesses (for example, MBEs or WBEs).

Vendor. A vendor is a business that is providing goods or services to a customer such as the City of Alexandria.

WBE. Woman-owned business enterprise. See women-owned business.

Women-owned business (WBE). A WBE is a business that is at least 51 percent owned and controlled by one or more individuals that are non-minority women. A business need not be certified as such to be included as a WBE in this study. For this study, businesses owned and controlled by minority women are counted as minority-owned businesses. In this study, a "WBE-certified businesses" is one certified as a woman-owned firm by a public agency.

APPENDIX B.
Legal Framework and Analysis

A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases involving local and state government minority and women-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 recently was continued and reauthorized by the Fixing America's Surface Transportation Act (FAST Act).[2] Recently, in October 2018, Congress passed the FAA Reauthorization Act, which continues the Federal DBE and ACDBE Programs.[3] The appendix provides a summary of the legal framework for the disparity study as applicable to the City of Alexandria ("City of Alexandria").

Appendix B begins with a review of the landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson*.[4] *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*,[5] ("*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 this disparity study and the strict scrutiny analysis. This analysis reviews the Fifth Circuit decision in *W.H. Scott Construction Co., Inc. v. City of Jackson, Mississippi*,[6] district court decision in *Kossman Contracting Co., Inc. v. City of Houston*,[7] and the Louisiana Supreme Court decisions in *Louisiana Associated General Contractors, Inc. v. New Orleans Aviation Board, and Louisiana Associated General Contractors, Inc. v. State of Louisiana, et.*

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[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. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

[3] Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.

[4] *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

[5] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

[6] *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999).

[7] *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

al.[8] The analysis discusses the Louisiana Equal Protection provision: La. Const., Art. I, Sec. 3, in Section C.4. below. The analysis also reviews recent court decisions that involved challenges to MBE/WBE/DBE programs in other jurisdictions in Section E below, which are informative to the study.

In addition, the analysis reviews other recent federal cases that have considered the validity of the Federal DBE Program and its implementation by a state or local government agency or a recipient of federal funds, including: *Orion Insurance Group, and Ralph Taylor v. Washington State Office of Minority and Women's Business Enterprises, USDOT, et al.*,[9] *Dunnet Bay Construction Co. v. Illinois DOT,*[10] *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation ("Caltrans"), et al.,*[11] *Western States Paving Co. v. Washington State DOT,*[12] *Mountain West Holding Co. v. Montana, Montana DOT, et al.,*[13] *M.K. Weeden Construction v. Montana, Montana DOT, et al.,*[14] *Northern Contracting, Inc. v. Illinois DOT,*[15] *Sherbrooke Turf, Inc. v. Minn. DOT and Gross Seed v. Nebraska Department of Roads,*[16] *Adarand Construction, Inc. v. Slater*[17] *("Adarand VII")*, *Midwest Fence Corp. v. USDOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.,*[18] *Geyer Signal, Inc. v. Minnesota DOT,*[19] *Geod Corporation v. New Jersey Transit Corporation,*[20] and *South Florida Chapter of the A.G.C. v. Broward County, Florida.*[21]

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[8] *Louisiana Associated General Contractors, Inc. v. New Orleans Aviation Board,* 764 So. 2d 31 (La. 1999); *Louisiana Associated General Contractors, Inc. v. State of Louisiana, et. al*, 669 So. 2d 1185 (S. Ct. La. 1996).

[9] *Orion Insurance Group, Taylor v. WSOMWBE, USDOT, et al.,* 2018 WL 6695345 (9th Cir. 2018), Memorandum opinion (not for publication and not precedent); Petition for Writ of Certiorari filed with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

[10] *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).

[11] *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).

[12] *Western States Paving Co. v. Washington State DOT,* 407 F.3d 983 (9th Cir. 2005), *cert. denied,* 546 U.S. 1170 (2006).

[13] *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum, (Not for Publication) U.S. 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. 2014).

[14] *M. K. Weeden Construction v. State of Montana, Montana DOT,* 2013 WL 4774517 (D. Mont. 2013).

[15] *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007).

[16] *Sherbrooke Turf, Inc. v. Minn. DOT* and *Gross Seed v. Nebraska Department of Roads,* 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).

[17] *Adarand Construction, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*").

[18] *Midwest Fence Corp. v. USDOT, 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).

[19] *Geyer Signal, Inc. v. Minnesota DOT,* 2014 W.L. 1309092 (D. Minn. 2014).

[20] *Geod Corporation v. New Jersey Transit Corporation*, 766 F.Supp. 2d 642 (D. N. J. 2010).

[21] *South Florida Chapter of the A.G.C. v. Broward County, Florida,* 544 F. Supp.2d 1336 (S.D. Fla. 2008).

As stated above and shown in detail below in Sections D, E and F, these cases in the Fifth and other federal Circuit Courts of Appeal and federal District Courts establish legal standards for satisfying the strict scrutiny test regarding whether there is the "compelling governmental interest" in a local or state government's marketplace to have a narrowly tailored race and ethnic conscious MBE/WBE/DBE program, that the local or state MBE/WBE/DBE Program is "narrowly tailored," and the standard relevant to cases involving challenges to MBE/WBE/DBE Programs and their implementation by state and local governments.

The analyses of these and other recent 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.

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.[22] 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."[23] 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.[24] 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.

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[22] 488 U.S. 469 (1989).

[23] 488 U.S. at 500, 510.

[24] 488 U.S. at 480, 505.

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.[25]

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.[26] 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."[27]

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 MBEs in the relevant market are qualified to undertake prime or subcontracting work in public construction projects."[28] "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."[29]

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."[30] 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."[31]

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."[32] "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."[33]

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[25] 488 U.S. at 507-510.

[26] 488 U.S. at 501, *quoting Hazelwood School Dist. v. United States,* 433 U.S. 299, 307–308, 97 S.Ct. 2736, 2741.

[27] 488 U.S. at 501 *quoting Hazelwood,* 433 U.S. at 308, n. 13, 97 S.Ct., at 2742, n. 13.

[28] 488 U.S. at 502.

[29] *Id.*

[30] 488 U.S. at 509.

[31] *Id.*

[32] 488 U.S. at 509.

[33] *Id.*

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."[34]

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.

C. The Legal Framework Applied to State and Local Government MBE/WBE/DBE Programs

The following provides an analysis for the legal framework focusing on recent key cases regarding state and local government 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, are instructive because they concern the strict scrutiny analysis, the legal framework in this area, challenges to the validity of MBE/WBE/DBE programs, and an analysis of disparity studies.

Strict scrutiny analysis

A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.[35] 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.[36]

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[34] 488 U.S. at 492.

[35] *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).

[36] *Adarand I*, 515 U.S. 200, 227 (1995); *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;

a. 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.[37] State and local governments cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions.[38] 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.[39]

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."[40] The evidence found to satisfy the compelling interest standard included numerous congressional investigations and hearings, and outside studies of statistical and anecdotal evidence (*e.g.*, disparity studies).[41] 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.[42]

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).

[37] *Id.*

[38] *Id.*; *see, e.g.*, *Concrete Works, Inc. v. City and County of Denver ("Concrete Works I"),* 36 F.3d 1513, 1520 (10th Cir. 1994).

[39] *See, e.g., Concrete Works I,* 36 F.3d at 1520.

[40] *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.

[41] *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.

[42] *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.

- 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.[43]

- 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.[44]

- 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.[45]

- F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21. In October 2018, December 2015 and in July 2012, Congress passed 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 women-owned businesses seeking to do business in airport-related markets," in "federally-assisted surface transportation markets," and that the continuing barriers "merit the continuation" of the Federal ACDBE Program and the Federal DBE Program.[46] Congress also found in 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.[47]

As stated above, it is instructive to the study to review the type of evidence utilized by Congress and considered by the courts to support the Federal DBE Program, and significantly for purposes of this study the implementation by local and state governments and agencies of their DBE Programs, which is similar to evidence considered by cases ruling on the validity of MBE/WBE/DBE programs. The federal courts also have held that Congress had ample evidence of discrimination in

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[43] *Adarand VII*. at 1170-72; *see DynaLantic, 885* F.Supp.2d 237.

[44] *Id.* at 1172-74; *see DynaLantic,* 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

[45] *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.

[46] 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.

[47] *Id.* at Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94. H.R. 22, § 1101(b)(1).

the transportation contracting industry to justify the Federal DBE Program (TEA-21), and the federal regulations implementing the program (49 CFR Part 26).[48]

[48] *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. 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.

Burden of proof. 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.[49] If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.[50] The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."[51]

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.[52] It is well established that "remedying the effects of past or present racial discrimination" is a compelling interest.[53] In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."[54]

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."[55] "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

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[49] *See Midwest Fence,* 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *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 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).

[50] *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.

[51] *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.

[52] *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; *See also Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000); *Geyer Signal, Inc., 2014* WL 1309092.

[53] *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); *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).

[54] *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.

[55] *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); *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).

locality or the locality's prime contractors.'"[56] Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.[57]

In addition to providing "hard proof" to support its compelling interest, the government must also show that the challenged program is narrowly tailored.[58] 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.[59] 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.[60]

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.[61] 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.[62] Conjecture and unsupported criticisms of the government's methodology are

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[56] *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).

[57] *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).

[58] *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); *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).

[59] *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); *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).

[60] *Id.; Adarand VII*, 228 F.3d at 1166.

[61] *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.

[62] *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).

insufficient.[63] The courts have held that mere speculation the government's evidence is insufficient or methodologically flawed does not suffice to rebut a government's showing.[64]

The courts have stated 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.'"[65] The courts hold that in assessing the evidence offered in support of a finding of discrimination, it considers "both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself."[66]

[63] *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.

[64] *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).

[65] *Geyer Signal, Inc., 2014* WL 1309092, *quoting Sherbrooke Turf,* 345 F.3d at 970.

[66] *Id, quoting Adarand Constructors, Inc.*, 228 F.3d at 1166; *see, e.g., Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 597 (3d Cir. 1996).

The courts have noted that "there is no 'precise mathematical formula to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark.'"[67] 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.[68] 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.[69] 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.[70]

The courts have stated the strict scrutiny standard is applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically "fatal in fact."[71] In so acting, a governmental entity must demonstrate it had a compelling interest in "remedying the effects of past or present racial discrimination."[72]

Thus, the courts hold that to justify a race-conscious measure, a government 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.[73] Courts have stated the sufficiency of the state or local government's evidence of discrimination "must be evaluated on a case-by-case basis."[74]

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[67] *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).

[68] *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).

[69] *Croson*, 488 U.S. 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).

[70] *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).

[71] *See, e.g., Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); *see, e.g., H. B. Rowe*, 615 F.3d at 241; 615 F.3d 233 at 241.

[72] *See, e.g., Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); *see, also H. B. Rowe; quoting Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

[73] *See, e.g., Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); *H. B. Rowe*; 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); *see, 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).

[74] *Concrete Works of Colorado v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994); *H. B. Rowe*, 615 F.3d at 241. (internal quotation marks omitted).

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.[75] "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."[76]

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.[77] The federal courts have held that a significant statistical disparity between the utilization and availability of minority- and women-owned firms may raise an inference of discriminatory exclusion.[78] However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.[79]

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[75] *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.

[76] *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).

[77] *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; *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).

[78] *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 (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).

[79] *Western States Paving*, 407 F.3d at 1001.

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.[80] There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,[81] "An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach."[82]

- Utilization analysis. Courts have accepted measuring utilization based on the proportion of an agency's contract dollars going to MBE/WBEs and DBEs.[83]

- Disparity index. An important component of statistical evidence is the "disparity index."[84] 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 impact. This has been referred to as "The Rule of Thumb" or "The 80 percent Rule."[85]

- 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

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[80] *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; *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).

[81] *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).

[82] *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).

[83] *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.

[84] *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).

[85] *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.

> statistical disparity corresponding to a standard deviation of less than two is not considered statistically significant.[86]

The Fifth Circuit Court of Appeals in *W. H. Scott Constr. Co. v. City of Jackson, Mississippi*, in discussing the *Croson* decision stated the U.S. Supreme Court made clear that combating racial discrimination is a compelling government interest.[87] The Fifth Circuit said that the Supreme Court noted a governmental entity can enact a race-conscious program to remedy past or present discrimination only 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."[88] The court in *W. H. Scott* held, therefore, the governmental entity must "[identify] that discrimination with the particularity required by the Fourteenth Amendment,"[89] so that there is "'a strong basis in evidence for its conclusion that remedial action was necessary.'"[90]

The Fifth Circuit pointed out that the Supreme Court stressed a governmental entity must establish a factual predicate, tying its set-aside percentage to identified injuries in the particular local industry.[91] The court in *W. H. Scott* found the Supreme Court provided some guidance in determining what types of evidence would justify the enactment of a remedial scheme. The Fifth Circuit quoted the Supreme Court 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.
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> … Moreover, 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."[92]

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[86] *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.

[87] 199 F.3d 206, 218, *citing Croson,* 448 U.S. at 492.

[88] *Id.*

[89] *Id.*

[90] *Id., citing Croson,* 448 U.S. at 500 (*quoting Wygant v. Jackson B. of Educ,* 476 U.S. 267, 277 (1986)).

[91] 199 F.3d 206, 218, *citing Croson,* 448 U.S. at 499 (noting that the "defects are readily apparent in this case. The 30 percent quota cannot in any realistic sense be tied to any injury suffered by anyone.").

[92] *Id., citing Croson*, 448 U.S. at 509 (emphasis in original).

The Fifth Circuit concluded 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.[93]

The Fifth Circuit stated that disparity studies are probative evidence of discrimination because they ensure that the "relevant statistical pool," of qualified minority contractors is being considered.[94]

Marketplace discrimination and data. In an instructive 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.[95] 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.*[96] 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."[97] 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."[98]

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.[99] Thus, the local government was not required to demonstrate that it is "guilty of prohibited discrimination" to meet its initial burden.[100]

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.[101] 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.[102]

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

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[93] 199 F.3d 206, 218, *citing Croson,* 448 U.S. at 499.

[94] 199 F.3d 206, 218.

[95] 321 F.3d at 973.

[96] *Id.*

[97] *Id., quoting Concrete Works II*, 36 F.3d at 1529 (emphasis added).

[98] *Concrete Works*, 321 F.3d 950, 973 (10th Cir. 2003), *quoting Concrete Works II*, 36 F.3d at 1529 (10th Cir. 1994).

[99] *Id.* at 973.

[100] *Id.*

[101] *Id.* at 974, *quoting Concrete Works II*, 36 F.3d at 1529.

[102] *Id.*

itself.[103] 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.[104]

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.[105] ("[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.*"[106] Further, the Court pointed out that it earlier rejected the 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."[107] 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.[108]

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."[109] 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.[110]

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 Tenth Circuit 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."[111]

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

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[103] *Id.* at 974.

[104] *Id., citing Adarand VII*, 228 F.3d at 1166-67.

[105] *Concrete Works*, 321 F.3d at 976, *citing Adarand VII*, 228 F.3d at 1166-67.

[106] *Id.* (emphasis added).

[107] *Id., quoting Concrete Works II*, 36 F.3d at 1529.

[108] *Id., quoting Concrete Works II*, 36 F.3d at 1530 (emphasis added).

[109] *Id.*

[110] *Concrete Works*, 321 F.3d at 976, *quoting Croson*, 488 U.S. at 492.

[111] *Id.* at 977, *quoting Adarand VII*, 228 F.3d at 1167-68.

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.[112]

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."[113] In *Adarand VII,* the Court concluded that this study, among other evidence, "strongly support[ed] an initial showing of discrimination in lending."[114]

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 connection between access to capital and ability to implement public works construction projects."[115]

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.[116]

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.[117]

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.[118] But personal accounts of actual discrimination may complement empirical evidence and play an important role in

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[112] *Id.* at 977.

[113] *Id.* at 977-78.

[114] *Id.* at 978, *quoting, Adarand VII*, 228 F.3d at 1170, n. 13.

[115] *Id.* at 978, *quoting Adarand VII*, 228 F.3d at 1170.

[116] *Id.* at 979, *quoting Adarand VII*, 228 F.3d at 1174.

[117] *Id.* at 979-80.

[118] *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).

bolstering statistical evidence.[119] 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.[120]

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.[121]

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.[122]

b. 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 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

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[119] *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).

[120] *Concrete Works I*, 36 F.3d at 1520.

[121] *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).

[122] *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).

- The impact of a race-, ethnicity- or gender-conscious remedy on the rights of third parties.[123]

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 government 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.[124]

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."[125] 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."[126]

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

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[123] *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.

[124] *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; *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.

[125] *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).

[126] *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.

appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'"[127]

[127] *Associated Gen. Contractors of Ohio, Inc. v. Drabik* ("Drabik II"), 214 F.3d 730, 738 (6th Cir. 2000).

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*[128] 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."[129] The Court found that the District failed to show it seriously considered race-neutral measures.

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 require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.[130] 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.[131]

The "narrowly tailored" analysis is instructive in terms of state or local governments implementing the Federal DBE Program, developing any potential legislation or programs that involve MBE/WBE/DBEs, or in connection with determining appropriate remedial measures to achieve legislative objectives.

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."[132]

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[128] 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007).

[129] 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).

[130] *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; *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.

[131] *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).

[132] *Croson*, 488 U.S. at 509-510.

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.[133]

The courts have held that while the narrow tailoring analysis 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.[134]

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[133] 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).

[134] *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, c*iting 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.

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.[135] For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;[136] (2) good faith efforts provisions;[137] (3) waiver provisions;[138] (4) a rational basis for goals;[139] (5) graduation provisions;[140] (6) remedies only for groups for which there were findings of discrimination;[141] (7) sunset provisions;[142] and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.[143]

It is significant and instructive that several recent federal court decisions have upheld the Federal DBE Program and its implementation by local and state governments and recipients of federal funds, including satisfying the narrow tailoring factors.[144]

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[135] *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).

[136] *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).

[137] *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.

[138] *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).

[139] *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).

[140] *Id.*

[141] *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.

[142] *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).

[143] *Coral Constr*., 941 F.2d at 925.

[144] *See, e.g., Midwest Fence Corp. v. USDOT, Illinois DOT, et al.,* 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), *cert. denied*, 2017 WL 497345 (2017); *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); *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al*., 713 F.3d 1187, (9th Cir. 2013); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006); *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al*., 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. May 16, 2017); *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007); S*herbrooke 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); *Adarand Constructors, Inc. v. Slater, Colorado DOT,* 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*"); *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); *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014); *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013); *Geod Corp. v. New Jersey Transit Corp.,* 766 F. Supp.2d. 642 (D. N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida,* 544 F. Supp.2d 1336 (S.D. Fla. 2008).

Intermediate scrutiny analysis

Certain Federal Courts of Appeal, including the Fifth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.[145] The Fifth Circuit has applied "intermediate scrutiny" to classifications based on gender.[146] Restrictions subject to intermediate scrutiny are permissible so long as they are narrowly tailored to serve a significant governmental interest.[147]

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.[148]

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.[149]

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[145] *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe,* 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *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); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification."); *Geyer Signal, Inc., 2014* WL 1309092; *Progressive Sec. Ins. Co. v. Foster*, 711 So. 2d 675 (La. 1998). (A classification that involves discrimination based on certain classes such as gender or illegitimacy will generally receive intermediate scrutiny. Under this level of review, to be upheld the classification must be substantially related to a legitimate state interest).

[146] *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)); *Progressive Sec. Ins. Co. v. Foster*, 711 So. 2d 675 (La. 1998). (A classification that involves discrimination based on certain classes such as gender or illegitimacy will generally receive intermediate scrutiny. Under this level of review, to be upheld the classification must be substantially related to a legitimate state interest).

[147] *Serv. Emp. Int'l Union, Local 5 v. City of Hous*., 595 F.3d 588, 596 (5th Cir. 2010); *see, e.g. State v. Granger*, 982 So. 2d 779, 787-788 (La. 2008); see, e.g., *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *see, e.g., H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *see, Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993).

[148] *Id.*; *See generally*, *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."); *Progressive Sec. Ins. Co. v. Foster*, 711 So. 2d 675 (La. 1998). (A classification that involves discrimination based on certain classes such as gender or illegitimacy will generally receive intermediate scrutiny. Under this level of review, to be upheld the classification must be substantially related to a legitimate state interest).

[149] *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.*

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.[150] 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 not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.[151]

The Eleventh Circuit has 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."[152]

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."[153]

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."[154] 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 women-owned contractors.[155] 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

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[150] *See generally*, *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.")

[151] *Coral Constr. Co.*, 941 F.2d at 931-932; *See Eng'g Contractors Ass'n*, 122 F.3d at 910.

[152] 122 F.3d at 929 (internal citations omitted).

[153] 615 F.3d 233, 242; 122 F.3d at 929 (internal citations omitted).

[154] *Contractors Ass'n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

[155] *Contractors Ass'n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

that case.[156]

The Third Circuit in *CAEP I* held the evidence offered by the City of Philadelphia regarding women-owned construction businesses was insufficient to create an issue of fact. The study in *CAEP I* contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses.[157] 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.[158] But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.[159] 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.[160] This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard.

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.[161] 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."[162]

The Fifth Circuit Court of Appeals has found that under a rational-basis review, the court presumes state legislation to be constitutionally valid.[163] A classification imposed by statute or law, according to the Fifth Circuit, 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.[164] If evaluation of challenged legislation reveals any conceivable state purpose that can be considered as served by the legislation, then it must be upheld.[165]

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[156] *Contractors Ass'n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

[157] *Contractors Ass'n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *See, e.g., Heller v. Doe,* 509 U.S. 312, 320 (1993); *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."); *State v. Granger*, 982 So. 2d 779, 787-788 (La. 2008); *La. Associated Gen. Contractors, Inc. v. State of Louisiana, et.al,* 669 So. 2d 1185 (La. 1996).

[162] *See, e.g., Heller v. Doe,* 509 U.S. 312, 320 (1993); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988); *see also, La. Associated Gen. Contractors, Inc. v. State of Louisiana, et.al, 669 So. 2d 1185* (La. 1996).

[163] *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988); *see R. T. Faulk III v. Union Pacific R. Co.*, 2011 WL 77905 (W.D. La. 2011).

[164] *Id.*; *see*, *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, *reh'g denied*, 450 U.S. 960 (1981).

[165] *Id.*; *see*, *McGowan v. Maryland*, 366 U.S. (1961); *Lucas v. United States*, 807 F.2d 414, 422 (5th Cir.1986).

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."[166] Because all legislation classifies its objects, differential treatment is justified by "any reasonably conceivable state of facts."[167] The Fifth Circuit holds that legislation need not pursue its permissible goal by using the least restrictive means of classification; consequently, the Equal Protection Clause is not violated "merely because the classifications made … are imperfect."[168]

A recent 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").[169]

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 percent; Woman-Owned[:] 5 percent: HUBZone[:] 3 percent; Service Disabled, Veteran-Owned[:] 3 percent."[170]

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.[171] The court stated it "cannot say that the agency's approach is clearly unlawful, or that the approach lacks a rational basis."[172]

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.[173] 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 …."[174]

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166 *Heller v. Doe*, 509 U.S. 312, 320 (1993).

167 *Id.*

168 *Johnson v. Rodriguez*, 110 F.3d 299, 306 (5th Cir. 1997), *cert. denied*, 522 U.S. 995 (1997) (quotation omitted).

169 2012 WL 5939228 (Fed. Cl. 2012).

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.*

174 *Id.*

Louisiana Constitution equal protection provision: La. Const., Art I, Sec. 3. The Louisiana Constitution, according to the courts, provides a different equal protection standard than that of the United States Constitution.[175] Article I, Section 3 of the Louisiana Constitution provides:

> No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.[176]

The Louisiana Supreme Court has found that the United States Constitution is more limited than the Louisiana Constitution Equal Protection clause, in that it provides only the following with respect to equal protection under state laws: "No State shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., art. 14. The Louisiana Supreme Court has concluded that States are permitted under the U.S. Constitution to afford their citizens greater equal protection rights than those afforded under the U.S. Constitution.[177] "Both the express language adopted in Art. I, Sec. 3 as well as the proceedings of the 1973 Constitutional Convention support [the] holding that Art. I, Sec. 3 was intended to give the citizens of this state greater equal protection rights than are provided under the Fourteenth Amendment."[178]

The Louisiana Supreme Court distinguished equal protection analysis under the federal law and Louisiana state law. Under federal equal protection strict scrutiny analysis, if a law distinguishes between individuals on the basis race, it will be presumed unconstitutional, but may be upheld if the law is shown to be necessarily related to a compelling state interest.[179] "On the other hand, Art. I, Sec. 3 provides that '[n]o law shall discriminate against a person because of race.'"[180] The Louisiana Supreme Court held that pursuant to the Louisiana Constitutional provision by its very terms, "it is irrelevant whether there is arguably a compelling state interest that justifies the racially discriminatory law, and once it is determined that a law discriminates against persons on the basis of race, there is no further inquiry."[181]

Therefore, according to the Louisiana Supreme Court, when a law discriminates against a person by classifying him or her on the basis of race, it shall be "forbidden completely," regardless of the justification behind the racial discrimination.[182]

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[175] *La. Associated Gen. Contractors, Inc. v. State of Louisiana, et.al*, 669 So. 2d 1185 (La. 1996).

[176] La. Const., Art. I, Sec. 3.

[177] *See La. Associated Gen. Contractors*, 669 So. 2d at 1196. (See summary in Section D.3 below).

[178] *Id.*

[179] *Id.* at 1197.

[180] *Id.* at 1197.

[181] *Id.* (See discussion in Section D.3 below).

[182] *Id.* at 1198; *see Louisiana Associated General Contractors, Inc. v. New Orleans Aviation Board,* 764 So. 2d 31, 32 (La. 1999).

The court stated that for classifications based on race, there is no scrutiny under the Louisiana Constitution equal protection provision.[183] According to the court, where a law of the state discriminates on the basis of race, it shall be forbidden completely, regardless of the race of the persons benefitted or burdened by the law.[184]

This principle was re-affirmed by the Louisiana Supreme Court in *State v. Granger*.[185] In *Granger*, the Louisiana Supreme Court reviewed the history of the adoption of the state Constitution as compared to the text of the U.S. Constitution and noted that while the "federal standard of equal protection analysis provides a minimal level of protection, states can afford greater protection than it requires … Louisiana has done just that." *Id.* (internal citations omitted). The court concluded that based on the stricter levels of scrutiny in the Louisiana Constitution, Art. I, sec. 3, "laws creating the type of classification listed in the first situation [based on race or religious beliefs] always fail."[186]

Federal courts interpreting the Louisiana Constitution are in accord. The Fifth Circuit Court of Appeals addressed this interplay between federal and state constitutions and held that "[u]nder the United States Constitution, classifications based on race are permissible if they are narrowly tailored to serve a compelling government interest. However, under the Louisiana Constitution, classifications based on race shall be repudiated completely, regardless of the justification."[187]

The Firth Circuit in *Dean v. City of Shreveport* concluded that "Article I, Section 3 of the Louisiana Constitution provides far greater protection against racial discrimination than does its federal counterpart."[188] Under this framework, the Fifth Circuit held that "[h]ere, the City's hiring process unquestionably classifies according to race. The City separates white and black firefighter applicants when deciding which applicants will proceed to phase two of the hiring process. The City's actions violate Article I, Section 3 of the Louisiana Constitution."[189]

Pending cases (at the time of this report)

There are pending cases in the federal courts at the time of this report involving challenges to MBE/WBE/DBE Programs and that may potentially impact and be instructive to the study, including the following:

Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al., U.S. District Court for Western District of Tennessee, Western Division, Case 2:19-cv-02407-SHL-tmp, filed on January 17, 2019. This is a challenge to the Shelby County, Tennessee "MWBE" Program. In *Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan*

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[183] *Id.* at 1198.

[184] *Id.* at 1199.

[185] 982 So. 2d 779, 787-789 (La. 2008).

[186] *Id.*

[187] *Dean v. City of Shreveport*, 438 F.3d 448, 464 (5th Cir. 2006) (internal citations and quotations omitted)).

[188] *Dean v. City of Shreveport*, 438 F.3d 448, 464 (5th Cir. 2006).

[189] *Id.* at 464-65; *see also Faulk v. Union Pac. R. Co.*, 2011 WL 777905, at *15 (W.D. La. Mar. 1, 2011) ("The Louisiana Constitution provides a different equal protection standard than the United States Constitution.").

& Thornburg, Inc. v. Shelby County, Tennessee, et al., the Plaintiffs are suing Shelby County for damages and to enjoin the County from the alleged unconstitutional and unlawful use of race-based preferences in awarding government construction contracts. The Plaintiffs assert violations of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. Sections 1981, l983, and 2000(d), and Tenn. Code Ann. § 5-14-108 that requires competitive bidding.

The Plaintiffs claim the County MWBE Program is unconstitutional and unlawful for both prime and subcontractors. Plaintiffs ask the Court to declare it as such, and to enjoin the County from further implementing or operating under it with respect to awarding government construction contracts.

At the time of this report, the parties are engaged in discovery.

In addition, Plaintiffs on February 17, 2010 filed with the Court a Motion to Exclude Proof from Mason Tillman Associates (MTA), the disparity study consultant to the County. A federal District Court in California (Northern District), issued an Order granting a Motion to Compel against Mason Tillman Associates on February 17, 2020, compelling production of documents pursuant to a subpoena served on it by the Plaintiffs. MTA appealed the Order to the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals has recently dismissed the appeal by MTA, and sent the case back to the federal district court in California. The federal district court in Tennessee issued an Order on April 9, 2020 in which it denied *without prejudice* the Motion to Exclude Proof based on the lack of authority to limit the County's ability to present proof at trial due to the non-party MTA's failure to meet its discovery obligations, that nothing in the record attributes MTA's failure to meet its discovery obligations to the County, and that MTA's efforts to avoid disclosure is coming to an end based on the recent dismissal of MTA's appeal to the Ninth Circuit. The district court in Tennessee stated in a footnote: "Now that the Ninth Circuit has dismissed MTA's appeal, Plaintiff is free to again ask the California district court to compel MTA (or sanction it for failing) to produce any documents which it is obligated to disclose."

Palm Beach County Board of County Commissioners v. Mason Tillman Associates, Ltd.; Florida East Coast Chapter of the AGC of America, Inc., Case No. 502018CA010511; In the 15th Judicial Circuit in and for Palm Beach County, Florida. In this case, the County sued Mason Tillman Associates (MTA) to turn over background documents from disparity studies it conducted for the Solid Waste Authority and for the county as a whole. Those documents include the names of women and minority business owners who, after MTA promised them anonymity, described discrimination they say they faced trying to get county contracts. Those documents were sought initially as part of a records request by the Associated General Contractors of America (AGC).

The County filed suit after its alleged unsuccessful efforts to get MTA to provide documents needed to satisfy a public records request from AGC. The Florida ECC of AGC (AGC) also requested information related to the disparity study that MTA prepared for the County.

The AGC requests documents from the County and MTA related to its study and its findings and conclusions. AGC requests documents including the availability database, underlying data, anecdotal interview identities, transcripts and findings, and documents supporting the findings of discrimination.

The MTA filed a Motion to Dismiss. The Court issued an order to defer the Motion to Dismiss and directing MTA to deliver the records to the court for in-camera inspection. The Court also has denied a motion by AGC to be elevated to party status and to conduct discovery. At the time of this report, the parties are in discovery.

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. At the time of this report there has not been a ruling on this Motion. The court issued a Case Management Order on April 14, 2020 focusing on the "preliminary legal issues" in the case and ordering discovery and that motions for summary judgment and opposition briefs be filed by August 2020 relating to the preliminary legal issues.

Pharmacann Ohio, LLC v. Ohio Dept. Commerce Director Jacqueline T. Williams, In the Court of Common Pleas, Franklin County, Ohio, Case No. 17-CV-10962, November 15, 2018, appeal pending, in the Court of Appeals of Ohio, Tenth Appellate District, Case No. 18-AP-000954.

This is a state court case that is instructive to the study as it discusses and analyzes the evidence presented by the state government to justify its legislation providing a preference to MBEs, and applies the struct scrutiny test to determine if the state had sufficient evidence to establish a race conscious preference program to MBEs.

In 2016, the Ohio legislature codified R.C. Chapter 3796, legalizing medical marijuana. The legislature instructed Defendant Ohio Department of Commerce to issue certain licenses to medical marijuana cultivators, processors, and testing laboratories. The Department was instructed to award 15 percent of said licenses to economically disadvantaged groups, defined as African Americans, American Indians, Hispanics, and Asians.

Plaintiff Greenleaf Gardens, LLC received a final score that would have otherwise qualified it to receive one of the twelve provisional licenses. Plaintiff was denied a provisional license, while Defendants Harvest Grows, LLC, and Parma Wellness Center, LLC were awarded provisional licenses due to the control of the defendant companies by one or more members of an economically disadvantaged group.

In 2018, Plaintiff filed its intervening complaint, seeking equal protection under the law pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. Plaintiff moved for summary judgment on counts one, two, and four of its complaint. On counts one and four of the complaint. Plaintiff seeks declaratory judgment that R.C. §3796.09(C) is unconditional on its face pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. Count two asserts a similar claim under the Fourteenth Amendment and the Ohio Constitution, but on an as applied basis.

R.C. §3796.09(C) is subject to strict scrutiny. The court held that strict scrutiny presumes the unconstitutionality of the classification absent a compelling governmental justification. Therefore, §3796.09(C) is presumed unconstitutional, absent sufficient evidence of a compelling governmental interest.

Defendants assert the State had a compelling government interest in redressing past and present effects of racial discrimination within its jurisdiction where the State itself was involved. In support, Defendants put forth evidence of prior discrimination in bidding for Ohio government contracts, other states' marijuana licensing related programs, marijuana related arrests, and evidence of the legislature's desire to include a provision in R.C. §3796.09 similar to Ohio's MBE program.

Some of the evidence Defendants provide, the court found may not have been considered by the legislature during their discussion of R.C. §3796.09. In support of its inclusion, Defendants cite law upholding the use of "post-enactment" evidence. Courts have reached differing conclusions as to whether post-enactment evidence may be used in a court's analysis; but the court found persuasive courts that have held "post-enactment evidence may not be used to demonstrate that the government's interest in remedying prior discrimination was compelling."

The only evidence clearly considered by the legislature *prior* to the passage of R.C. §3796.09(C), the court stated, is marijuana related arrests. There is evidence that legislators may have considered MBE history and specifically requested the inclusion of a provision similar to the MBE program. However, the only evidence provided are a few emails seeking a provision like the MBE program. There was no testimony showing any statistical or other evidence was considered from the previous studies conducted for the MBE program.

Defendants included evidence of statistical studies in 2013, showing the legislature considered evidence of racial disparities for African Americans and Latinos regarding arrest rates related to marijuana. The court did not find this to be evidence supporting a set aside for economically disadvantaged groups who are not referenced in either the statistical evidence or the anecdotal evidence on arrest rates. Evidence of increased arrest rates for African Americans and Latinos for marijuana generally, the court found, is not evidence supporting a finding of discrimination within the medical marijuana industry for African Americans, Hispanics, American Indians and Asians.

The Defendants assert the legislators considered the history of R.C. §125.081, Ohio's MBE program. The last studies Defendants reference to support the legislature's conclusion that remedial action is necessary in the industry of government procurement contracts were conducted in 2001, leading to the creation of the Encouraging Diversity Growth and Equity Program in 2003. Since then, various cities have conducted independent studies of their governments and the utilization of MBEs in procurement practices. Although Defendants reference these materials, these studies were not reviewed by the legislature for R.C. §3796.09(C).

The only evidence referenced in the materials provided by the Defendants to show the General Assembly considered Ohio's MBE and EDGE history are three emails between a congressional staff member and an employee of the Legislative Service Commission requesting a set aside like the one included in R.C. §125.081 and R.C. §123.125. There is no reference to the legislative history and evidence from the original review in between 1978 and 1980. The legislators who reviewed the evidence in 1980 clearly were not members of the legislature in 2016 when R.C. §2796.09(C) passed.

Even if a few legislators might have seen the MBE evidence, the court stated it cannot find it was considered by the General Assembly as evidence supporting remedial action.

Additionally, even if the court could have found this evidence was considered by the legislature in support of R.C. §3796.09(C), the materials from R.C. §125.081 pertain to *government procurement contracts* only. The court held the law requires that evidence considered by the legislature must be directly related to discrimination in that particular industry. Defendants argued the fact that the medical marijuana industry is new, but the court said such newness necessarily demonstrates there is no history of discrimination in this particular industry, i.e. legal cultivation of medical marijuana.

Finally, Defendants' remaining evidence, the court said, is post-enactment. The court stated it would be given a lesser weight than that of pre-enactment evidence. Considering all the evidence put forth, the court found there is not a strong basis in evidence supporting the legislature's conclusion that remedial action is necessary to correct discrimination within the medical marijuana industry. Accordingly, it held a compelling government interest does not exist.

The court also found R.C. §3796.09(C) is not narrowly tailored to the legislature's alleged compelling interest. Under Ohio law, the legislature must engage in an analysis of alternative remedies and prior efforts *before* enacting race-conscious remedies. Neither party directed the court to sufficient evidence of alternative remedies proposed or analyzed by the legislature during their review of R.C. §3796.09(C). The evidence of prior alternative remedies pertains to the government contracting market. Neither of the studies Defendant cites relate to the medical marijuana industry. The Defendants did not show evidence of any alternative remedies considered by the legislature before enacting R.C. §3796.09(C).

The court believed alternative remedies could have been available to the legislature to alleviate the discrimination the legislature stated it sought to correct. If the legislature sought to rectify the elevated arrest rates for African Americans and Latinos/Hispanics possessing marijuana, the correction should have been giving preference to those companies owned by former arrestees and convicts, not a range of economically disadvantaged individuals, including preferences for unrelated races like Native Americans and Asians.

R.C. §3796.09(C) appears to be somewhat flexible, the court stated, in that it includes a waiver provision. The court found the entire statute itself is not flexible, being that it is a strict percentage, unrelated to the particular industry it is intended for, medical marijuana. R.C. §3796.09(C) requires 15 percent of cultivator licenses are issued to economically disadvantaged group members. This is not an estimated goal, but a specific requirement. Additionally, R.C. §3796.09(C) does not include a proposed duration. Accordingly, the court found R.C. §3796.09(C) is not flexible.

Defendants admitted that the 15 percent stated within R.C. §3796.09(C) was lifted from R.C. §125.081 without any additional research or review by the legislature regarding the relevant labor market described in R.C. §3796.09(C), the medical marijuana industry. Defendants argued that the numbers as associated with the contracting market are directly applicable to the newly created medical marijuana industry because of a disparity study conducted by Maryland. The Maryland study was not reviewed by the legislature before enacting R.C. §3796.09(C), and is a review of markets and disparity in Maryland, not Ohio. Accordingly, the court found this one study the Defendants use to

try to connect two very different industries (government contracting market and a newly created medical marijuana industry) has little weight, if any.

Regarding the statistics the legislature did not review prior to enacting R.C. §3796.09(C), the cited statistics pertaining to the arrest rates of minorities, the court found, are not directly related to the values listed within the statute. Much of the statistics referenced are based on general rates throughout the United States, or findings on discrimination pertaining to all drug related arrests. But these other statistics do not demonstrate the racial disparities pertaining to specifically marijuana throughout the state of Ohio. The statistics cited in the materials, the court said, is not reflected in the amount chosen to remediate the discrimination R.C. §3796.09(C), fifteen percent. This percentage is not based on the evidence demonstrating racial discrimination in marijuana related arrest in Ohio. Therefore, the court concluded the numerical value was selected at random by the legislature, and not based on the evidence provided.

Defendants argued third parties are minimally impacted. R.C. §3796:2-1-01 allots twelve licenses to be issued to the most qualified applicants. By allowing a 15 percent set aside, the court concluded licenses are given to lower qualified applicants solely on the basis of race. The court found the 15 percent set aside is not insignificant and the burden is excessive for a newly created industry with limited participants.

Finally, the Defendants assert R.C. §3796.09(C) is a continual focus of the legislature which leads to reassessment and reevaluation of the program. As the statute does not include instructions for the legislature to assess and evaluate the program on a reoccurring basis, the court concluded that this factor is not fulfilled.

Upon review of all factors together, the court found failure of the legislature to evaluate or employ race-neutral alternative remedies; plus, the inflexible and unlimited nature of the statute; combined with the lack of relationship between the numerical goals and the relevant labor market; and the large impact of the relief on the rights of third parties, shows the legislature failed to narrowly-tailor R.C. §3796.09(C).

As the ultimate burden remains with Plaintiff to demonstrate the unconstitutionality of R.C. §3796.09(C), the court found Plaintiff met its burden by showing the legislature failed to compile and review enough evidence related to the medical marijuana industry to support the finding of a strong basis in evidence for a compelling government interest to exist. Additionally, the legislature did not narrowly tailor R.C. §3796.09(C). Therefore, the Court finds R.C. §3796.09(C) is unconstitutional on its face pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution.

The case at the time of this report is on appeal in the Court of Appeals of the Ohio Tenth Appellate District, Case No. 18-AP-000954.

This list of pending cases is not exhaustive, but in addition to the cases cited previously may potentially have an impact on the study and implementation of MBE/WBE/DBE Programs, related legislation, state and local government implementation of the Federal DBE Program, and other types of programs impacting participation of MBE/WBE/DBEs.

Ongoing review. The above represents a summary of the legal framework pertinent to the study and implementation of MBE/WBE/DBE, or race-, ethnicity- or gender-neutral programs, the Federal DBE Program, and the implementation of the Federal DBE Program by state and local governments and recipients of federal funds. 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 in the Fifth Circuit Court of Appeals

1. *W.H. Scott Constr. Co. v. City of Jackson, Mississippi,* 199 F.3d 206 (5th Cir. 1999)

A nonminority 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 percent of all city contracts. 199 F.3d at 208. *Id.* The 5 percent 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 percent because it was found that 10 percent 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 percent participation by subcontractors certified as Disadvantaged Business Enterprises (DBEs) and 5 percent 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 percent 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 percent. *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 percent 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 percent 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 percent. *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 percent 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 percent 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 percent 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 provide 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 percent 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.

2. *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 women-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 4 percent of the value of a contract. *Id.* Kossman did not present evidence that he ever bid on more than 4 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 nonminority 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 women-owned businesses (WBEs) declined by 50 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 4 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 34 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 nonminority 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.

3. *Louisiana Associated General Contractors, Inc. v. State of Louisiana, et. al*, 669 So. 2d 1185 (La. 1996)

In 1994, the Louisiana Health Care Authority advertised for bids for a capital renovation project in New Orleans. 669 So. 2d at 1189. The project was designated as a minority set-aside project in accordance with the Louisiana Minority and Women's Business Enterprise Act ("Act"). Thus, only minority business enterprise contractors could bid on the project. *Id.*

Plaintiff Louisiana Associated General Contractors, Inc. filed a petition for Declaratory Injunctive Relief and sought to enjoin the acceptance of the bids by the Authority for the project, to enjoin any further enforcement of the Act, and to have the Act declared unconstitutional alleging that it discriminated on the basis of race in violation of the Louisiana Constitution equal protection provision (La. Const. Art. I, Sec. 3). *Id* at 1189. The trial court issued a temporary restraining order restraining the Authority from continuing to treat the project as a minority set-aside project and from awarding any other public works contracts as set-aside projects under the Act. *Id* at 1189-1190. Subsequently, the Authority withdrew the pending bid request and re-bid the project without the minority set-aside designation. *Id.* at 1190.

Because the Authority stated that it would continue to issue future minority set-aside designated bids under the Act, the Louisiana AGC filed a supplemental and amending petition reiterating its previous request for declaratory and injunctive relief. *Id.* at 1190. Thereafter, the Louisiana AGC filed a motion for summary judgment. *Id.* The trial court granted the motion, finding that those portions of the Act which denied the opportunity to bid or granted bidding preferences based on race were unconstitutional. *Id.* The trial court also held the remaining portions of the Act were so interrelated that they were not severable, including the provisions relating to gender-based preferences, and therefore declared the entire Minority Business Enterprise Act to be an unconstitutional violation of the Louisiana Constitution equal protection provision (Art. I. Sec. 3) and permanently enjoined the authority from any implementation or enforcement of the Act. *Id.*

The Act. The Louisiana Minority Women's Business Enterprise Act was initially enacted in 1984 and later amended and reenacted in 1992. The Act required a certain percentage of funds expected to be expended on public works and procurement contracts be designated solely for participation by certified minority business enterprises and women's business enterprises. *Id.* at 1188. The Act provided that the percentage applicable to each agency cannot exceed 10 percent MBEs and 2 percent for WBEs. *Id.* The Act was mandatory on each state agency and applied to all public works contracts and all contracts for the procurement of goods and services by state agencies and educational institutions. *Id.* Each agency was required to comply with the overall annual participation goals established for the individual agency under the Act. *Id.*

In order to meet the goals set for participation by MBEs and WBEs, the agencies set aside public works or procurement contracts solely for bidding by certified business enterprises. *Id.* at 1189. The Act also mandated that preferences be used in certain situations, including where a contract for the construction of public works was to be awarded by the Division of Administration and the amount of the contract was $200,000 or more. *Id.* In such cases, the award was required to be made to a minority-owned business when the price bid by such business was within 5 percent of the otherwise lowest responsive and responsible bidder, and where the minority business enterprise agreed to

adjust its bid to that of the lowest bidder, as long as the minority business enterprises original bid was within 5 percent of that bid. *Id.*

In sum, the court stated, the Act mandated that state agencies employ a system of set-asides and preferences in procurement of public works contracts from which only certified MBEs and WBEs benefit. *Id.* at 1189. The court said, therefore, while certified MBEs were able to bid on 100 percent of the public works and procurement contracts let by the state, nonminority businesses were only able to bid equally on approximately 90 percent of such constructs put out to bid by state agencies. *Id.*

Article I. Section 3 of the Louisiana Constitution. Article I, Section 3 of the Louisiana Constitution provides that no person shall be denied the equal protection of the laws, and that no laws shall discriminate against a person because of race or religious ideas, beliefs, or affiliations, and that no law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. *Id.* at 1195.

The Louisiana Supreme Court concluded that the Fourteenth Amendment to the United States Constitution provides only with respect to equal protection that no states shall deny any person within its jurisdiction the equal protection of the laws. *Id.* at 1195. By its own terms, the Louisiana Supreme Court found that the Fourteenth Amendment does not specify or delineate which classifications will receive particular levels of scrutiny nor does it explain how a particular level of scrutiny will operate in application. *Id.* at 1195-1196. Generally, the Louisiana Supreme Court said under the Fourteenth Amendment to the United States Constitution, governmental action will receive strict scrutiny if a classification infringes on a fundamental or express constitutional right or if it discriminates on the basis of a "suspect" classification, such as race. *Id.* at 1196. The law is presumed to be unconstitutional and will be struck down unless shown to be necessarily related to a compelling state interest. *Id.*

A classification will generally receive intermediate scrutiny if it involved discrimination based on certain classes such as gender. *Id* at 1196. To be upheld on this level of review the classification must be substantially related to a legitimate state interest. *Id.* The lowest tier of review applies to any other classification and requires the party challenging the law to prove that the classification is not rationally related to any legitimate government interest. *Id.*

The framers of the 1974 Louisiana Constitution had the voters ratify the equal protection provision which gave greater rights and protection than its federal counterpart. *Id.* at 1196. The court held that Article I, Section 3 was intended to give the citizens of Louisiana greater equal protection rights than are provided under the Fourteenth Amendment. *Id.* The court thus held as follows: "The section on its face absolutely prohibits any state law which discriminates on the basis of race." *Id.* at 1196.

The court rejected the argument by the state that it has a constitutional duty under the Fourteenth Amendment to engage in discrimination, finding that the United States Supreme Court has never interpreted the Fourteenth Amendment to require discrimination on the basis of race for any reason whatsoever. *Id.* at 1199. The Louisiana Supreme Court said that the United States Supreme Court pointed out that states do not have a duty to engage in race preference programs but instead have the "authority" to do so, should they so desire, provided this authority be exercised within the constraints of the Fourteenth Amendment. *Id.* at 1199. Thus, the court concluded that although a

state has the authority to participate in race preference programs under the Fourteenth Amendment, that same provision does not mandate that it do so. *Id.* Consequently, the court found that a state constitution which prohibits a state from enacting such programs is not in violation of the Fourteenth Amendment. *Id.*

The state also argued that the Louisiana Constitution provision should be interpreted to allow for racial classifications in the imposition of quotas or set-aside programs because to hold otherwise would require the state to withdraw from federal programs, which may condition the state's receipt of federal funds on, among other things, the state's use of minority preferences and set-asides in use of the funds. *Id.* at 1200. The Louisiana Supreme Court rejected that argument finding that the absolute and mandatory language used in the prohibition against laws which discriminate on the basis of race found in the Louisiana Constitution does not change because the state may stand to lose federal funds if it has to withdraw from participating in voluntary federal programs wherein the distribution of federal funds may be contingent on the state's violation of its own constitution. *Id.* at 1200.

The Louisiana Supreme Court held the language of the second sentence in the Louisiana Constitution equal protection provision does not allow for the consideration of any hypothetical loss of federal funds, and that the legislature can suggest, and the people can vote for, an amendment to the Louisiana Constitution which would allow for the state to participate in such federal programs without the state's having to violate its own constitution. *Id.* at 1200. The Louisiana Supreme Court in a footnote pointed out that the court did not decide or predict a federal court's decision as to whether a federal funds program that mandates both state participation and the use of set-asides would preempt the state's constitution under the federal Supremacy Clause. *Id.* at n.14.

The Louisiana Minority and Women's Business Enterprise Act is Held Unconstitutional. The Louisiana Supreme Court found that the Act sets up a system whereby state agencies are mandated to meet annual goals for participation by certified MBEs, and that the goals were to be met under the Act mainly through the use of set-asides and also through preferences in the awarding of public works and procurement contracts. *Id.* at 1200. Because only members of certain races can obtain an MBE designation, and only certified MBEs may bid on a minority set-aside project, the court held the set-aside provisions under the Act discriminated against members of those races which cannot obtain an MBE designation because they cannot bid on the set-aside project. *Id.* at 1200-1201. The court concluded the Act deprives certain citizens of the opportunity to compete for contracts that have been set-aside solely on the basis of race, thereby creating an absolutely prohibited racial classification. *Id.* at 1201.

Similarly, the court found certain provisions under the Act create a system of preferences that generally operate such that although members of all races can bid on a project, a certified MBE will receive a contract if its bid is within 5 percent of the lowest responsive and responsible bidder provided the MBE agrees to adjust its bid to the amount of the original lowest bid. *Id.* at 1201. The court held that preferences such as this also discriminated against nonminority business enterprises. *Id.* Therefore, with respect to these preferences, the court concluded the Act on its face treats business enterprises differently solely because of the race of its owner's and officer's.

The court thus held that the set-asides and preferences under the Act discriminate against a person on the basis of race, and the Act, to that extent, was unconstitutional under the Louisiana Constitution equal protection provision (La. Const. Art. I, Sec 3.). *Id.* at 1201.

The court determined the trial court correctly found the Act unconstitutional in so far as it adopts racial classifications in the application and implementation of its set-aside preference programs, *Id.* at 1201. The court then held that because the legislature would not have passed the Act without the presence of the MBE set-aside and preference features, the unconstitutional portions of the law having to do with these racially based set-asides and preferences were so interrelated with the remaining portions of the Act having to do with women's business enterprises that they could not be separated without destroying the intent of the legislature in enacting it at all. *Id.* at 1201-1202. Therefore, the court also found the remaining portions of the Act relating to gender-based preferences were not severable from the unconstitutional portions relating to race-based preferences; thus, the entire Act was held unconstitutional. *Id.* at 1202.

Dissent. There was one dissenting Justice of the Louisiana Supreme Court who would have sent the case back to the trial court to determine if there was evidence of past discrimination. *Id.* at 1203-1204. If there was determined to be past discrimination, the dissent would hold that the state has the authority to take remedial action narrowly tailored to eliminate that discrimination. *Id.* at 1203-1204.

4. *Louisiana Associated General Contractors, Inc. V. New Orleans Aviation Board*, 764 So.2d 31 (La. 1999)

The Louisiana Associated General Contractors filed a Petition for Declaratory and Injunctive relief against the New Orleans Aviation Board's Disadvantaged Business Enterprise Plan, alleging that it created unconstitutional race- and gender-based classifications. 764 So. 2d 31 (La. 1999). The trial court granted relief, and the Aviation Board filed an appeal to the Louisiana Supreme Court. The Louisiana Supreme Court held that Board's Program violated the City's Interim Small Disadvantaged Business Development Ordinance. *Id.* at 31.

Facts and procedural background. The New Orleans Aviation Board (NOAB) adopted the "Disadvantaged Business Enterprise Plan for the New Orleans International Airport" (Program). *Id.* at 32. The Program provided participation goals, preferences, and set-asides on airport and heliport related contracts for businesses that qualify as disadvantaged business enterprises (DBE). *Id.* Before the NOAB would qualify a business as a DBE, at least 51 percent of a business must be owned and controlled by individuals who were socially and economically disadvantaged. Under the Program particular gender and racial groups were presumed to be socially and economically disadvantaged. *Id.* This presumption may be rebutted if challenged by a third party. *Id.*

The Louisiana Associated General Contractors (LAGC) filed a Petition for Declaratory and Injunctive Relief against the NOAB alleging that the Program created unlawful race- and gender-based classifications in violation of Article I § 3 of the Louisiana Constitution, which the Louisiana Supreme Court stated forbids the creation and application of laws that discriminate on the basis of race or "arbitrarily, capriciously, or unreasonably discriminate" on the basis of sex. *Id.* at 32. LAGC further contended that Section 38:2233.2 of the Revised Statutes, which provided for set-asides in public works contracts for minority contractors, was also unconstitutional. Alternatively, LAGC alleged that the Program lacked authority because it violated the low bid requirements of the

Louisiana Public Bid Law and the New Orleans Home Rule Charter by awarding contracts on the bases of race and gender. *Id.* Upon LAGC's motion, the trial court issued a temporary restraining order which enjoined NOAB from receiving bids on the Project. *Id.*

The LAGC moved for summary judgment based on the Louisiana Supreme Court's opinion in *Louisiana Associated General Contractors, Inc. v. State*, 669 So. 2d 1185 (La. 1996), which the Louisiana Supreme Court stated it found that the Louisiana Constitution "absolutely" bans race-based classifications. *Id.* The trial court granted LAGC's motion for summary judgment declaring Rev. Stat. 38:2233.2 and the Program unconstitutional as to city projects, and permanently enjoined NOAB from utilizing the Statute or the Program in non-federal public works projects. *Id.*

Following some appeal issues, the case was remanded back to the trial court, and the trial court ruled that the City of New Orleans Home Rule Charter gave NOAB authority to adopt the Program. *Id.* at 33. But, the trial court again declared the Program an unconstitutional violation of Article I, § 3, and issued a permanent injunction restraining NOAB from enforcing the Program on any non-federal works projects. *Id.* NOAB appealed the trial court's ruling of unconstitutionality, and LAGC cross appealed the trial court's ruling that NOAB had authority under local law to authorize the Program. *Id.*

The City Interim DSBD Ordinance. The City of New Orleans' "Interim Disadvantaged Small Business Development Ordinance" (Interim Ordinance), authorized establishment of "a program for participation goals, preferences, and set-asides in city contracts and procurement for firms owned by socially and economically disadvantaged persons," and "[provides] for the interim suspension of all race-based set-asides, goals, and preferences." *Id.* at 33. Under the Interim Ordinance, if a public works or construction project exceeds $50,000, the general contractor was required to make a reasonable effort to subcontract at least 25 percent of the total dollar in subcontracts to New Orleans' DBEs. *Id.*

To qualify as a DBE under the ordinance, at least 51 percent of the business must be owned and controlled by socially and economically disadvantaged individuals. According to the Interim Ordinance, socially disadvantaged individuals were "individuals … who have been subjected to discrimination, prejudice, or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.* at 33. The social disadvantage must stem from circumstances beyond their control. Also, the Interim Ordinance defined economically disadvantaged individuals as "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 and competitive market area who are not socially disadvantaged." *Id.* Before a person could qualify as a socially disadvantaged individual, the person must prove by clear and convincing evidence he has actually suffered a disadvantage. *Id.* Merely claiming membership in a group which may be considered socially disadvantaged was not enough to qualify for disadvantaged status under the Interim Ordinance. *Id.*

When determining which businesses qualify as economically or socially disadvantaged, the Interim Ordinance strictly prohibited race- and gender-based discrimination or preferential treatment. Section 2–604(A)(1) of the Interim Ordinance stated:

> (A)(1) No person or business firm shall be certified for inclusion or included in the registry of firms owned and controlled by socially and economically disadvantaged persons and no contract shall be set aside for award, nor shall any person or firm be awarded any city contract or subcontract or preference in contracting, subcontracting or vending to or with the city, on the basis of race, color, creed, national origin, or gender.

Id. at 33. The Interim Ordinance also prevented the City of New Orleans from issuing or carrying out any policy dealing with city contracts that provided preferential treatment on the basis of race or gender. Section 2–603 provided that all ordinances, executive or administrative policy memoranda, directives, or orders which required or authorized race- or gender-based preferences in city contracts were, on an interim basis, superseded and suspended by the Interim Ordinance. *Id.* at 33-34.

According to the NOAB Program individuals who belonged to the following groups were presumed socially and economically disadvantaged: (a) Women; (b) African Americans; (c) Hispanic Americans; (d) Native Americans; (e) Asian-Pacific Americans; and (f) Subcontinent Asian Americans. *Id.* at 34. Generally, the NOAB did not investigate the actual disadvantaged status of those individuals presumed to be disadvantaged unless their status was challenged by a third party. *Id.* If challenged, the business may lose its status as a DBE. Individuals who did not belong to one of the aforementioned groups may also apply for DBE qualification to be reviewed on a case by case basis. *Id.* No presumption was afforded to individuals whose race or gender was not listed in the Program. Before the NOAB would certify these individuals, they must prove that their disadvantaged status arose from individual circumstances, rather than by membership in a particular group. *Id.*

Holding the Program violated the Interim Ordinance. The court found that the Program facially violated the Interim Ordinance on two points. First, the Program's standard for determining if an individual is socially and economically disadvantaged, the court held, fell far below the standard commanded by the Interim Ordinance. *Id.* at 34. Under the Program, if an individual was female or belonged to a specific race-based group included in the Program's list, he was presumed to be socially and economically disadvantaged. *Id.* at 34-35. The Interim Ordinance, however, refused to consider an individual as disadvantaged simply because the individual belonged to a particular race or gender group. *Id.* at 35. The individual must provide clear and convincing evidence that proved he actually suffered a disadvantage by belonging to a particular group. *Id.*

The Interim Ordinance's burden of proof fell upon the individual seeking disadvantaged status. *Id.* But, no burden of proof, according the court, existed under the Program unless the presumption was rebutted by a third party. *Id.* Thus, the court held that the Program's presumption on its face violated the standard required by the Interim Ordinance. *Id.*

Second, the court held the Program violated § 2–604 of the Interim Ordinance which prohibited showing preference toward or discriminating against individuals on the basis of gender or race when qualifying them for socially or economically disadvantage set-aside contracts. *Id.* at 35. The Program, however, specifically stated that individuals who were female or belonged to a specific race-based group automatically qualified as socially and economically disadvantaged. *Id.* Thus, the court found that if they own and control at least 51 percent of the business they were automatically allowed to bid on and receive up to 100 percent of the full dollar amount of the contracts offered to subcontractors under the Program. *Id.*

The court said that, however, the individuals who were not included within the Program's list of people presumed to be disadvantaged, may only bid on and receive up to 50 percent of the full dollar amount of the contracts offered to subcontractors under the Program unless they can prove that they have actually suffered a disadvantage because of their individual circumstances. *Id* at 35. In addition, the court noted that during oral arguments before the trial court, NOAB's counsel conceded that the Program's requirements provided preferential treatment on the basis of race and gender by stating, "This is just a preference …. It is not a set aside." *Id.*

The court agreed with the argument that the Program's presumption was preferential, and further held that it also allowed unlawful discriminatory practices by providing set-asides on the bases of race and gender. *Id.* at 35. Because the court found the Program's burden of proof for qualifying individuals as socially disadvantaged fell short of the burden required under the Interim Ordinance, and because the Program provided preference toward individuals on the basis of race and gender when awarding public works contracts, the court held that the Program was prohibited by the City of New Orleans' Interim Ordinance. *Id.* Therefore, the court reversed that part of the ruling of the trial court which held that the NOAB had authority under local law to adopt the Program, and the court affirmed the permanent injunction imposed by the trial court. *Id.*

E. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs in Other Jurisdictions

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 women-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 women-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 women-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 women-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. These data were 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 nonminority 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.

Women-owned businesses overutilized. The study's public-sector disparity analysis demonstrated that women-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 women-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 again 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 not 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 nonminority-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 women-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 women-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 women-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 women-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 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." *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 nonminority 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. *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 were 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 nonminority-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 percent, 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 percent of the total number of contracting firms in the state, but only get 3 percent of the dollar value of certain contracts, that 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 percent 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).

9. *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 defendants 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.

10. *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 women-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.

11. *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 5 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 nonminority 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 nonminority 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.

12. *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 nonminority 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 is 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.

Recent District Court Decisions

11. *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 tit. 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.

12. *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.

13. *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.

14. *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 intervenors 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.

15. *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.

16. *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).

17. *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 women-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.

18. *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d 1232 (W.D. OK. 2001)

Plaintiffs, nonminority 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 nonminority 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 nonminority 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 Intervenors 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 Intervenors did not actually offer any of the evidence to the court in this case. The Intervenors 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 Intervenors 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 Intervenors' evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenors 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 nonminority 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.

19. *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.

20. *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).

21. *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 defendants 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 to *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 MBEs 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 nonminority 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 nonminority 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 nonminority 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.

22. *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 nonminority 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. *Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs v. Washington State Office of Minority & Women's Business Enterprises, United States DOT, et al.*, 2018 WL 6695345 (9th Cir. December 19, 2018), Memorandum opinion (not for publication), Petition for Rehearing denied, February 2019. Petition for Writ of Certiorari file with the U.S. Supreme Court denied (June 24, 2019).

Plaintiffs, Orion Insurance Group ("Orion") and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law. The USDOT and Washington State Office of Minority & Women's Business Enterprises ("OMWBE"), moved for a summary dismissal of all the claims.

Plaintiff Taylor received results from a genetic ancestry test that estimated he was 90 percent European, 6 percent Indigenous American and 4 percent Sub-Saharan African. Taylor submitted an application to OMWBE seeking to have Orion certified as an MBE under Washington State law. Taylor identified himself as Black. His application was initially rejected, but after Taylor appealed, OMWBE voluntarily reversed their decision and certified Orion as an MBE.

Plaintiffs submitted to OMWBE Orion's application for DBE certification under federal law. Taylor identified himself as Black American and Native American in the Affidavit of Certification. Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group.

OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

District Court decision. The district court held OMWBE did not act arbitrarily or capriciously when it found the presumption that Taylor was socially and economically disadvantaged was rebutted because of insufficient evidence he was either Black or Native American. By requiring individualized determinations of social and economic disadvantage, the court held the Federal DBE Program requires states to extend benefits only to those who are actually disadvantaged.

Therefore, the district court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause. The district court also dismissed the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause.

The district court found there was no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus, or creates a disparate impact on mixed-race individuals. The district court held the Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

Void for vagueness claim. Plaintiffs asserted that the regulatory definitions of "Black American" and "Native American" are void for vagueness. The district court dismissed' the claims that the definitions of "Black American" and "Native American" in the DBE regulations are impermissibly vague.

Claims for violations of 42 U.S.C. § 2000d (Title VI) against the State. Plaintiffs' claims were dismissed against the State Defendants for violation of Title VI. The district court found plaintiffs failed to show the state engaged in intentional racial discrimination. The DBE regulations' requirement that the state make decisions based on race, the district court held were constitutional.

The Ninth Circuit on appeal affirmed the District Court. The Ninth Circuit held the district court correctly dismissed Taylor's claims against Acting Director of the USDOT's Office of Civil Rights, in her individual capacity. The Ninth Circuit also held the district court correctly dismissed Taylor's discrimination claims under 42 U.S.C. § 1983 because the federal defendants did not act "under color or state law" as required by the statute.

In addition, the Ninth Circuit concluded the district court correctly dismissed Taylor's claims for damages because the United States has not waived its sovereign immunity on those claims. The Ninth Circuit found the district court correctly dismissed Taylor's claims for equitable relief refund under 42 U.S.C. § 2000d because the Federal DBE Program does not qualify as a "program or activity" within the meaning of the statute.

Claims under the Administrative Procedure Act. The Ninth Circuit stated the OMWBE did not act in an arbitrary and capricious manner when it determined it had a "well-founded reason" to question Taylor's membership claims, and that Taylor did not qualify as a "socially and economically disadvantaged individual." Also, the court found OMWBE did not act in an arbitrary and capricious manner when it did not provide an in-person hearing under 49 C.F.R. §§ 26.67(b)(2) and 26.87(d) because Taylor was not entitled to a hearing under the regulations.

The Ninth Circuit held the USDOT did not act in an arbitrary and capricious manner when it affirmed the state's decision because the decision was supported by substantial evidence and consistent with federal regulations. The USDOT "articulated a rational connection" between the evidence and the decision to deny Taylor's application for certification.

Claims under the Equal Protection Clause and 42 U.S.C. §§ 1983 and 2000d. The Ninth Circuit held the district court correctly granted summary judgment to the federal and state Defendants on Taylor's equal protection claims because Defendants did not discriminate against Taylor, and did not treat Taylor differently from others similarly situated. In addition, the court found the district court properly granted summary judgment to the state defendants on Taylor's discrimination claims under 42 U.S.C. §§ 1983 and 2000d because neither statute applies to Taylor's claims.

Having granted summary judgment on Taylor's claims under federal law, the Ninth Circuit concluded the district court properly declined to exercise jurisdiction over Taylor's state law claims.

Petition for Writ of Certiorari. Plaintiffs/Appellants filed a Petition for Writ of Certiorari with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

2. *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.* USDOT 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 to demonstrate 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 10 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 USDOT 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.

3. *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 percent of prime contractors in the construction field, received 9.13 percent of prime contracts valued below $500,000 and 8.25 percent 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 percent of available subcontractors, and in the construction industry they receive 44.62 percent of available subcontracts, but those subcontracts amounted to only 10.65 percent 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 percent 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 percent.

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 women-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 percent 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 percent 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.*

4. *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 judgement 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 percent. *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 percent. *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 percent, 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 percent 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 judgement that the IDOT DBE Program is unconstitutional and injunctive relief against its enforcement.

The district court granted the IDOT Defendants' motion for summary judgement 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 nonminority owned businesses could not even bid on certain contracts. *Id.* Under IDOT's DBE Program, all contractors, minority and nonminority contractors, can bid on all contracts. *Id.* at 690-691.

The court said the absence of complete exclusion from competition with minority- or women-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 nonminority-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 percent 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 percent 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 percent 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 judgement 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.

5. *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 women-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 women-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 women-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 women-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 women-owned firms, including female minorities, showing substantial disparities in the utilization of all women-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 women-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.

A. 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).

1. 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 women-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 identified precisely 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 women-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.

2. 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 women-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 women-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.*

B. 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.

C. 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.

D. Application of program to mixed state-funded 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.*

6. *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 the maximum 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.

7. *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 women-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 clearer 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.*

8. *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.

9. *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 also is 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 women-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*.).

10. *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

11. *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn 2017)

In a recent criminal case that is noteworthy because it involved a challenge to the Federal DBE Program, a federal district court in the Western District of Pennsylvania upheld the Indictment by the United States against Defendant Taylor who had been indicted on multiple counts arising out of a scheme to defraud the United States Department of Transportation's Disadvantaged Business Enterprise Program ("Federal DBE Program"). *United States v. Taylor,* 232 F.Supp. 3d 741, 743 (W.D. Penn. 2017). Also, the court in denying the motion to dismiss the Indictment upheld the federal regulations in issue against a challenge to the Federal DBE Program.

Procedural and case history. This was a white-collar criminal case arising from a fraud on the Federal DBE Program by Century Steel Erectors ("CSE") and WMCC, Inc., and their respective principals. In this case, the Government charged one of the owners of CSE, Defendant Donald Taylor, with fourteen separate criminal offenses. The Government asserted that Defendant and CSE used WMCC, Inc., a certified DBE as a "front" to obtain 13 federally funded highway construction contracts requiring DBE status, and that CSE performed the work on the jobs while it was represented to agencies and contractors that WMCC would be performing the work. *Id.* at 743.

The Government contended that WMCC did not perform a "commercially useful function" on the jobs as the DBE regulations require and that CSE personnel did the actual work concealing from general contractors and government entities that CSE and its personnel were doing the work. *Id.* WMCC's principal was paid a relatively nominal "fixed-fee" for permitting use of WMCC's name on each of these subcontracts. *Id.* at 744.

Defendant's contentions. This case concerned *inter alia* a motion to dismiss the Indictment. Defendant argued that Count One must be dismissed because he had been mischarged under the "defraud clause" of 18 U.S.C. § 371, in that the allegations did not support a charge that he defrauded the United States. *Id.* at 745. He contended that the DBE program is administered through state and county entities, such that he could not have defrauded the United States, which he argued merely provides funding to the states to administer the DBE program. *Id.*

Defendant also argued that the Indictment must be dismissed because the underlying federal regulations, 49 C.F.R. § 26.55(c), that support the counts against him were void for vagueness as applied to the facts at issue. *Id.* More specifically, he challenged the definition of "commercially useful function" set forth in the regulations and also contended that Congress improperly delegated its duties to the Executive branch in promulgating the federal regulations at issue. Id at 745.

Federal government position. The Government argued that the charge at Count One was supported by the allegations in the Indictment which made clear that the charge was for defrauding the United States' Federal DBE Program rather than the state and county entities. *Id.* The Government also argued that the challenged federal regulations are neither unconstitutionally vague nor were they promulgated in violation of the principles of separation of powers. *Id.*

Material facts in Indictment. The court pointed out that the Pennsylvania Department of Transportation ("PennDOT") and the Pennsylvania Turnpike Commission ("PTC") receive federal funds from FHWA for federally funded highway projects and, as a result, are required to establish goals and objectives in administering the DBE Program. *Id.* at 745. State and local authorities, the court stated, are also delegated the responsibility to administer the program by, among other things, certifying entities as DBEs; tracking the usage of DBEs on federally funded highway projects through the award of credits to general contractors on specific projects; and reporting compliance with the participation goals to the federal authorities. *Id.* at 745-746.

WMCC received 13 federally funded subcontracts totaling approximately $2.34 million under PennDOT's and PTC's DBE program and WMCC was paid a total of $1.89 million." *Id.* at 746 . These subcontracts were between WMCC and a general contractor, and required WMCC to furnish and erect steel and/or precast concrete on federally funded Pennsylvania highway projects. *Id.* Under PennDOT's program, the entire amount of WMCC's subcontract with the general contractor, including the cost of materials and labor, was counted toward the general contractor's DBE goal because WMCC was certified as a DBE and "ostensibly performed a commercially useful function in connection with the subcontract." *Id.*

The stated purpose of the conspiracy was for Defendant and his co-conspirators to enrich themselves by using WMCC as a "front" company to fraudulently obtain the profits on DBE subcontracts slotted for legitimate DBE's and to increase CSE profits by marketing CSE to general contractors as a "one-stop shop," which could not only provide the concrete or steel beams, but also erect the beams and provide the general contractor with DBE credits. *Id.* at 746.

As a result of these efforts, the court said the "conspirators" caused the general contractors to pay WMCC for DBE subcontracts and were deceived into crediting expenditures toward DBE participation goals, although they were not eligible for such credits because WMCC was not performing a commercially useful function on the jobs. *Id.* at 747. CSE also obtained profits from DBE subcontracts that it was not entitled to receive as it was not a DBE and thereby precluded legitimate DBE's from obtaining such contracts. *Id.*

Motion to Dismiss — challenges to Federal DBE Regulations. Defendant sought dismissal of the Indictment by contesting the propriety of the underlying federal regulations in several different respects, including claiming that 49 C.F.R. § 26.55(c) was "void for vagueness" because the phrase "commercially useful function" and other phrases therein were not sufficiently defined. *Id at 754.* Defendant also presented a non-delegation challenge to the regulatory scheme involving the DBE Program. *Id.* The Government countered that dismissal of the Indictment was not justified under these theories and that the challenges to the regulations should be overruled. The court agreed with the Government's position and denied the motion to dismiss. *Id.* at 754.

The court disagreed with Defendant's assessment that the challenged DBE regulations are so vague that people of ordinary intelligence cannot ascertain the meaning of same, including the phrases "commercially useful function;" "industry practices;" and "other relevant factors." *Id.* at 755*, citing,* 49 C.F.R. § 26.55(c). The court noted that other federal courts have rejected vagueness and related challenges to the federal DBE regulations in both civil, *see Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932 (7th Cir. 2016) (rejecting vagueness challenge to 49 C.F.R. § 26.53(a) and "good faith efforts" language), and criminal matters, *United States v. Maxwell*, 579 F.3d 1282, at 1302 (11th Cir. 2009).

With respect to the alleged vagueness of the phrase "commercially useful function," the court found the regulations both specifically describes the types of activities that: (1) fall within the definition of that phrase in § 26.55(c)(1); and, (2) are beyond the scope of the definition of that phrase in § 26.55(c)(2). *Id.* at 755, *citing*, 49 C.F.R. §§ 26.55(c)(1)–(2). The phrases "industry practices" and "other relevant factors" are undefined, the court said, but "an undefined word or phrase does not render a statute void when a court could ascertain the term's meaning by reading it in context." *Id.* at 756.

The context, according to the court, is that these federal DBE regulations are used in a comprehensive regulatory scheme by the DOT and FHWA to ensure participation of DBEs in federally funded highway construction projects. *Id.* at 756. These particular phrases, the court pointed out, are also not the most prominently featured in the regulations as they are utilized in a sentence describing how to determine if the activities of a DBE constitute a "commercially useful function." *Id.*, *citing*, 49 C.F.R. § 26.55(c).

While Defendant suggested that the language of these undefined phrases was overbroad, the court held it is necessarily limited by § 26.55(c)(2), expressly stating that "[a] DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation." *Id.* at 756, *quoting*, 49 C.F.R. § 26.55(c).

The district court in this case also found persuasive the reasoning of both the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit, construing the federal DBE regulations in *United States v. Maxwell*. *Id.* at 756. The court noted that in *Maxwell*, the defendant argued in a post-trial motion that § 26.55(c) was "ambiguous" and the evidence presented at trial showing that he violated this regulation could not support his convictions for various mail and wire fraud offenses. *Id.* at 756. The trial court disagreed, holding that:

the rules involving which entities must do the DBE/CSBE work are not ambiguous, or susceptible to different but equally plausible interpretations. Rather, the rules clearly state that a DBE […] is required to do its own work, which includes managing, supervising and performing the work involved …. And, under the federal program, it is clear that the DBE is also required to negotiate, order, pay for, and install its own materials.

Id. at 756, *quoting, United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009). The defendant in *Maxwell*, the court said, made this same argument on appeal to the Eleventh Circuit, which soundly rejected it, explaining that:

> [b]oth the County and federal regulations explicitly say that a CSBE or DBE is required to perform a commercially useful function. Both regulatory schemes define a commercially useful function as being responsible for the execution of the contract and actually performing, managing, and supervising the work involved. And the DBE regulations make clear that a DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. 49 C.F.R. § 26.55(c)(2). There is no obvious ambiguity about whether a CSBE or DBE subcontractor performs a commercially useful function when the job is managed by the primary contractor, the work is performed by the employees of the primary contractor, the primary contractor does all of the negotiations, evaluations, and payments for the necessary materials, and the subcontractor does nothing more than provide a minimal amount of labor and serve as a signatory on two-party checks. In short, no matter how these regulations are read, the jury could conclude that what FLP did was not the performance of a "commercially useful function."

Id. at 756, *quoting, United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009).

Thus, the Western District of Pennsylvania federal district court in this case concluded the Eleventh Circuit in *Maxwell* found that the federal regulations were sufficient in the context of a scheme similar to that charged against Defendant Taylor in this case: WMCC was "fronted" as the DBE, receiving a fixed fee for passing through funds to CSE, which utilized its personnel to perform virtually all of the work under the subcontracts. *Id.* at 757.

Federal DBE regulations are authorized by Congress and the Federal DBE Program has been upheld by the courts. The court stated Defendant's final argument to dismiss the charges relied upon his unsupported claims that the USDOT lacked the authority to promulgate the DBE regulations and that it exceeded its authority in doing so. *Id.* at 757. The court found that the Government's exhaustive summary of the legislative history and executive rulemaking that has taken place with respect to the relevant statutory provisions and regulations suffices to demonstrate that the federal DBE regulations were made under the broad grant of rights authorized by Congressional statutes. *Id., citing,* 49 U.S.C. § 322(a) ("The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer."); 23 U.S.C. § 304 (The Secretary of Transportation "should assist, insofar as feasible, small business enterprises in obtaining contracts in connection with the prosecution of the highway system."); 23 U.S.C. § 315 ("[Subject to certain exceptions related to tribal lands and national forests], the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Title.").

Also, significantly, the court pointed out that the Federal DBE Program has been upheld in various contexts, "even surviving strict scrutiny review," with courts holding that the program is narrowly tailored to further compelling governmental interests. *Id.* at 757*, citing*, *Midwest Fence Corp.*, 840 F.3d at 942 (citing *Western States Paving Co. v. Washington State Dep't of Transportation,* 407 F.3d 983, 993 (9th Cir. 2005); *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000)).

In light of this authority as to the validity of the federal regulations and the Federal DBE Program, the Western District of Pennsylvania federal district court in this case held that Defendant failed to meet his burden to demonstrate that dismissal of the Indictment was warranted. *Id.*

Conclusion. The court denied the Defendant's motion to dismiss the Indictment. The Defendant subsequently pleaded guilty. Recently on March 13, 2018, the court issued the final Judgment sentencing the Defendant to Probation for 3 years; ordered Restitution in the amount of $85,221.21; and a $30,000 fine. The case also was terminated on March 13, 2018.

12. *Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office of Minority & Women's Business Enterprises, United States DOT, et al.*, 2017 WL 3387344 (W.D. Wash. 2017)

Plaintiffs, Orion Insurance Group ("Orion"), a Washington corporation, and its owner, Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a disadvantaged business enterprise ("DBE") under federal law. 2017 WL 3387344. Plaintiffs moved the Court for an order that summarily declared that the Defendants violated the Administrative Procedure Act (APA), declared that the denial of the DBE certification for Orion was unlawful, and reversed the decision that Orion is not a DBE. *Id.* at *1. The United States Department of Transportation ("USDOT") and the Acting Director of USDOT, (collectively the "Federal Defendants") move for a summary dismissal of all the claims asserted against them. *Id.* The Washington State Office of Minority & Women's Business Enterprises ("OMWBE"), (collectively the "State Defendants") moved for summary dismissal of all claims asserted against them. *Id.*

The court held Plaintiffs' motion for partial summary judgment was denied, in part, and stricken, in part, the Federal Defendants' motion for summary judgment was granted, and the State Defendants' motion for summary judgment was granted, in part, and stricken, in part. *Id.*

Factual and procedural history. In 2010, Plaintiff Ralph Taylor received results from a genetic ancestry test that estimated that he was 90 percent European, 6 percent Indigenous American and 4 percent Sub-Saharan African. Mr. Taylor acknowledged that he grew up thinking of himself as Caucasian, but asserted that in his late 40s, when he realized he had Black ancestry, he "embraced his Black culture." *Id.* at *2.

In 2013, Mr. Taylor submitted an application to OMWBE, seeking to have Orion, his insurance business, certified as an MBE under Washington State law. *Id.* at *2. In the application, Mr. Taylor identified himself as Black, but not Native American. *Id.* His application was initially rejected, but after Mr. Taylor appealed the decision, OMWBE voluntarily reversed their decision and certified Orion as an MBE under the Washington Administrative Code and other Washington law. *Id.* at *2.

In 2014, Plaintiffs submitted, to OMWBE, Orion's application for DBE certification under federal law. *Id.* at *2. His application indicated that Mr. Taylor identified himself as Black American and Native American in the Affidavit of Certification submitted with the federal application. *Id.* Considered with his initial submittal were the results from the 2010 genetic ancestry test that estimated that he was 90 percent European, 6 percent Indigenous American and 4 percent Sub-Saharan African. *Id.* Mr. Taylor submitted the results of his father's genetic results, which estimated that he was 44 percent European, 44 percent Sub-Saharan African and 12 percent East Asian. *Id.* Mr. Taylor included a 1916 death certificate for a woman from Virginia, Eliza Ray, identified as a "Negro," who was around 86 years old, with no other supporting documentation to indicate she was an ancestor of Mr. Taylor. *Id.* at *2.

In 2014, Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group over a long period of time prior to his application. *Id.* at *3. OMWBE also found that even if there was sufficient evidence to find that Mr. Taylor was a member of either of these racial groups, "the presumption of disadvantage has been rebutted," and the evidence Mr. Taylor submitted was insufficient to show that he was socially and economically disadvantaged. *Id.*

Mr. Taylor appealed the denial of the DBE certification to the USDOT. Plaintiffs voluntarily dismissed this case after the USDOT issued its decision. *Id.* at **3-4. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.*, U.S. District Court for the Western District of Washington case number 15-5267 BHS. In 2015, the USDOT affirmed the denial of Orion's DBE certification, concluding that there was substantial evidence in the administrative record to support OMWBE's decision. *Id.* at *4.

This case was filed in 2016. *Id.* at *4. Plaintiffs assert claims for (A) violation of the Administrative Procedures Act, 5 U.S.C. § 706, (B) "Discrimination under 42 U.S.C. § 1983" (reference is made to Equal Protection), (C) "Discrimination under 42 U.S.C. § 2000d," (D) violation of Equal Protection under the United States Constitution, (E) violation of the Washington Law Against Discrimination and Article 1, Sec. 12 of the Washington State Constitution, and (F) assert that the definitions in 49

C.F.R. § 26.5 are void for vagueness. *Id.* Plaintiffs seek damages, injunctive relief: ("[r]eversing the decisions of the USDOT, Ms. Jones and OMWBE, and OMWBE's representatives … and issuing an injunction and/or declaratory relief requiring Orion to be certified as a DBE," and a declaration the "definitions of 'Black American' and 'Native American' in 49 C.F.R. § 26.5 to be void as impermissibly vague,") and attorneys' fees, and costs. *Id.*

OMWBE did not act arbitrarily or capriciously in denying certification. The court examined the evidence submitted by Mr. Taylor and by the State Defendants. *Id.* at **7-12. The court held that OMWBE did not act arbitrarily or capriciously when it found that the presumption that Mr. Taylor was socially and economically disadvantaged was rebutted because there was insufficient evidence that he was a member of either the Black or Native American groups. *Id.* at *8. Nor did it act arbitrarily and capriciously when it found that Mr. Taylor failed to demonstrate, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.* at *9. Under 49 C.F.R. § 26.63(b)(1), after OMWBE determined that Mr. Taylor was not a "member of a designated disadvantaged group," the court stated Mr. Taylor "must demonstrate social and economic disadvantage on an individual basis." *Id.* Accordingly, pursuant to 49 C.F.R. § 26.61(d), Plaintiffs had the burden to prove, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.*

In making these decisions, the court found OMWBE considered the relevant evidence and "articulated a rational connection between the facts found and the choices made." *Id.* at *10. By requiring individualized determinations of social and economic disadvantage, the Federal DBE "program requires states to extend benefits only to those who are actually disadvantaged." *Id., citing, Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 946 (7th Cir. 2016). OMWBE did not act arbitrary or capriciously when it found that Mr. Taylor failed to show he was "actually disadvantaged" or when it denied Plaintiff's application. *Id.*

The USDOT affirmed the decision of the state OMWBE to deny DBE status to Orion. *Id.* at **10-11.

Claims for violation of equal protection. To the extent that Plaintiffs assert a claim that, on its face, the Federal DBE Program violates the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at **12-13. The Ninth Circuit has held that the Federal DBE Program, including its implementing regulations, does not, on its face, violate the Equal Protection Clause of the U.S. Constitution. *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). *Id.* The Western States Court held that Congress had evidence of discrimination against women and minorities in the national transportation contracting industry and the Federal DBE Program was a narrowly tailored means of remedying that sex and raced based discrimination. *Id.* Accordingly, the court found race-based determinations under the program have been determined to be constitutional. *Id.* The court noted that several other circuits, including the Seventh, Eighth, and Tenth have held the same. *Id.* at *12*, citing, Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 936 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000).

To the extent that Plaintiffs assert that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at *12. Plaintiffs argue that, as applied to them, the regulations "weigh adversely and disproportionately upon" mixed-race individuals, like Mr. Taylor. *Id.* This claim should be dismissed, according to the court, as the Equal Protection Clause prohibits only intentional discrimination. *Id.* Even considering materials filed outside the administrative record, the court found Plaintiffs point to no evidence that the application of the regulations here was done with an intent to discriminate against mixed-race individuals, or that it was done with racial animus. *Id.* Further, the court said Plaintiffs offer no evidence that application of the regulations creates a disparate impact on mixed-race individuals. *Id.* Plaintiffs' remaining arguments relate to the facial validity of the DBE program, and the court held they also should be dismissed. *Id.*

The court concluded that to the extent that Plaintiffs base their equal protection claim on an assertion that they were treated differently than others similarly situated, their "class of one" equal protection claim should be dismissed. *Id.* at *13. For a class of one equal protection claim, the court stated Plaintiffs must show they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Id.*

Plaintiffs, the court found, have failed to show that Mr. Taylor was intentionally treated differently than others similarly situated. *Id.* at *13. Plaintiffs pointed to no evidence of intentional differential treatment by the Defendants. *Id.* Plaintiffs failed to show that others that were similarly situated were treated differently. *Id.*

Further, the court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment. *Id.* at *13. Both the State and Federal Defendants according to the court, offered rational explanations for the denial of the application. *Id.* Plaintiffs' Equal Protection claims, asserted against all Defendants, the court held, should be denied. *Id.*

Void for vagueness claim. Plaintiffs assert that the regulatory definitions of "Black American" and both the definition of "Native American" that was applied to Plaintiffs and a new definition of "Native American" are void for vagueness, presumably contrary to the Fifth and Fourteenth Amendments' due process clauses. *Id.* at *13.

The court pointed out that although it can be applied in the civil context, the Seventh Circuit Court of Appeals has noted that in relation to the DBE regulations, the void for vagueness "doctrine is a poor fit." *Id.* at *14, *citing, Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 947–48 (7th Cir. 2016). Unlike criminal or civil statutes that prohibit certain conduct, the Seventh Circuit noted that the DBE regulations do not threaten parties with punishment, but, at worst, cause lost opportunities for contracts. *Id.* In any event, the court held Plaintiffs' claims that the definitions of "Black American" and of "Native American" in the DBE regulations are impermissibly vague should be dismissed. *Id.*

The court found the regulations require that to show membership, an applicant must submit a statement, and then if the reviewer has a "well founded" question regarding group membership, the reviewer must ask for additional evidence. 49 C.F.R. § 26.63 (a)(1). *Id.* at *14. Considering the purpose of the law, the court stated the regulations clearly explain to a person of ordinary intelligence what is required to qualify for this governmental benefit. *Id.*

The definition of "socially and economically disadvantaged individual" as a "citizen … who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of groups and without regard to their individual qualities," the court determined, gives further meaning to the definitions of "Black American" and "Native American" here. *Id.* at *14. "Otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity." *Id.* at *14, *quoting, Gammoh v. City of La Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005).

The court held plaintiffs also fail to show that these terms, when considered within the statutory framework, are so vague that they lend themselves to "arbitrary" decisions. *Id.* at *14. Moreover, even if the court did have jurisdiction to consider whether the revised definition of "Native American" was void for vagueness, the court found a simple review of the statutory language leads to the conclusion that it is not. *Id.* The revised definition of "Native Americans" now "includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiian." *Id., citing,* 49 C.F.R. § 26.5. This definition, the court said, provides an objective criterion based on the decisions of the tribes, and does not leave the reviewer with any discretion. *Id.* The court thus held that Plaintiffs' void for vagueness challenges were dismissed. *Id.*

Claims for violations of 42 U.S.C. §2000d against the State Defendants. Plaintiffs' claims against the State Defendants for violation of Title VI (42 U.S.C. § 2000d), the court also held, should be dismissed. *Id.* at *16. Plaintiffs failed to show that the State Defendants engaged in intentional impermissible racial discrimination. *Id.* The court stated that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* The court pointed out the DBE regulations' requirement that the State make decisions based on race has already been held to pass constitutional muster in the Ninth Circuit. *Id.* at *16, *citing, Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). Plaintiffs made no showing that the State Defendants violated their Equal Protection or other constitutional rights. *Id.* Moreover, Plaintiffs, the court found, failed to show that the State Defendants intentionally acted with discriminatory animus. *Id.*

The court held to the extent the Plaintiffs assert claims that are based on disparate impact, those claims are unavailable because "Title VI itself prohibits only intentional discrimination." *Id.* at *17, *quoting, Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005). The court therefore held this claim should be dismissed. *Id.* at *17.

Holding. Therefore, the court ordered that Plaintiffs' Motion for Partial Summary Judgment was: Denied as to the federal claims; and Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD.

In addition, the Federal Defendants' Motion for Summary Judgment on the Administrative Procedure Act, Equal Protection, and Void for Vagueness Claims was Granted; and the claims asserted against the Federal Defendants were Dismissed.

The State Defendants' Cross Motion for Summary Judgment was Granted as to Plaintiffs claims against the State Defendants for violations of the APA, Equal Protection, Void for Vagueness, 42 U.S.C. § 1983, and 42 U.S.C. § 2000d, and those claims were Dismissed. *Id.* Also, the court held the State Defendants' Cross Motion for Summary Judgment was Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD. *Id.*

13. *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).[190]

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.

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[190] 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.

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 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 the 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 women-owned businesses, as well as anecdotal evidence, that 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 nonminority 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 women-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.

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.*

14. *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-Intervenors 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-Intervenors and the plaintiffs filed a Stipulation that the Federal Defendant-Intervenors have the right to intervene and should be permitted to intervene in the matter, and consequently the plaintiffs did not contest the Federal Defendant-Intervenor's Motion for Intervention. The Court issued an Order that the Stipulation of Intervention, agreeing that the Federal Defendant-Intervenors may intervene in this lawsuit, be approved and that the Federal Defendant-Intervenors 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.*

A. 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.*

B. 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 *.

1. 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 women-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and women-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 women-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 nonminority 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.

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.

2. 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.*

C. 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.*

D. 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.

1. 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.

2. 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.*

3. 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.

III. 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.

15. *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 , was 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.

16. *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 0.81 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.

17. *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.*

18. *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). These 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.

19. *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.

20. *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.

21. *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 or 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.

22. *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 women-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 to 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.

23. *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 women 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.

24. *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.*

25. *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.

26. *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 nonminority 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 concluding, 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.

Narrowly 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 nonminority 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 nonminority 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 percent of contract actions, 93.0 percent of dollars awarded, and in which

92.2 percent 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 are 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 nonminority 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 2 to 5 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 5 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 2 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 nonminority 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 nonminority 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 nonminority-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 nonminority 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.

Narrowly 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 nonminority 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 5 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 2 to 5 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 nonminority 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.

APPENDIX C.
City Contract Data Collection

Keen Independent compiled data about City procurements as well as subcontracts on certain contracts. The study team examined construction, professional services, goods and other services contracts during the January 1, 2015 through December 31, 2019 study period.

Appendix C describes the study team's utilization data collection processes in three parts:

A. Data for prime contractors, consultants and other vendors;
B. Subcontract data;
C. Characteristics of utilized firms.
D. City of Alexandria review; and
E. Data limitations.

A. Data for Prime Contractors, Consultants and other Vendors

Data received. Keen Independent compiled information about firms receiving procurements with the City by examining purchase orders (POs) maintained in Banner, the City's financial system.

Keen Independent examined information for POs issued during the January 1, 2015 through December 31, 2019 study period. The study team used the Account Title and Commodity Description fields when coding the type of work involved in each procurement.

Exclusions. Some types of purchases are typically outside the scope of a disparity study. The study team made certain exclusions for purchases related to:

- Government agencies;
- Nonprofits;
- Utilities;
- Banks;
- Colleges and universities;
- Insurance companies;
- U.S. Department of Transportation;
- U.S. Department of Housing and Urban Development grants; and
- Products related to national markets (e.g. electrical equipment, police equipment supplies, firefighting equipment and office supplies).

Coding of work types. Keen Independent coded the type of work involved in each procurement using 30+ categories of construction, professional services, goods and other services work. For example, "electrical work" is one category of construction work used when coding the type of work for different procurements.

Keen Independent based its coding of types of work on the 8-digit subindustry codes developed by Dun & Bradstreet. D&B uses a system that follows the 4-digit Standard Industrial Classification (SIC) system, with more subcategories within each sector. This is a more detailed coding of subindustries available from the NAICS systems of subindustry codes that is sometimes used in economic research.

To code the primary type of work involved in each procurement, Keen Independent examined the description in the PO data and sometimes augmented this information by researching information about the firm performing the work or providing the goods.

Information analyzed. Keen Independent received data regarding City procurements totaling $164 million for the January 1, 2015 through December 31, 2019 study period. As Keen Independent obtained information on both payments and issuance of POs, the study team attempted to eliminate any double counting of payments and POs while making adjustments to combine the purchase orders and payment data into a final dataset for City procurements.

B. Subcontract Data

Information about subcontracts for construction and professional services procurements above $500,000 came from City departments and consulting engineers working with the City.

C. Characteristics of Utilized Firms

Keen Independent examined firm location and attempted to collect other business characteristics including the race, ethnicity and gender.

Firm location. The study team analyzed the location of firms receiving City work based on vendor address data provided in the vendor databases.

Sometimes the vendor database only had a headquarters or billing address and not an address for its local office. For firms receiving a large amount of procurement dollars that initially appeared to be out of the market area, Keen Independent further researched whether the business had a physical presence within the Central Louisiana geographic market area. If so, Keen Independent added this local address to the location information for that firm.

Firm ownership. Collecting data on the race, ethnicity and gender ownership of utilized firms is key to building the database on firm characteristics. The City provided race/ethnicity and gender for some but not all businesses in its vendor database.

Keen Independent used the following sources of information to determine whether firms were owned by minorities or women (including race/ethnicity of ownership):

- Louisiana United Certification Program (LAUCP) directory;
- Small Business Administration business directory;
- Study team availability survey with firm owners and managers;
- Other review of firm information (e.g., information about ownership on firms' websites or previous disparity studies in the geographic market area);
- Information from Dun & Bradstreet; and
- City of Alexandria staff review.

D. City of Alexandria Review

City of Alexandria reviewed Keen Independent contract data during several stages of the study process. The study team met with the City staff multiple times to review data collection, information the study team gathered, sample data for specific contracts and preliminary results.

Keen Independent reviewed and incorporated City feedback throughout the study process.

E. Data Limitations

Limitations concerning procurement data collection and analysis include the following:

- The City of Alexandria does not systematically track information about subcontracts on its projects.
- Keen Independent determined race, ethnicity and gender ownership based on information from many different sources, including study team research on individual companies. It is possible that some of the ownership data were inaccurate.

It does not appear that these data limitations would materially affect overall results of the disparity analyses.

APPENDIX D.
Availability Data Collection

The study team used an approach similar to a "custom census" to compile data on minority- and women-owned firms available for City contracts and developed dollar-weighted availability benchmarks for minority- and women-owned firms for each study industry based on analysis of individual prime contracts and subcontracts. Appendix D further explains the availability data collection methodology in five parts:

A. General approach to collecting availability information;

B. Development of the survey instruments;

C. Execution of availability surveys;

D. Additional considerations related to measuring availability; and

E. Availability survey instrument.

A. General Approach to Collecting Availability Information

Keen Independent collected information from firms about their availability for City of Alexandria contracts through telephone surveys as well as fax and fillable PDF surveys (sent to any firms that requested them or downloaded them from the study website).

Business listing. The firms contacted in the availability surveys were businesses that Dun & Bradstreet (D&B) identified in study-related subindustries in Central Louisiana (the D&B Hoover's business establishment database). The availability analysis focused on companies in Central Louisiana performing types of work most relevant to City contracts.

Dun & Bradstreet's Hoover's affiliate maintains the largest commercially available database of U.S. businesses. The study team used D&B listings to identify firms that might be qualified and interested in doing work for the City. The study team excluded any listings that were government agencies or not-for-profit organizations (either before the survey or based on a question in the survey).

Chapter 3 describes how the study team determined the types of work involved in City prime contract and subcontracts. The subindustries to be included in the survey were determined after reviewing City prime contract and subcontract dollars for different types of work. D&B classifies types of work by Standard Industrial Classification (SIC) codes describing work specialization. Figure D-1 on page 3 of this appendix identifies the work specialization codes the study team determined were the most related to the contracts and subcontracts examined in the study. (Note that some of the industry descriptions end with "nec," which means "not elsewhere classified.")

The study team obtained a list of firms from D&B Hoover's database within relevant work codes that had locations within Central Louisiana. D&B provided phone numbers for these businesses.

Dun & Bradstreet provided names of 1,879 unique businesses located in Central Louisiana that appeared to perform relevant types of work. The study team did not draw a sample of those firms for the availability analysis; rather, the study team attempted to contact each business identified through telephone surveys and other methods. Some courts have referred to similar approaches to gathering availability data as a "custom census."

Telephone surveys. Keen Independent retained Customer Research International (CRI) to conduct telephone surveys with listed businesses. After receiving the list described above, CRI used the following process to complete telephone surveys with business establishments:

- Firms were contacted by telephone. Up to five phone calls were made at different times of day and different days of the week to attempt to reach each company.
- Interviewers indicated that the calls were made on behalf of the City of Alexandria to firms providing work or products related to City contracts.
- Interviews began in August of 2020 and CRI completed the survey effort in September.

Other avenues to complete a survey. If a company was not able to complete a survey on the telephone, business owners could request a fax or fillable PDF version of the survey. Additionally, the study team posted PDFs of the survey on the disparity study website, and any business owner could respond to the survey, regardless of whether they were on the initial business list.

Figure D-1.
SIC codes for D&B survey availability list source

Construction and professional services		Other services and goods	
Construction		**Other services**	
General road construction and widening		**Vehicle repair services**	
1611	Highway and street construction, Except elevated highways	7532	Top and body repair and paint shops
Bridge and elevated highway construction		7533	Auto exhaust system repair shops
1622	Bridge, tunnel, and elevated highway construction	7536	Automotive glass replacement shops
Office and public building construction		7537	Automotive transmission repair shops
1541	Industrial buildings and warehouses	7538	General automotive repair shops
1542	Nonresidential construction, nec	7539	Automotive repair shops, nec
Concrete flatwork (including sidewalk, curb and gutter)		7549	Automotive services, nec
1771	Concrete work	**Landscape contracting and maintenance**	
Electrical work		0782	Lawn and garden services
1731	Electrical work	**Staffing services**	
Underground utilities such as water, sewer and utilities lines		7361	Employment agencies
1623	Water, sewer and utility lines	7363	Placement agencies
Other concrete work		**Building cleaning and maintenance**	
1791	Structural steel erection	7217	Carpet and upholstery cleaning
Water well drilling and servicing		7349	Building maintenance services, nec
2E+07	Wastewater and sewage treatment plant work	**Equipment repair services**	
Excavation, site prep, grading and drainage		3699	Electrical machinery, equipment, and supplies, nec
1629	Heavy construction, nec	7629	Electrical and electronic repair shops, nec
1794	Excavation work	7692	Welding repair
1799	Special trade contractors, nec	7694	Armature rewinding shops
Wrecking and demolition		7699	Repair shops and related services, nec
1795	Wrecking and demolition work		
Plumbing, heating and air conditioning		**Goods**	
1711	Plumbing, heating and air conditioning	**Signs and advertising specialties**	
Painting work		3993	Signs and advertising specialties
1721	Painting and paper hanging	**Tires**	
Roofing		3011	Tires and inner tubes
1761	Roofing, siding, and sheet metal work	5014	Tires and tubes
Sports and recreational facility construction		5531	Auto and home supply stores
1629	Heavy construction, nec	**Cars and trucks**	
Pavement marking		3711	Motor vehicles and car bodies
1721	Painting and paper hanging	3713	Truck and bus bodies
		5012	Automobiles and other motor vehicles
Professional services		5511	New and used car dealers
Architecture and engineering		**Clothing and uniforms**	
8711	Architectural services	2311	Men's and boy's suits and coats
8712	Management services	5611	Men's and boys' clothing stores
Construction management		5699	Miscellaneous apparel and accessories
8741	Management services	**Food**	
8742	Management consulting services	2051	Bread, cake, and related products
Surveying and mapping		2053	Frozen bakery products, except bread
7389	Business services, nec	5141	Groceries, general line
8713	Surveying services	5142	Packaged frozen goods
		5143	Dairy products, except dried or canned
		5144	Poultry and poultry products
		5145	Confectionery
		5146	Fish and seafoods
		5147	Meats and meat products
		5148	Fresh fruits and vegetables
		5149	Groceries and related products, nec
		5311	Department stores

Figure D-1 (continued).
SIC codes for D&B survey availability list source

Goods (continued)

Building materials and supplies		**Building materials and supplies (cont'd)**	
2911	Petroleum refining	5039	Construction materials, nec
2951	Asphalt paving mixtures and blocks	5051	Metals service centers and offices
2952	Asphalt felts and coatings	5063	Electrical apparatus and equipment
3089	Plastics products, nec	5072	Hardware
3241	Cement, hydraulic	5074	Plumbing and hydronic heating supplies
3251	Brick and structural clay tile	5075	Warm air heating and air conditioning
3253	Ceramic wall and floor tile	5078	Refrigeration equipment and supplies
3255	Clay refractories	5099	Durable goods, nec
3259	Structural clay products, nec	5211	Lumber and other building materials
3261	Vitreous plumbing fixtures	5231	Paint, glass, and wallpaper stores
3264	Porcelain electrical supplies		
3271	Concrete block and brick	**Horticultural materials and supplies**	
3272	Concrete products, nec	1819	Sod farms
3273	Ready-mixed concrete	5191	Farm supplies
3281	Cut stone and stone products	5193	Flowers and florists supplies
3299	Nonmetallic mineral products,		
3312	Blast furnaces and steel mills	**Lighting equipment**	
3315	Steel wire and related products	3648	Lighting equipment
3317	Steel pipe and tubes		
3321	Gray and ductile iron foundries	**Heavy construction equipment**	
3429	Hardware, nec	3531	Construction machinery
3431	Metal sanitary ware	3536	Hoists, cranes, and monorails
3432	Plumbing fixture fittings and trim	5082	Construction and mining machinery
3433	Heating equipment, except electric	5083	Farm and garden machinery
3441	Fabricated structural metal		
3442	Metal doors, sash, and trim	**Office equipment**	
3443	Fabricated plate work (boiler shop)	3555	Printing trades machinery
3444	Sheet metalwork	3579	Office machines, nec
3446	Architectural metalwork	5044	Office equipment
3448	Prefabricated metal buildings	5045	Computers, peripherals, and software
3449	Miscellaneous metalwork		
3534	Elevators and moving stairways	**Petroleum and petroleum products**	
3535	Conveyors and conveying equipment	2992	Lubricating oils and greases
3564	Blowers and fans	5171	Petroleum bulk stations and terminals
3585	Refrigeration and heating equipment	5172	Petroleum products, nec
3669	Communications equipment, nec	5983	Fuel oil dealers
5031	Lumber, plywood, and millwork	5984	Liquefied petroleum gas dealers
5032	Brick, stone, and related material	5989	Fuel dealers, nec
5033	Roofing, siding, and insulation		

B. Development of the Survey Instruments

Keen Independent developed the survey instruments and obtained City staff review before performing the surveys. The final survey instrument is presented at the end of this Appendix.

The availability survey included nine sections. The study team did not know the race ethnicity or gender of the business owner when contacting a business establishment. Obtaining that information was a key component of the survey. Areas of survey questions included:

- **Identification of purpose.** The surveys began by identifying the City of Alexandria as the survey sponsor and describing the purpose of the study (i.e., identifying companies interested in doing business with the City).

- **Verification of correct business name.** CRI confirmed that the business reached was in fact the business sought out.

- **Contact information.** CRI collected complete contact information for the establishment and the individual who completed the survey.

- **Verification of for-profit business status.** The survey asked whether the organization was a for-profit business as opposed to a government or not-for-profit entity. Interviewers continued the survey with businesses that responded "yes" to that question.

- **Identification of main lines of business.** The study team asked businesses to briefly describe their main line of business as an open-ended question. In a later section (B) for construction and professional services businesses, respondents then selected from a list the types of work that their firm performed (interviewees could select multiple responses). All businesses not performing construction work or professional services were instead asked an open-ended question about what additional types of work their business performs.

- **Sole location or multiple locations.** The interviewer asked business owners or managers if their companies had other locations and whether their establishments were affiliates or subsidiaries of other firms. (Keen Independent combined relevant responses from multiple locations into a single record for multi-establishment firms.)

- **Past bids or work related to public agencies.** The survey then asked about bids and work on past public sector contracts in Louisiana. The questions were asked in connection with both prime contracts and subcontracts as well as supply work and trucking.

- **Qualifications and interest in future City work.** The interviewer asked about businesses' qualifications and interest in future work with the City, and for some firms, whether they were interested in prime contracts and/or subcontracts. (Keen Independent did not ask companies providing goods or non-professional services whether they were interested in working as subcontractors as this is less relevant than in construction or for professional services.)

- **Largest contracts.** The study team asked businesses to identify the value of the largest contract or subcontract on which they had bid or had been awarded in Central Louisiana during the past five years.

- **Ownership.** Businesses were asked if more than 50 percent of the firm was owned and controlled by women and/or minorities. If businesses indicated that they were minority-owned, they were also asked about the race and ethnicity of owners. For companies which identified race/ethnicity as "other," Keen Independent reviewed and assigned the correct minority classification when possible and otherwise identified them as "majority-owned." For a duplicate response with "Don't know" or "Refused," priority was given to the responses with "yes" or "no" and specific racial information.

- **Business background.** The study team asked respondents to identify the approximate year in which the business was established. The interviewer asked several questions about the size of businesses in terms of their revenues and number of employees. For businesses with multiple locations, this section also asked about their revenues and number of employees across all locations.

- **Potential barriers in the marketplace.** Establishments were asked a series of questions on whether barriers came to mind about starting and expanding a business or achieving success in their industry in Central Louisiana. In addition, this section included a question asking whether interviewees would be willing to participate in an in-depth interview about marketplace conditions.

C. Execution of Availability Surveys

Keen Independent held planning and monitoring sessions with CRI as part of the launch of the availability surveys. CRI began conducting full availability surveys in August of 2020 and completed the surveys in September.

To minimize non-response, CRI made at least five attempts at different times of day and on different days of the week to reach each business establishment. CRI identified and attempted to interview an available company representative such as the owner, manager or other key official who could provide accurate and detailed responses to the questions included in the survey.

Establishments that the study team successfully contacted. Figures D-2 and D-3 present the dispositions of the businesses the study team attempted to contact for availability surveys.

Note that the following analysis is based on business counts after Keen Independent removed duplicate listings (beginning with a list of 1,879 unique businesses).

Non-working or wrong phone numbers. Some of the business listings that the study team attempted to contact were:

- Non-working phone numbers (323); or

- Wrong numbers for the desired businesses (27).

Some non-working phone and wrong numbers reflected business establishments that closed, were sold or changed their names. Those phone numbers could also have changed between the time that a source listed them and the time that the study team attempted to contact them.

Figure D-2.
Disposition of attempts to survey business establishments

	Number of firms	Percent of business listings
Beginning list (unique businesses)	**1,879**	
Less non-working phone numbers	323	
Less wrong number	27	
Firms with working phone numbers	**1,529**	**100 %**
Less no answer	710	
Less could not reach responsible staff member	180	
Less unreturned fax/email	34	
Less said they already completed the survey but didn't	4	
Firms successfully contacted	**601**	**39 %**

Note:
Study team made at least five attempts to complete an interview with each establishment.

Source:
Keen Independent Research from 2020 Availability Surveys.

Working phone numbers. As shown in Figure D-2, there were 1,529 businesses with working phone numbers that the study team attempted to contact. For various reasons, the study team was unable to contact some of those businesses:

- No answer. Some businesses could not be reached after at least five attempts at different times of the day and on different days of the week (710 establishments).
- Could not reach responsible staff member. For some businesses (180), a responsible staff person could not be reached to complete the survey after repeated attempts.
- Unreturned fax or email surveys. The study team sent email or fax invitations to those who requested to do the survey via fillable PDF or fax. There were 34 businesses that requested such surveys but did not return them. After sending the survey via fax or email, the study team later followed up with each of these firms to remind them to complete the survey.
- Respondent indicated that they had already completed a survey. There were four respondents who said that they had already completed a PDF or phone survey that were not found within the survey responses.

After taking those unsuccessful attempts into account, the study team was able to successfully contact 601 businesses, or 39 percent of those with working phone numbers. This response rate is consistent with similar availability surveys Keen Independent has performed in other cities in recent years.

Establishments included in the availability database. Figure D-3 presents the disposition of the 601 businesses the study team successfully contacted and how that number resulted in the 121 businesses the study team included in the availability database.

Figure D-3.
Disposition of successfully contacted businesses

Note:
Study team made at least five attempts to complete an interview with each establishment.

Source:
Keen Independent Research from 2020 Availability Surveys.

	Number of firms
Firms successfully contacted	**601**
Less business not interested	382
Less no longer in business	49
Less don't do related work	4
Firms that completed interviews about business characteristics	**166**
Less not a for-profit business	41
Less firms with no location in the study area	4
Firms included in availability database	**121**

Establishments not interested in discussing availability for City work. Of the 601 businesses that the study team successfully contacted, 382 were not interested in discussing their availability for City work, or reported they were not qualified to work with the City as a prime contractor or subcontractor. In Keen Independent's experience, those types of responses are often firms that do not perform relevant types of work. Another 49 respondents indicated that their companies were no longer in business, and four firms were found to not perform work related to City contracts.

Businesses included in the availability database. Some firms responding to availability surveys were not included in the final availability database because they indicated that they were not a for-profit business or did not have a location within the study area.

- Of the completed surveys, 41 indicated that they were not a for-profit business (including nonprofits, government agencies and private residences). Surveys ended when respondents reported that their establishments were not for-profit businesses.

- There were four firms surveyed that did not have a location within the study area (Keen Independent attempted to find a Central Louisiana location for each of these firms but was unsuccessful).

After those final screening steps, the survey effort produced a database of 121 businesses potentially available for City work.

Coding responses from multi-location businesses. There were multiple responses from some firms. Responses from different locations of the same business were combined into a single, summary data record after reviewing the multiple responses. Each unique business was only counted once in the tables above.

D. Additional Considerations Related to Measuring Availability

The study team made several additional determinations related to its approach to measuring availability.

Not providing a count of all businesses available for City work. The purpose of the availability surveys was to provide precise, unbiased estimates of the percentage of all firms available for City contracts that were MBEs or WBEs.

- The research appropriately focused on firms in the relevant geographic area for City contracts in the subindustries relevant to City work. Firms in subindustries that comprised a very small portion of City work were not included in the surveys.

- The study team did not purchase D&B data for firms outside Central Louisiana and not all firms on the list of businesses completed surveys, even after repeated attempts to contact them.

Therefore, the availability analysis did not provide a comprehensive listing of every business that could be available for all types of City work and should not be used in that way.

Federal courts have approved similar approaches to measuring availability that Keen Independent used in this study. 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]

Using D&B lists. Keen Independent purchased Dun & Bradstreet business listings for Central Louisiana as the starting point for 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 in its listings — it is completely free to listed firms. Even so, the database does not include all establishments operating in Central Louisiana due to the following reasons:

- There can be a lag between formation of a new business and inclusion in D&B listings, meaning that the newest businesses may be underrepresented in the sample frame.

- Although D&B includes home-based businesses, those businesses are more difficult to identify and are thus somewhat less likely than other businesses to be included in D&B listings. Small, home-based businesses are more likely than large businesses to be minority- or women-owned, which again suggests that MBE/WBEs might be underrepresented in the final availability database.[2]

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[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

[2] Michael McManus. 2016. Minority Business Ownership: Data from the 2012 Survey of Business Owners. U.S. Small Business Administration. https://www.sba.gov/sites/default/files/advocacy/Minority-Owned-Businesses-in-the-US.pdf (accessed June 16, 2019).

- Some businesses providing work related to City projects might not be classified in those industries as such in the D&B data. For example, there were some firms receiving City work that did not complete an availability survey. Further research indicated that some were out of business or acquired by another company by the time that the survey was conducted or might have been no longer interested in City work.

Selection of specific subindustries. Keen Independent identified specific subindustries using federally defined 4-digit Standard Industrial Classification codes to compile business listings from Dun & Bradstreet. There is unavoidable imprecision when choosing specific SIC codes to define establishments to be surveyed, which leaves some businesses off the contact list.

Large number of companies reporting that they do not perform related work or were not interested in discussing City work. Many firms contacted in the availability surveys indicated that they did not perform related work or were otherwise not interested in City work. The number of responses fitting these categories reflects the fact that Keen Independent was necessarily broad when developing its initial lists.

For example, one cannot know based upon the D&B data which electrical firms perform public works projects and which are focused on residential work. Therefore, Keen Independent acquired a general list of electrical firms (code 1731), and through surveys identified which firms would perform electrical work on City projects. Some did not.

There were a few companies that had actually performed City contracts but responded in the availability survey that they were not interested in discussing their availability for City work or did not perform relevant work. However, these firms accounted for about 3 percent of the total of such responses.

Non-response bias. An 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 considered the potential for non-response bias due to:

- Research sponsorship;
- Differences in success reaching potential interviewees;
- Calling from outside Louisiana; and
- Language barriers.

Research sponsorship. Interviewers introduced themselves by identifying the City of Alexandria as the survey sponsor because businesses may be less likely to answer somewhat sensitive business questions if the interviewer was unable to identify the sponsor.

Differences in success reaching potential interviewees. There might be differences in the success reaching firms in different types of work. However, Keen Independent concludes that any such

differences did not lead to lower availability estimates for MBEs and WBEs than if the study team had been able to successfully reach all firms.

Businesses in highly mobile fields, such as landscaping, are more difficult to reach for availability surveys than businesses more likely to work out of fixed offices (e.g., engineering firms). That assertion suggests that response rates may differ by work specialization. Simply counting all surveyed businesses across work specializations to determine overall MBE/WBE availability would lead to estimates that were biased in favor of businesses that could be easily contacted by email or telephone.

However, work specialization as a potential source of non-response bias in the availability analysis is minimized because the availability analysis examines businesses within particular work fields before determining an availability figure. In other words, the potential for landscaping firms to be less likely to complete a survey is taken into account because the number of MBE/WBEs, for example, is compared with the number of total landscaping firms when calculating availability for landscaping work.

Keen Independent examined whether minority- and women-owned firms were more difficult to reach in the telephone survey and found no indication that interviewers were less likely to complete telephone surveys with MBE/WBEs than majority-owned firms. The study team examined response rates based on MBE/WBE versus non-MBE/WBE business ownership data that D&B had for firms in the list purchased from this source. Comparing MBE/WBE representation on the initial list from Dun & Bradstreet with MBE/WBE representation on the list of firms (from the D&B Hoover's source) that were successfully contacted, MBE/WBEs were just slightly more likely to be successfully contacted than majority-owned firms. Based on D&B identification of ownership, MBE/WBE firms were 9 percent of the initial list and 8 percent of successfully surveyed firms. (Note that D&B records under-identify MBE/WBEs and are not the basis for the availability analysis.)

Therefore, there is no indication that there were differences in response rates that materially affected the estimates of MBE/WBE availability in this study.

Calling from outside Louisiana. Telephone calls made by CRI interviewers originated from outside the State of Louisiana. It might have been obvious to people in Louisiana that the phone calls were placed from outside the State and the interviewers were not from Louisiana. This might have reduced the overall response rate. However, there was no indication that minority- and women-owned firms were less likely to respond to the calls than white male-owned businesses.

Potential language barriers. The study team did not report any difficulties interviewing potentially available businesses due to language barriers. Study results do not appear to have been affected by conducting the principal portions of the availability survey in English.

Response reliability. Business owners and managers were asked questions that may be difficult to answer, including questions about revenues and employment.

Keen Independent explored the reliability of survey responses in a number of ways. For example:

- Keen Independent reviewed 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 DBE-certified businesses that was compared with survey responses concerning business ownership.

- Keen Independent compared survey responses about the largest contracts that businesses won during the past five years with actual City contract data.

- For firms indicating a high number of worktypes, the study team reviewed responses.

- Keen Independent reviewed all firms indicating bid capacity over $5 million.

COVID-19. The study team considered the impact of the COVID-19 pandemic on the availability survey results.

The State of Louisiana began its reopening process on May 15, 2020 and the phone survey took place in August and September of 2020. None of the businesses surveyed indicated the COVID-19 pandemic as a reason for not answering the survey. One business did not explicitly mention COVID-19 but elected not to take the survey and provided a vague reason which could have been related to the pandemic. Overall, of the 1,529 businesses with working phone numbers, less than one-tenth of 1 percent directly or indirectly reported COVID-19 as a reason for not completing an availability survey.

A copy of the survey instrument for construction follows.

E. Availability Survey Instrument

CITY OF ALEXANDRIA, LA
FAX/EMAIL SURVEY

The information developed in these surveys will add to the City's existing data on companies interested in doing business with the City of Alexandria

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:
Kenneth D. Nolley
Director of Internal Audit/Safety
City of Alexandria
(318) 449-5057
Kenneth.nolley@cityofalex.com

(Do not return completed surveys to Kenneth Nolley. See instructions above.)

You may also visit www.keenindependent.com/alexandrialadisparitystudy/ to learn more.

Z5. What is the name of your business?

_____

Z8. Address of business (if multiple offices, choose a Central Louisiana location if possible):

City (Required): _____

State (Required):_____

ZIP: _____

A2. Is your firm a for-profit business (as opposed to a nonprofit organization, a foundation or a government office)?

01 = Yes

02 = No

98 = Don't know

A4. What would you say is the main line of business of your company?

_____

A5. Is this the sole location for your business, or do you have offices in other locations?

01 = Sole location

02 = Have other locations

98 = Don't know

A6. Is your company a subsidiary or affiliate of another firm?

01 = Independent [SKIP TO B1]

02 = Subsidiary or affiliate of another firm

98 = Don't know [SKIP TO B1]

A7. What is the name of your parent company?

_____

98 = Don't know

B1. Which of the following types of construction-related work does your firm perform? Select all that apply.

01 = Bridge and elevated highway construction

02 = General road construction and widening

03 = Sports and recreational facility construction

04 = Office and public building construction

05 = Electrical work

06 = Plumbing, heating and air conditioning

07 = Wrecking and demolition

08 = Excavation, site prep, grading and drainage

09 = Concrete flatwork (including sidewalk, curb and gutter)

10 = Other concrete work

11 = Pavement marking

12 = Painting

13 = Water well drilling and servicing

14 = Roofing

15 = Underground utilities such as water, sewer and other utility lines

20 = Architecture and engineering

21 = Construction management

88 = Other (Please specify): _____

98 = Don't know

C1. The next questions are about your company's role in construction work. During the past six years, has your company bid on or been awarded public sector work in Louisiana?

1 = Yes

2 = No [SKIP TO C3]

98 = Don't know [SKIP TO C3]

C2. For those bids or awards, which of the following describes your role? Please select all that apply.

1 = Prime contractor

2 = Subcontractor

3 = Trucker or hauler

4 = Supplier or manufacturer

98 = Don't know

C3. Is your company qualified and interested in working with the City of Alexandria as a prime contractor?

1 = Yes

2 = No

98 = Don't know

C4. Is your company qualified and interested in working with the City of Alexandria as a subcontractor?

1 = Yes

2 = No

98 = Don't know

E1. In rough dollar terms, in the past six years what was the largest contract or subcontract your company was awarded, bid on, or submitted quotes for anywhere in Louisiana?

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 $2 million

5 = More than $2 million up to $5 million

6 = More than $5 million

97 = Not applicable

98 = Don't know

The next questions are about the ownership of the business.

F1. A business is defined as woman-owned if more than half — that is, more than 50 percent — 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, more than 50 percent — 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?

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?

1 = African American

2 = Asian American (This includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, the United States territories of the Pacific, or the Northern Mariana Islands; or persons whose origins are from subcontinent Asia, including persons whose origins are from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, or Nepal.)

3 = Hispanic American or Portuguese American (This includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race.)

4 = Native American (This includes American Indians, Eskimos, Aleuts or Hawaiians of Polynesian descent.)

5 = Other group (Please specify): _____

98 = Don't know

The next questions are about the background of the business.

G1. About what year was your firm established?

_____

98 = Don't know

The next set of questions pertain to annual averages for your company for the past five years (or just years in business if formed after 2015).

G3. About how many employees did you have working out of <u>just your location</u>, on average, over the past five years? (This includes employees who work <u>at</u> your location and those who work <u>from</u> your location.)

_____

98 = Don't know

G5. Think about the annual gross revenue of your company, considering just your location. Please estimate the annual average for the past five years.

1 = Up to $0.5 million

2 = More than $0.5 million up to $1 million

3 = More than $1 million up to $3.5 million

4 = More than $3.5 million up to $7.5 million

5 = More than $7.5 million up to $12 million

6 = More than $12 million up to $16.5 million

7 = More than $16.5 million up to $24 million

8 = More than $24 million up to $30 million

9 = More than $30 million up to $39.5 million

10 = More than $39.5 million

98 = Don't know

G6. **[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 five years?

_____

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

G7. **[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 $0.5 million up to $1 million

3 = More than $1 million up to $3.5 million

4 = More than $3.5 million up to $7.5 million

5 = More than $7.5 million up to $12 million

6 = More than $12 million up to $16.5 million

7 = More than $16.5 million up to $24 million

8 = More than $24 million up to $30 million

9 = More than $30 million up to $39.5 million

10 = More than $39.5 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 five years in Central Louisiana 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 projects 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 the City of Alexandria?

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 in general in Central Louisiana?

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 in Central Louisiana?

1 = Yes

2 = No

97 = Does not apply

98 = Don't know

H1j. Has your company experienced any difficulties receiving payment from the City of Alexandria in a timely manner?

1 = Yes

2 = No

97 = Does not apply

98 = Don't know

H1k. 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

H1l. 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

H1m. 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

H1o. 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

H1p. Has your company experienced any difficulties obtaining supply or distributorship relationships?

1 = Yes

2 = No

97 = Does not apply

98 = Don't know

H1q. 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. Do any other barriers come to mind about starting and expanding a business or achieving success in your industry in Central Louisiana?

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

_____

_____

_____

_____

2 = No

97 = Does not apply

98 = Don't know

H3. Would you be willing to participate in a follow-up interview to discuss your business's experience with any of these issues?

1 = Yes

2 = No

97 = Does not apply

98 = Don't know

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

08 = Office manager

09 = Receptionist

88 = Other (Please specify) _____

I4. What mailing address could the City of Alexandria use to contact you?

Street Address: _____

City: _____

State: _____

ZIP: _____

I5P. What phone number could the City of Alexandria use to contact you?

_____

I6. What e-mail address could the City of Alexandria 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 for the City of Alexandria.

APPENDIX E.
Entry and Advancement in the Alexandria Study Industries

Federal courts have found that 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."[1] Congress found that discrimination had impeded the formation of qualified minority-owned businesses. In the marketplace appendices (Appendix E through Appendix I), Keen Independent examines whether some of the barriers to business formation that Congress found for minority- and women-owned businesses also appear to occur in the Central Louisiana marketplace.

Potential barriers to business formation include barriers associated with entering and advancing as employees in the study industries. Appendix E examines recent data on employment and workplace advancement that may ultimately influence business formation within the Alexandria study industries.[2, 3]

Based on research about where firms obtaining City contracts are located, Keen Independent considers the relevant geographic market area for this study to be the Kisatchie Delta Regional Planning & Development District. This area includes Avoyelles, Catahoula, Concordia, Grant, La Salle, Rapides, Vernon and Winn parishes. The marketplace appendices refer to this area as "Central Louisiana." The "study industries" are the construction, professional services, goods and other services industries. After presenting overall demographic characteristics for the study industries as a whole, Keen Independent separately examines results for each industry as the pathways into these industries and career ladders for employees differ between industries. All results pertain to conditions before the COVID-19 pandemic.

A. Introduction

Keen Independent examined whether there were barriers to the formation of businesses owned by minorities and women in the Central Louisiana marketplace. Business ownership typically results from an individual entering an industry as an employee and then advancing within that industry before starting a business in that sector. Within the entry and advancement process, there may be barriers that limit opportunities for some individuals. Figure E-1 presents a model of entry and advancement in the study industries.

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[1] *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), citing *Adarand Constructors, Inc. v. Slater*, 228 F.3d (10th Cir. 2000); *Western States Paving Co., Inc. v. Washington State DOT*, 345 F.3d 964 (8th Cir. 2003).

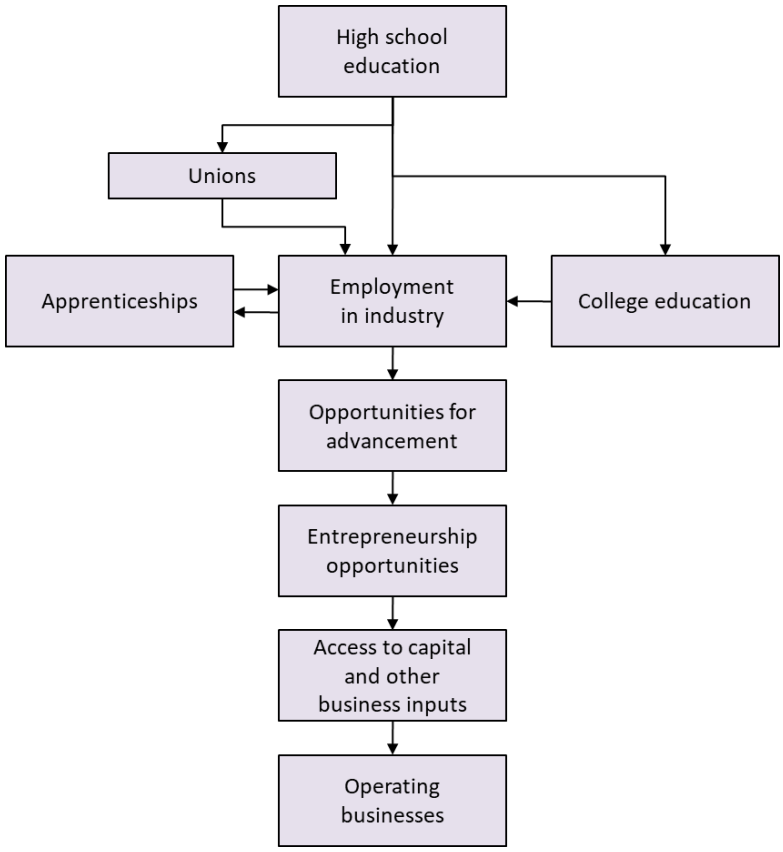
[2] In Appendix E and other appendices that present information about local marketplace conditions, information for "professional services" refers to professional, scientific and technical services. References to "goods" pertains to wholesale and retail trade. "Other services" refers to administrative, support and waste management services, as well as other services except for public administration.

[3] Several other report appendices analyze other quantitative aspects of conditions in the Central Louisiana marketplace. Appendix F explores business ownership. Appendix G presents an examination of access to capital. Appendix H considers the success of businesses. Appendix I presents the data sources that Keen Independent used in those appendices.

Appendix E uses 2014–2018 American Community Survey (ACS) data to analyze education, employment and workplace advancement — all factors that may influence whether individuals gain the work experience and qualifications to start businesses in the study industries.

Figure E-1.
Model for studying entry into study industries in Central Louisiana

Source:
Keen Independent Research.



Keen Independent began the analysis by examining the representation of people of color and women among business owners and workers in Central Louisiana.

People of color among workers and business owners in Central Louisiana. Figure E-2 shows the demographic distribution of business owners in the study industries business owners in other industries (excluding the study industries) and workers in the labor force, based on 2014–2018 ACS data. (Demographics of the workforce in each individual study industry are presented separately later in Appendix E.) Analysis of Central Louisiana in 2014–2018 indicated the following:

- African Americans were 25 percent of the workforce and 15 percent of business owners in the study industries.
- Asian Americans accounted for about 1 percent of all workers and business owners in study industries.
- Hispanic Americans were about 4 percent of the workforce and business owners in the study industries.

- Native Americans accounted for approximately 1 percent of the workforce and 2 percent of business owners in the study industries.

- Non-Hispanic whites accounted for about 79 percent of business owners in the study industries and 86 percent of business owners in other industries, higher than their representation in the workforce (68%).

Figure E-2.
Demographic distribution of business owners and the workforce in Central Louisiana, 2014–2018

Central Louisiana	Workforce in all industries	Business owners in study industries	Business owners in all other industries
Race/ethnicity			
African American	25.2 %	14.5 % **	9.0 % **
Asian American	1.4	0.9 **	2.7 **
Hispanic American	3.9	3.9	1.5 **
Native American or other minority	1.1	2.1 **	1.2
Non-Hispanic white	68.4	78.5 **	85.6 **
Total	**100.0 %**	**100.0 %**	**100.0 %**
Gender			
Female	47.2 %	40.1 % **	33.9 % **
Male	52.8	59.9 **	66.1 **
Total	**100.0 %**	**100.0 %**	**100.0 %**

Note: ** Denotes that the difference in proportions between workforce and business owners in the specified industries for the given race/ethnicity/gender group is statistically significant at the 95% confidence level.

"All other industries" includes all industries other than the construction, professional services, goods and other services industries.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata Sample (PUMS). The 2014–2018 raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Keen Independent analyzed whether differences between the representation of each group among business owners and the representation of that group in the workforce were statistically significant, which means that sampling in the Census data can be rejected as a cause of the observed differences (noted with asterisks in Figure E-2). Each of the differences described above were statistically significant.

Female workers and business owners in Central Louisiana. Figure E-2 also examines the percentage of Central Louisiana business owners and workers who are women. In 2014–2018, women accounted for about 40 percent of business owners in the study industries, 7 percentage points below women's representation in the overall workforce (47%).

General academic research on conditions in the Central Louisiana labor market. Recent research has focused on the effects of the historic August 2016 flood and subsequent recovery efforts.

A report published by Louisiana Economic Development (LED) estimated that the flood disrupted 19,000 businesses across the state. This affected approximately 278,500 workers, about 14 percent of the workforce in the state. In Avoyelles Parish, part of the Central Louisiana marketplace and one of the most impacted parishes, an estimated 100 businesses and 1,200 workers were directed affected. Overall, an estimated 19,900 Louisiana businesses were disrupted by the flood.[4]

Experts also reported that poorer and more vulnerable populations were disproportionately affected by the flood. Poorer communities typically reside in less desirable locations, including locations that are more likely to experience natural disasters and weather events. Individuals that relied on public assistance also suffered, as public funds and assistance were redirected to disaster relief efforts.[5]

In part because of the disproportionate damage to poorer communities, minority residents displaced by the historic flood of 2016 may have been slower and overall less likely to return to the region. Because the flood occurred later in the study period, it is possible that fewer people of color are now participating in the Central Louisiana workforce compared to what is reflected in the ACS data.

B. Construction Industry

Keen Independent examined how education, training, employment and advancement may affect the number of businesses that people of color and women owned in the Central Louisiana construction industry in 2014–2018.

Education. Formal education beyond high school is not a prerequisite for most construction jobs,[6] and the construction industry often attracts individuals who have relatively less formal education than in other industries.[7] Based on 2014–2018 ACS data, 52 percent of construction workers in Central Louisiana were high school graduates without post-secondary education and 20 percent had not graduated high school. About 7 percent of construction workers had a four-year college degree or more compared to 12 percent in all other industries combined.

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[4] Terrell, D. *The Economic Impact of the August 2016 Floods on the State of Louisiana* (Rep.). Retrieved from Louisiana Economic Development website: https://gov.louisiana.gov/assets/docs/RestoreLA/SupportingDocs/Meeting-9-28-16/2016-August-Flood-Economic-Impact-Report_09-01-16.pdf

[5] Upton, J. (2017, August 8). One year after the Great Flood, Louisiana's most vulnerable cope with the losses. *Grist*. Retrieved August 6, 2020 from https://grist.org/article/one-year-after-the-great-flood-louisianas-most-vulnerable-cope-with-the-losses/

[6] Bureau of Labor Statistics, U.S. Department of Labor. (2018, January 30). Construction and extraction occupations. *Occupational Outlook Handbook*. Retrieved from https://www.bls.gov/ooh/construction-and-extraction/home.htm

[7] CPWR - The Center for Construction Research and Training. (2013). Educational attainment and internet usage in construction and other industries. In *The construction chart book: The U.S. construction industry and its workers* (5th ed.). Retrieved from https://www.cpwr.com/sites/default/files/publications/5th%20Edition%20Chart%20Book%20Final.pdf;

CPWR - The Center for Construction Research and Training. (2007). Educational attainment and internet usage in construction and other industries. In *The construction chart book: The U.S. construction industry and its workers* (3rd ed.). Retrieved from https://www.cpwr.com/sites/default/files/research/CB3_FINAL.pdf

Race/ethnicity. Due to the educational requirements of entry-level jobs and the limited education beyond high school for many minority groups in the marketplace, one would expect a relatively high representation of those groups in the Central Louisiana construction industry, especially in entry-level positions.

- African Americans represented a large population of workers without post-secondary education. In 2014–2018, about 15 percent of all African American workers age 25 and older who worked in Central Louisiana held at least a four-year college degree, compared to 23 percent for non-Hispanic whites 25 and older.

- Of Central Louisiana workers age 25 and older, the percentage of Native Americans (14%) with a four-year college degree was also lower than that of non-minorities in 2014–2018.

- The percentage of Hispanic Americans with a four-year college degree (21%) was slightly less than non-Hispanic whites (23%).

In 2014–2018, 60 percent of Asian American workers age 25 and older in Central Louisiana had at least a four-year college degree. One might expect representation of Asian Americans in the Central Louisiana construction industry to be lower than in other industries given this level of education.

Gender. According to 2014–2018 ACS data for Central Louisiana, 18 percent of female workers and 25 percent of male workers age 25 and older had at least a four-year college degree. This might contribute to lower representation of women among construction workers.

Among people with a college degree, women have been less likely to enroll in construction-related degree programs. Nationally, women have low levels of enrollment in Construction Management programs, and this may be due to (a) the prevailing notion that construction is an industry dominated by males and is unkind to females and families, and (b) secondary school career counselors' lack of discussion of women's career opportunities in the construction fields, and female students' consequent lack of knowledge of these professions.[8]

Apprenticeship and training. Training in the construction industry is largely on-the-job and through trade schools and apprenticeship programs. Entry-level jobs for workers out of high school are often for laborers, helpers or apprentices. More skilled positions in the construction industry may require additional training through a technical or trade school, or through an apprenticeship or other training program. Apprenticeship programs can be developed by employers, trade associations, trade unions or other groups.

Workers can enter apprenticeship programs from high school or trade school. Apprenticeships have traditionally been three- to five-year programs that combine on-the-job training with classroom instruction.[9] In response to limited construction employment opportunities during the

[8] Sewalk, S., & Nietfeld, K. (2013). Barriers preventing women from enrolling in construction management programs. *International Journal of Construction Education and Research, 9*(4), 239-255. doi:10.1080/15578771.2013.764362

[9] Bureau of Labor Statistics, U.S. Department of Labor. (2013). Apprenticeship: Earn while you learn. Retrieved from https://www.bls.gov/careeroutlook/2013/summer/art01.pdf

Great Recession, apprenticeship programs limited the number of new apprenticeships[10] as well as access to knowing when and where apprenticeships occur.[11] Apprenticeship programs often refer to an "out-of-work list" when contacting apprentices; those who have been on the list the longest are given preference.

Furthermore, some research indicates that apprentices are often hired and laid off several times throughout the duration of their apprenticeship program. Apprentices were more successful if they were able to maintain steady employment, either by remaining with one company and moving to various work sites, or by finding work quickly after being laid off. Apprentices identified mentoring from senior coworkers, such as journey workers, foremen or supervisors, and being assigned tasks that furthered their training as important to their success.[12]

Employment. With educational attainment for minorities and women as context, Keen Independent examined employment in the Central Louisiana construction industry. Figure E-3 presents data from 2014–2018 to compare the demographic composition of the construction industry with the total workforce in Central Louisiana.

Race/ethnicity. Based on 2014–2018 ACS data, people of color were about 14 percent of those working in the Central Louisiana construction industry. Examination of the Central Louisiana construction industry workforce in 2014–2018 shows that:

- African Americans were a smaller percentage of workers in construction (11%) than in other industries (26%);
- Hispanic Americans were slightly underrepresented in the construction industry (3%) compared to other industries (4%);
- Less than one-half of 1 percent of construction workers and about 1 percent of all workers were Native Americans; and
- There were no Asian Americans in the ACS data who worked in construction.

The differences described above are statistically significant. Figure E-3 presents these results.

The average educational attainment of people of color is consistent with requirements for construction jobs, so education does not explain the low number of these groups employed in the Central Louisiana construction industry relative to other industries. Historically, racial discrimination by construction unions has contributed to the low employment of African Americans in construction trades.[13] The role of unions is discussed more thoroughly later in Appendix E (including research that suggests discrimination has been reduced in unions).

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[10] Kelly, M., Pisciotta, M., Wilkinson, L., & Williams, L. S. (2015). When working hard is not enough for female and racial/ethnic minority apprentices in the highway trades. *Sociological Forum, 30*(2), 415-438. doi:10.1111/socf.12169

[11] Graves, F. G., et al. *Women in construction: Still breaking ground* (Rep.). Retrieved from National Women's Law Center website: https://www.nwlc.org/sites/default/files/pdfs/final_nwlc_womeninconstruction_report.pdf

[12] Ibid.

[13] Feagin, J. R., & Imani, N. (1994). Racial barriers to African American entrepreneurship: An exploratory study. *Social Problems, 41*(4), 562-584. doi:10.1525/sp.1994.41.4.03x0272l; Waldinger, R., & Bailey, T. (1991). The continuing significance of race: Racial conflict and racial discrimination in construction. *Politics & Society, 19*(3), 291-323. doi:10.1177/003232929101900302; *United Steelworkers v. Weber*, 443 U.S. 193 (5th Cir. 1979).

Gender. There are large differences between the representation of women in the construction workforce and their representation in all other industries. For the years 2014–2018, women represented 8 percent of all construction workers and 50 percent of workers in all other industries.

Figure E-3.
Demographics of workers in construction and all other industries
in Central Louisiana, 2014–2018

Central Louisiana	Construction		All other industries
Race/ethnicity			
African American	10.8 %	**	26.2 %
Asian American	0.0		1.5
Hispanic American	2.8	**	4.0
Native American or other minority	0.3	**	1.1
Total minority	**13.9 %**		**32.8 %**
Non-Hispanic white	86.1	**	67.2
Total	**100.0 %**		**100.0 %**
Gender			
Female	8.1 %	**	49.9 %
Male	91.9	**	50.1
Total	**100.0 %**		**100.0 %**

Note: ** Denotes that the difference in proportions between workers in the construction industry and all other industries for the given Census/ACS year is statistically significant at the 95% confidence level.

"All other industries" includes all industries other than the construction industry.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Academic research concerning any effect of race- and gender-based discrimination in construction labor markets. There is substantial academic literature that has examined whether race- or gender-based discrimination affects opportunities for people of color and women to enter construction trades in the United States.

Many studies indicate that race- and gender-based discrimination affect opportunities for minorities and women in the construction industry. For example, literature concerning women in construction trades has identified substantial barriers to entry and advancement due to gender discrimination and sexual harassment.[14] A recent study found that when African American women in construction advance into leadership roles, they often find that others unduly challenge their authority.

[14] Denissen, A. M., & Saguy, A. C. (2013). Gendered homophobia and the contradictions of workplace discrimination for women in the building trades. *Gender & Society, 28*(3), 381-403. doi:10.1177/0891243213510781; Ericksen, J. A., & Schulteiss, D. E. (2009). Women pursuing careers in trades and construction. *Journal of Career Development, 36*(1), 68-89. doi:10.1177/0894845309340797

Participants of this study also reported incidents of harassment, bullying, and the assumption that they are inferior to their male peers; these instances are believed to hinder African American females' career development and overall success in the construction industry.[15]

In a separate study, white men were least likely to report challenges related to being assigned low-skill or repetitive tasks that did not enable them to learn new skills. Women and people of color felt that they were disproportionately performing low-skill tasks that negatively impacted the quality of their training experience.[16]

Additionally, women encounter practical issues such as difficulty in accessing personal protective equipment that fits them properly (they frequently find such employer-provided equipment to be too large). This sometimes poses a safety hazard, and even more often hinders female workers' productivity, which can impact their relationships with supervisors as well as their opportunities for growth in the industry.[17]

Research suggests that race and gender inequalities in a workplace are often evidenced through the acceptance of the "good old boys' club" culture.[18] There may also be an attachment to the idea that "working hard" will bring success. However, the quantitative and qualitative evidence indicates that "hard work" alone does not ensure success for women and people of color.[19] In 2014, the National Women's Law Center found low representation of women, and especially women of color, in construction jobs and apprenticeships. Women experience many barriers to success in this career path, including explicit gender discrimination and harassment.[20]

The temporary nature of construction work results in uncertain job prospects, and the relatively high turnover of laborers presents a disincentive for construction firms to invest in training. Some researchers have concluded that constant turnover has lent itself to informal recruitment practices and nepotism, compelling laborers to tap social networks for training and work. They credit the importance of social networks with the high degree of ethnic segmentation in the construction

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[15] Hunte, R. (2016). Black women and race and gender tensions in the trades. *Peace Review, 28*(4), 436-443. doi:10.1080/10402659.2016.1237087

[16] Kelly, M., et al. (2015). When working hard is not enough for female and racial/ethnic minority apprentices in the highway trades. *Sociological Forum, 30*(2), 415-438. doi:10.1111/socf.12169

[17] Onyebeke, L. C., et al. (2016). Access to properly fitting personal protective equipment for female construction workers. *American Journal of Industrial Medicine, 59*(11), 1032-1040. doi:10.1002/ajim.22624

[18] Kelly, Maura, et al. (2015). When working hard is not enough for female and racial/ethnic minority apprentices in highway trades. *Eastern Sociological Society*, *30*(2): 415–438.

[19] Ibid.

[20] Jackson, Sarah. (2019, Nov. 29). *'Not the boys' club anymore': Eight women take a swing at the construction industry.* NBC News. Retrieved from https://www.nbcnews.com/news/us-news/not-boys-club-anymore-eight-women-take-swing-construction-industry-n1091376; Graves, F. G., et al. *Women in construction: Still breaking ground* (Rep.). Retrieved from National Women's Law Center website: https://www.nwlc.org/sites/default/files/pdfs/final_nwlc_womeninconstruction_report.pdf

industry.[21] Unable to integrate themselves into traditionally white social networks, African Americans and other minorities faced long-standing historical barriers to entering the industry.[22]

Importance of unions to entry in the construction industry. Labor researchers characterize construction as a historically volatile industry that is sensitive to business cycles, making the presence of labor unions important for stability and job security within the industry.[23] According to the Bureau of Labor Statistics, in 2019 union membership among people employed in construction occupations was over 17 percent.[24] National union membership within all occupations during 2019 was about 10 percent.[25] The difference in union membership rates demonstrates the importance of unions within the construction industry. In Louisiana, union membership for all occupations during 2019 was about 5 percent,[26] although it is unclear what percentage of workers in construction are union members.

Construction unions aim to provide a reliable source of labor for employers and preserve job opportunities for workers by formalizing the recruitment process, coordinating training and apprenticeships, enforcing standards of work, and mitigating wage competition. The unionized sector of construction would seemingly be a path for African Americans and other underrepresented groups into the industry.

However, some researchers have identified racial discrimination by trade unions that has historically prevented minorities from obtaining employment in skilled trades.[27] Some researchers have argued that union discrimination has taken place in a variety of forms, including the following examples:

- Unions have used admissions criteria that adversely affect minorities. In the 1970s, federal courts ruled that standardized testing requirements for unions unfairly disadvantaged minority applicants who had less exposure to testing. In addition, the policies that required new union members to have relatives who were already in the union perpetuated the effects of past discrimination.[28]

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[21] Waldinger, R., & Bailey, T. (1991). The continuing significance of race: Racial conflict and racial discrimination in construction. *Politics & Society, 19*(3), 291-323. doi:10.1177/003232929101900302

[22] Feagin, J. R., & Imani, N. (1994). Racial barriers to African American entrepreneurship: An exploratory study. *Social Problems, 41*(4), 562-584. doi:10.1525/sp.1994.41.4.03x0272l

[23] Applebaum, H. A. (1999). *Construction workers, U.S.A.* Westport, CT: Greenwood Press.

[24] Bureau of Labor Statistics, U.S. Department of Labor. (2020, January 22). *Union affiliation of employed wage and salary workers by occupation and industry* [Press release]. Retrieved from https://www.bls.gov/news.release/union2.t03.htm

[25] Bureau of Labor Statistics, U.S. Department of Labor. (2020, January 22). *Union Members —2019* [Press release]. Retrieved from https://www.bls.gov/news.release/pdf/union2.pdf

[26] Bureau of Labor Statistics, U.S. Department of Labor. (2020, January 29). *Union Members in Louisiana — 2019* [Press release]. Retrieved from https://www.bls.gov/regions/southwest/news-release/unionmembership_louisiana.htm

[27] U.S. Department of Justice. (1996). Proposed reforms to affirmative action in federal procurement (61 FR 26042). *Federal register, 101*(61), 26042-63. Office of the Federal Register, National Archives and Records Administration.

[28] Ibid.; *U.S. v. Iron Workers Local 86*, 443 F.2d 544 (9th Cir. 1971); *Sims v. Sheet Metal Workers International Association*, 489 F. 2d 1023 (6th Cir. 1973); *U.S. v. International Association of Bridge, Structural and Ornamental Iron Workers*, 438 F.2d 679 (7th Cir. 1971).

- Of those minority individuals who are admitted to unions, a disproportionately low number are admitted into union-coordinated apprenticeship programs. Apprenticeship programs are an important means of producing skilled construction laborers, and the reported exclusion of African Americans from those programs has severely limited their access to skilled occupations in the construction industry.[29]

- Although formal training and apprenticeship programs exist within unions, most training of union members takes place informally through social networking. Nepotism characterizes the unionized sector of construction as it does the non-unionized sector, and that practice favors a white-dominated status quo.[30]

- Traditionally, unions have been successful in resisting policies designed to increase African American participation in training programs. The political strength of unions in resisting affirmative action in construction has hindered the advancement of African Americans in the industry.[31]

- Discriminatory practices in employee referral procedures, including apportioning work based on seniority, have precluded minority union members from having the same access to construction work as their white counterparts.[32]

- According to testimony from African American union members, even when unions implement meritocratic mechanisms of apportioning employment to laborers, white workers are often allowed to circumvent procedures and receive preference for construction jobs.[33]

More recent research suggests that the relationship between minorities and unions has been changing. As a result, historical observations may not be indicative of current dynamics in construction unions. Recent studies focusing on the role of unions in apprenticeship programs have compared minority and female participation and graduation rates for apprenticeships in joint programs (that unions and employers organize together) with rates in employer-only programs.

Many of those studies conclude that the impact of union involvement is generally positive or neutral for minorities and women, compared to non-Hispanic white males, as summarized below.

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[29] Applebaum, H. A. (1999). *Construction workers, U.S.A.* Westport, CT: Greenwood Press.

[30] Ibid. A high percentage of skilled workers reported having a father or relative in the same trade. However, the author suggests this may not be indicative of current trends.

[31] Waldinger, R., & Bailey, T. (1991). The continuing significance of race: Racial conflict and racial discrimination in construction. *Politics & Society, 19*(3), 291-323. doi:10.1177/003232929101900302

[32] U.S. Department of Justice. (1996). Proposed reforms to affirmative action in federal procurement (61 FR 26042). *Federal register, 101*(61), 26042-63. Office of the Federal Register, National Archives and Records Administration.

[33] Feagin, J. R., & Imani, N. (1994). Racial barriers to African American entrepreneurship: An exploratory study. *Social Problems, 41*(4), 562-584. doi:10.1525/sp.1994.41.4.03x0272l

- Glover and Bilginsoy analyzed apprenticeship programs in the U.S. construction industry during 1996 through 2003. Their dataset covered about 65 percent of apprenticeships during that time. The authors found that joint programs had "much higher enrollments and participation of women and ethnic/racial minorities" and exhibited "markedly better performance for all groups on rates of attrition and completion" compared to employer-run programs.[34]

- In a similar analysis focusing on female apprentices, Bilginsoy and Berik found that women were most likely to work in highly skilled construction professions as a result of enrollment in joint programs as opposed to employer-run programs. Moreover, the effect of union involvement in apprenticeship training was higher for African American women than for white women.[35]

- Additional research on the presence of African Americans and Hispanic Americans in apprenticeship programs found that African Americans were 8 percent more likely to be enrolled in a joint program than in an employer-run program. However, Hispanic Americans were less likely to be in a joint program than in an employer-run program.[36] Those data suggest that Hispanic Americans may be more likely than African Americans to enter the construction industry without the support of a union.

Recent union membership data support those findings as well. For example, 2019 Current Population Survey (CPS) asked participants, "Are you a member of a labor union or of an employee association similar to a union?" CPS data showed that union membership was highest among African Americans (11%), and non-Hispanic whites (10%). Hispanic American workers (9%) and Asian American workers (9%) had relatively lower rates of union membership.[37] Recent research utilizing ACS data puts African American union membership in the construction industry at over 17 percent.[38]

According to some research, union apprenticeships appear to have drawn more African Americans into the construction trades in some markets,[39] and studies have found a high percentage of minority construction apprentices. In 2010 in New York City, for example, approximately 69 percent of first-year local construction apprentices were African American, Hispanic American, Asian American, or members of other minority groups. In addition, 11 percent of local New York City construction apprentices were women. It should be noted that, though the Building and Construction Trades Council of Greater New York set a goal that women represent 10 percent of

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[34] Glover, R. W., & Bilginsoy, C. (2005). Registered apprenticeship training in the U.S. construction industry. *Education + Training, 47*(4/5), 337-349. doi:10.1108/00400910510601913

[35] Berik, G., & Bilginsoy, C. (2006). Still a wedge in the door: Women training for the construction trades in the USA. *International Journal of Manpower, 27*(4), 321-341. doi:10.1108/01437720610679197

[36] Bilginsoy, C. (2005). How unions affect minority representation in building trades apprenticeship programs. *Journal of Labor Research, 26*(3), 451-463. doi:10.1007/s12122-005-1014-4

[37] Bureau of Labor Statistics, U.S. Department of Labor. (2020, January 22). *Union Members —2019* [Press release]. Retrieved from https://www.bls.gov/news.release/pdf/union2.pdf

[38] Bucknor, C. (2016). *Black workers, unions, and inequality*. Washington D.C.: Center for Economic and Policy Research.

[39] Mishel, L. (2017). *Diversity in the New York City union and nonunion construction sectors* (Rep.). Retrieved from Economic Policy Institute website: http://www.epi.org/publication/diversity-in-the-nyc-construction-union-and-nonunion-sectors/

local apprentices; the City did not establish a goal for minority participation.[40] However, this increase in apprenticeships may not necessarily be indicative of improved future prospects for minority workers. A study in Oregon found that, though minority men's participation in construction apprenticeships was roughly proportional to their representation in the state's workforce, their representation in skilled trades apprenticeships was lower than might be expected.[41]

Recent research suggests there may be a surplus of workers in the Central Louisiana construction industry, with greater numbers of eligible workers than opportunities. According to a recent report by the Louisiana Workforce Commission, a notable decline in the Alexandria Regional Labor Market Area (RLMA) construction industry occurred between 2016 and 2019.[42] During this time, the construction industry reported the greatest number of unemployment claims per industry in the RLMA.

Although union membership and union program participation vary based on race and ethnicity, there is no clear picture from the research about the causes of those differences and their effects on construction industry employment. Research is especially limited concerning the impact of unions on African American employment. It is unclear from past studies whether unions presently help or hinder equal opportunity in construction and whether effects in Central Louisiana are different from other parts of the country. In addition, current research indicates that the effects of unions on entry into the construction industry may be different for different minority groups. Some unions are actively trying to provide a more inclusive environment for racial minorities and women through "insourcing" and active recruitment into apprenticeship programs.[43, 44]

Advancement. To research opportunities for advancement in the Central Louisiana construction industry, Keen Independent examined the representation of people of color and women in construction occupations (defined by the U.S. Bureau of Labor Statistics[45]). Appendix I provides full descriptions of construction trades with large enough sample sizes in the 2014–2018 ACS for analysis.

Racial/ethnic composition of construction occupations. Figure E-4 presents the race/ethnicity of workers in select construction-related occupations in Central Louisiana, including lower-skill occupations (e.g., construction laborers), higher-skill construction trades (e.g., electricians), and

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[40] Figueroa, M., Grabelsky, J., & Lamare, J. R. (2013). Community workforce agreements: A tool to grow the union market and to expand access to lifetime careers in the unionized building trades. *Labor Studies Journal, 38*(1), 7-31. doi:10.1177/0160449x13490408

[41] Berik, G., Bilginsoy, C., & Williams, L. S. (2011). Gender and racial training gaps in Oregon apprenticeship programs. *Labor Studies Journal, 36*(2), 221-244. doi:10.1177/0160449x10396377

[42] Louisiana Workforce Commission. (2020). *Louisiana Workforce Information Review* (Rep.). Retrieved from Louisiana Workforce Commission website: http://www.laworks.net/Downloads/LMI/WorkforceInfoReview_2019.pdf

[43] Judd, R. (2016, November 30). Seattle's building boom is good news for a new generation of workers. *The Seattle Times, Pacific NW Magazine*. Retrieved from https://www.seattletimes.com/pacific-nw-magazine/seattles-building-boom-is-good-news-for-a-new-generation-of-workers/

[44] For example, Boston's "Building Pathways" apprenticeship program is designed to recruit workers from low-income underserved communities. https://buildingpathwaysboston.org/

[45] Bureau of Labor Statistics, U.S. Department of Labor. (2001). Standard occupational classification major groups. Retrieved from http://www.bls.gov/soc/major_groups.htm

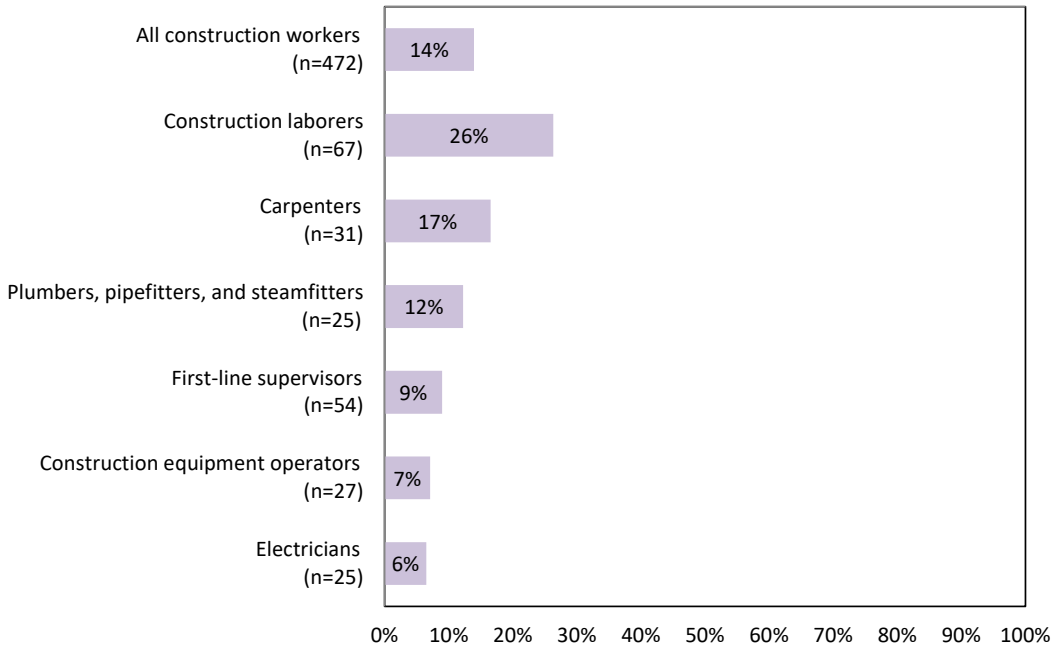
supervisory roles. The trades correspond to types of construction labor often involved in transportation contracting. Figure E-4 presents those data for 2014–2018.

Based on 2014–2018 ACS data, there are large differences in the racial and ethnic makeup of workers in various construction trades in Central Louisiana. As shown in Figure E-4, when compared with the representation of minorities among all construction workers (14%), the representation of minorities was greater among construction laborers (26%) and carpenters (17%). Minority representation in the following occupations was substantially lower than in construction overall:

- First-line supervisors (9%);
- Construction equipment operators (7%); and
- Electricians (6%).

Rates of minority representation are lower in occupations with relatively higher requirements in education, training and apprenticeship. This suggests that people of color may face greater barriers in accessing the requisite training and apprenticeships for high-skill occupations in the Central Louisiana construction industry.

Figure E-4.
Minorities as a percentage of selected construction occupations in Central Louisiana, 2014–2018



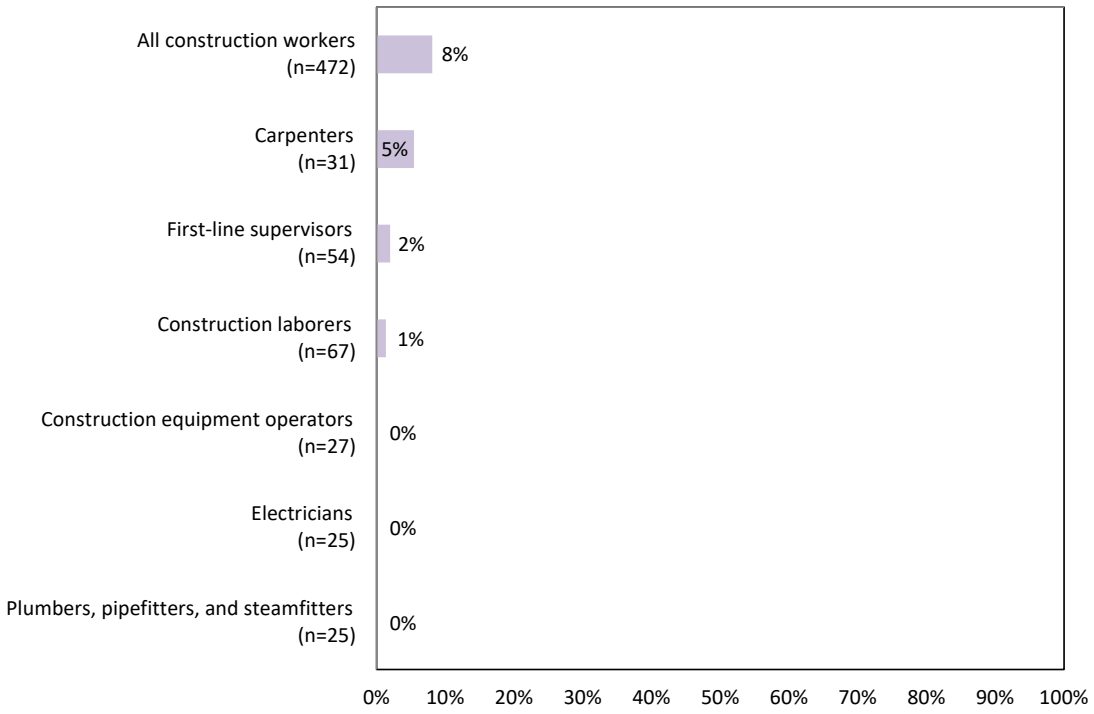
Note: All minorities were combined into a single category due to small sample size.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Gender composition of construction occupations. Keen Independent also analyzed the proportion of workers who are women in construction-related occupations. Figure E-5 summarizes the representation of women in select construction-related occupations in Central Louisiana for 2014–2018. (Overall, women made up only 8 percent of workers in the industry in 2014–2018.)

In Central Louisiana from 2014–2018, women accounted for no more than 2 percent of those working in most of the large construction trades. In the ACS data, there were no women working as electricians or plumbers, pipefitters and steamfitters. Figures E-5 provides these results.

Figure E-5.
Women as a percentage of construction workers in selected occupations in Central Louisiana, 2014–2018



Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples.
The 2014–2018 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Percentage of mangers who are people of color. To further assess advancement opportunities in the Central Louisiana construction industry, Keen Independent examined the proportion of construction workers who reported being managers. Figure E-6 presents the percentage of construction employees who reported working as managers in 2014–2018 for Central Louisiana by racial/ethnic and gender group.

In 2014–2018, about 4 percent of non-Hispanic whites in the Central Louisiana construction industry were managers. For this analysis, all people of color were combined into a single category due to small sample size. Relatively fewer minorities (3%) worked as managers in the construction industry. This difference was not statistically significant, in part due to small sample size.

Percentage of managers who are women. In the Central Louisiana construction industry, 3.7 percent of women construction workers were managers, about the same as the 4.1 percent of male workers who were managers in 2014–2018.

Figure E-6.
Percentage of construction workers who worked as a manager in 2014–2018 in Central Louisiana

Central Louisiana	2014–2018
Race/ethnicity	
Minority	3.1 %
Non-Hispanic white	4.2
Gender	
Female	3.7 %
Male	4.1
All individuals	4.1 %

Note: *, ** Denote that the difference in proportions between the minority and non-Hispanic white groups (or between females and males or persons with disabilities and all others) for the given Census/ACS year is statistically significant at the 90% and the 95% confidence level, respectively.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

C. Professional Services Industry

Keen Independent also examined how education and employment may influence the number of workers, and therefore potential entrepreneurs, who are minorities and women in the professional services industry.

Education. Unlike the construction industry, lack of relevant education may preclude workers' entry into jobs in professional services. Many professional services occupations require at least a four-year college degree and some require licensure.

According to the 2014–2018 ACS, 35 percent of individuals working in the Central Louisiana professional services industry had at least a four-year college degree and 11 percent had a two-year degree.

Barriers to college education can restrict employment opportunities, advancement opportunities and, consequently, business ownership in the professional services industries. Low numbers of business owners in professional services may in part reflect the lack of higher education for particular racial, ethnic and gender groups.[46] Keen Independent explores this issue below.

Race/ethnicity. Figure E-7 presents the percentage of workers age 25 and older with at least a four-year college degree in Central Louisiana. About 23 percent of all nonminority workers age 25 and older had at least a four-year degree in 2014–2018. For Central Louisiana workers 25 years and older in other racial/ethnic groups, the data indicated the following:

- About 15 percent of both African Americans and Native Americans age 25 and older held a four-year college degree or higher;
- 60 percent of Asian Americans had a four-year degree or higher; and
- About 21 percent of Hispanic Americans had at least a four-year degree.

The level of education necessary to work in the professional services industries may affect employment opportunities for groups for which college education lags that of non-Hispanic whites.

[46] Dickson, P. H., Solomon, G. T., & Weaver, K. M. (2008). Entrepreneurial selection and success: Does education matter? *Journal of Small Business and Enterprise Development, 15*(2), 239-258. doi:10.1108/14626000810871655; Feagin, J. R., & Imani, N. (1994). Racial barriers to African American entrepreneurship: An exploratory study. *Social Problems, 41*(4), 562-584. doi:10.1525/sp.1994.41.4.03x0272l; Macionis, J. J. (2018). *Sociology* (16th ed.). Harlow, England: Pearson.

Gender. Figure E-7 also presents the results by gender group. According to 2014–2018 data, in Central Louisiana relatively more female workers age 25 and older had at least a four-year college degree (25%) than their male counterparts (18%).

Figure E-7.
Percentage of all workers 25 and older with at least a four-year college degree in Central Louisiana, 2014–2018

Central Louisiana	2014-2018	
Race/ethnicity		
African American	15.3 %	**
Asian American	60.0	**
Hispanic American	21.2	
Native American or other minority	15.2	
Non-Hispanic white	22.8	
Gender		
Female	24.6 %	**
Male	18.4	
All individuals	21.4 %	

Note: ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or between females and males or persons with disabilities and all others) for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Employment. Figure E-8 compares the demographic composition of Central Louisiana professional services workers to that of workers in all other industries who are 25 years or older and have a college degree. Due to small sample size, all minorities were combined into a single category.

In 2014–2018, about 23 percent of workers in the Central Louisiana professional services industry were people of color. The representation of people of color in the Central Louisiana professional services industry is about 2 percentage points lower than their representation among workers of similar age and education across all other industries, not a statistically significant difference (see Figure E-8).

Women were relatively underrepresented in the Central Louisiana professional services industry. In 2014–2018, women represented about 34 percent of professional service workers in Central Louisiana with a college degree, compared to 51 percent in all other industries. This difference was statistically significant.

Figure E-8.
Demographic distribution of professional service workers and workers age 25 and older with a four-year college degree in all other industries in Central Louisiana, 2014–2018

Central Louisiana	Professional services		All other industries	
Race/ethnicity				
Minority	23.3	%	25.7	%
Non-Hispanic white	76.7		74.3	
Total	**100.0**	**%**	**100.0**	**%**
Gender				
Female	34.3	% **	56.9	%
Male	65.7	**	43.1	
Total	**100.0**	**%**	**100.0**	**%**

Note: *,** Denote that the difference in proportions between workers in the specified industry and all other industries for the given race definition and Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

"All other industries" includes all industries other than the professional services industries.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Many studies have examined the factors that contribute to low minority and female participation in the STEM fields.[47] Some factors that may play a role include isolation within work environments,[48] negative bias toward females in the engineering fields,[49] the perception that STEM fields are non-communal,[50] low anticipated power in male-dominated domains such as the STEM fields,[51] and inadequate secondary-school preparation for college-level STEM courses.[52]

Researchers have also found that some minority groups, including African Americans, Hispanic Americans and Native Americans, continue to have disproportionately low representation among recipients of science and engineering bachelor's degrees and science and engineering doctorate degrees. The study found that those same groups were disproportionately underrepresented among employees in science and engineering occupations.[53]

D. Goods Industry

Keen Independent also examined how workforce composition may affect the number of potential minority and female business owners in the goods industry.

Race/ethnicity. In 2014–2018, people of color were about 31 percent of the workforce in the Central Louisiana goods industry, with African Americans comprising most of these workers. The demographic composition of workers in the industry was similar to the marketplace workforce as a whole. These results are presented in Figure E-9.

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[47] See, e.g., Rice, D. (2017). Diversity in STEM? Challenges influencing the experiences of African American female engineers. In J. Ballenger, B. Polnick, & B. J. Irby (Eds.), *Women of color in STEM: Navigating the workforce* (pp. 157-180). Charlotte, NC: Information Age Publishing; Moss-Racusin, C. A., Dovidio, J. F., Brescoll, V. L., & Graham, M. J. (2012). Science faculty's subtle gender biases favor male students. *Proceedings of the National Academy of Sciences, 109*(41), 16474-16479. doi:10.1073/pnas.1211286109

[48] Rice, D. (2017). Diversity in STEM? Challenges influencing the experiences of African American female engineers. In J. Ballenger, B. Polnick, & B. J. Irby (Eds.), *Women of color in STEM: Navigating the workforce* (pp. 157-180). Charlotte, NC: Information Age Publishing; Strayhorn, T. L. (2015). Factors influencing black males' preparation for college and success in STEM majors: A mixed methods study. *Western Journal of Black Studies, 39*(1), 45-63. Retrieved from http://link.galegroup.com.ezp3.lib.umn.edu/apps/doc/A419267248/EAIM?u=umn_wilson&sid=EAIM&xid=dd369039; Wagner, S. H. (2017). Perceptions of support for diversity and turnover intentions of managers with solo-minority status. *Journal of Organizational Psychology, 17*(5), 28-36. Retrieved from http://www.na-businesspress.com/JOP/WagnerSH_17_5_.pdf

[49] Banchefsky, S., Westfall, J., Park, B., & Judd, C. M. (2016). But you don't look like a scientist!: Women scientists with feminine appearance are deemed less likely to be scientists. *Sex Roles, 75*(3/4), 95-109. doi:10.1007/s11199-016-0586-1; Moss-Racusin, C. A., Dovidio, J. F., Brescoll, V. L., & Graham, M. J. (2012). Science faculty's subtle gender biases favor male students. *Proceedings of the National Academy of Sciences, 109*(41), 16474-16479. doi:10.1073/pnas.1211286109; Reuben, E., Sapienza, P., & Zingales, L. (2014). How stereotypes impair women's careers in science. *Proceedings of the National Academy of Sciences, 111*(12), 4403-4408. doi:10.1073/pnas.1314788111

[50] Stout, J. G., Grunberg, V. A., & Ito, T. A. (2016). Gender roles and stereotypes about science careers help explain women and men's science pursuits. *Sex Roles, 75*(9/10), 490-499. doi:10.1007/s11199-016-0647-5

[51] Chen, J. M., & Moons, W. G. (2014). They won't listen to me: Anticipated power and women's disinterest in male-dominated domains. *Group Processes & Intergroup Relations, 18*(1), 116-128. doi:10.1177/1368430214550340

[52] Strayhorn, T. L. (2015). Factors influencing black males' preparation for college and success in STEM majors: A mixed methods study. *Western Journal of Black Studies, 39*(1), 45-63. Retrieved from http://link.galegroup.com.ezp3.lib.umn.edu/apps/doc/A419267248/EAIM?u=umn_wilson&sid=EAIM&xid=dd369039

[53] National Center for Science and Engineering Statistics. (2017, January 31). NCSES publishes latest Women, Minorities, and Persons with Disabilities in Science and Engineering report. *National Science Foundation: Where Discoveries Begin.* Retrieved from https://www.nsf.gov/news/news_summ.jsp?cntn_id=190946

Gender. Relatively more women worked in the Central Louisiana goods industry compared to their representation in all other industries. In 2014–2018, women represented about 55 percent of goods industry workers and 46 percent of workers in all other industries.

Figure E-9 compares the demographic composition of workers in the Central Louisiana goods industry to that of workers in all other industries in the market area.

Figure E-9.
Demographic distribution of workers in goods and all other industries in Central Louisiana, 2014–2018

Central Louisiana	Goods		All other industries	
Race/ethnicity				
African American	24.2	%	25.3	%
Asian American	1.1		1.4	
Hispanic American	3.0		4.0	
Native American or other minority	2.1	*	0.9	
Total minority	**30.5**	**%**	**31.7**	**%**
Non-Hispanic white	69.5		68.3	
Total	**100.0**	**%**	**100.0**	**%**
Gender				
Female	54.7	% **	46.1	%
Male	45.3	**	53.9	
Total	**100.0**	**%**	**100.0**	**%**

Note: ** Denote that the difference in proportions between workers in the goods industry and workers in all other industries for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

E. Other Services Industry

Keen Independent also examined the demographic composition of the Central Louisiana other services industry workforce (see Figure E-10). Keen Independent defined the "other services" industry in this study as a wide range of sectors providing services other than professional services to businesses and government agencies.

Race/ethnicity. People of color represented about 28 percent of the workforce in the Central Louisiana other services industry in 2014–2018. Of that workforce:

- About 22 percent were African American (lower than the 26% found for other industries);
- About 3 percent were Hispanic American; and
- Roughly 2 percent were Asian American and 1.6 percent were Native American.

Non-Hispanic whites represented a relatively larger portion of other service workers (72%) compared to workers in all other industries (68%).

Gender. About 44 percent of workers in the industry were women in 2014–2018, which is less than the representation of women in the overall workforce (48%). This difference was statistically significant.

Figure E-10 presents the demographic composition of workers in the Central Louisiana other services industry and in all other local industries.

Figure E-10.
Demographic distribution of workers in other services and all other industries in Central Louisiana, 2014–2018

Central Louisiana	Other services	All other industries
Race/ethnicity		
African American	21.8 % *	25.5 %
Asian American	1.7	1.4
Hispanic American	3.3	3.9
Native American or other minority	1.6	1.0
Total minority	**28.4 %**	**31.8 %**
Non-Hispanic white	71.6	68.2
Total	**100.0 %**	**100.0 %**
Gender		
Female	43.5 % *	47.5 %
Male	56.5 *	52.5
Total	**100.0 %**	**100.0 %**

Note: * Denotes that the difference in proportions between workers in professional services and all other industries for the given Census/ACS year is statistically significant at 90% confidence level.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

F. Summary

People of color were 32 percent of the Central Louisiana workforce between 2014 and 2018 and women accounted for about 47 percent of all workers. Analysis of the Central Louisiana workforce in the study industries indicates that there could be barriers to employment for some minority groups and for women in certain industries.

- Among construction workers, African Americans, Hispanic Americans, Native Americans and women were underrepresented compared to representation among workers in all other industries. These differences were statistically significant. The largest gap was for African Americans, who comprise just 11 percent of the Central Louisiana construction workforce compared to 26 percent of all workers.

  In Central Louisiana, representation of people of color in construction trades such as electricians and among construction supervisors was low when compared to their representation in the construction industry as a whole. There were some construction trades in which there were no women in the Census Bureau sample data for Central Louisiana.

- Women constituted a smaller portion of the Central Louisiana professional services workforce when compared to their representation among workers in all other industries (a statistically significant difference).

- In the other services industry, African Americans and women represented a relatively smaller portion of workers than would be expected based on their representation among workers in all other industries. These differences were statistically significant.

Any barriers to entry or advancement in the study industries might affect the relative number of businesses owned by people of color and women in these industries in Central Louisiana. Appendix F, which follows, examines rates of business ownership among individuals working in the study industries.

APPENDIX F.
Business Ownership in the Alexandria Study Industries

Approximately one in six construction workers in the Central Louisiana marketplace was a self-employed business owner in 2014–2018. A similar portion of those working in the Central Louisiana professional services industry were self-employed business owners. While just 4 percent of those working in the Central Louisiana goods industry were self-employed, more than one in four working in the local other services industry was a business owner.

Focusing on these study industries, Keen Independent examined business ownership for different groups of workers in Central Louisiana using Public Use Microdata Samples (PUMS) from the 2014–2018 American Community Survey (ACS). Keen Independent assessed whether the rates of business ownership within each industry differed for people of color and women compared with other workers in those industries.

As discussed in Appendix E, for this study Keen Independent considers the relevant geographic market area to consist of the Kisatchie Delta Regional Planning & Development District.[1] Any discussion of the "Central Louisiana marketplace" or "Central Louisiana" in the following analysis includes firms and individuals located in these areas. The "study industries" are the construction, professional services, goods and other services industries. Business owners include those who are "self-employed," and this appendix uses these terms interchangeably. All results pertain to conditions pre-COVID-19 pandemic.

Business Ownership Rates

Many studies have explored differences between minority and nonminority business ownership at the national level.[2] Although self-employment rates have increased for minorities and women over time, several studies indicate that race, ethnicity and gender continue to affect opportunities for business ownership. The extent to which such individual characteristics may limit business ownership opportunities differs across industries and regions.[3]

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[1] This area includes Avoyelles, Catahoula, Concordia, Grant, La Salle, Rapides, Vernon and Winn parishes.

[2] See, e.g., Bates, T., & Robb, A.M. (2016). Impacts of owner race and geographic context on access to small-business financing. *Economic Development Quarterly*, *30*(2), 159-170; Blanchflower, D. (2008). Minority self employment in the United States and the impact of Affirmative Action programs. *NBER Working Paper Series*, (13972); Fairlie, R. W., & Robb, A. M. (2007). Why are black-owned businesses less successful than white-owned businesses? The role of families, inheritances and business human capital. *Journal of Labor Economics*, *25*(2), 289-323; Fairlie, R. W., & Robb, A. M. (2006). Race, families and success in small business: A comparison of African-American-, Asian-, and white-owned businesses. *Russell Sage Foundation*; Chatterji, A. K., Chay, K. Y., & Fairlie, R. W. (2013). The impact of city contracting set-asides on black self-employment and employment. *Journal of Labor Economics, 32*(3), 507-561.

[3] Lofstrom, M., Bates, T., & Parker, S. C. (2014). Why are some people more likely to become small-business owners than others: Entrepreneurship entry and industry-specific barriers. *Journal of Business Venturing, 29*(2), 232-251.

Construction industry. Keen Independent classified workers as self-employed if they reported that they worked in their own unincorporated or incorporated business. In 2014–2018, about 18 percent of workers in the Central Louisiana construction industry were self-employed, compared with about 6 percent of workers in all other industries in the Central Louisiana marketplace.

Figure F-1 shows the following differences in the percentage of workers who were self-employed in the Central Louisiana construction industry across groups (all minorities were combined into a single category due to small sample size):

- About 29 percent of racial and ethnic minorities working in the Central Louisiana construction industry between 2014 and 2018 were self-employed, more than the rate for non-Hispanic whites (16%). However, this difference was not statistically significant, which means the difference could be simply due to small sample sizes for construction workers in Central Louisiana.

- Approximately 20 percent of women in the construction industry were self-employed, a greater rate than that of men in the same industry. This difference is not statistically significant.

Figure F-1.
Percentage of workers in the Central Louisiana construction industry who were self-employed, 2014–2018

Demographic group	2014-2018
Race/ethnicity	
Minority	28.8 %
Non-Hispanic white	16.3
Gender	
Female	20.3 %
Male	17.8
All individuals	18.0 **%**

Note: ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at 95% confidence level.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Professional services industry. Figure F-2 presents the percentage of workers in the Central Louisiana professional services industry who were self-employed based on ACS data for 2014–2018. For this analysis all minority groups were combined due to data small sample size.

There were some differences in business ownership rates across groups in the Central Louisiana professional services industry, but they were not statistically significant.

- About 14 percent of people of color in the professional services industry were business owners, less than the business ownership rate among non-Hispanic whites (17%). This difference in self-employment rates was not statistically significant.

- The self-employment rate for women in the professional services industry (14%) was about 5 percentage points less than the rate among men (19%). This difference was not statistically significant.

Figure F-2.
Percentage of workers in the Central Louisiana professional services industry who were self-employed, 2014–2018

Demographic group	2014-2018
Race/ethnicity	
Minority	13.5 %
Non-Hispanic white	17.4
Gender	
Female	14.1 %
Male	19.2
All individuals	16.6 %

Note: ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Goods industry. Relatively few people working in the Central Louisiana goods industry are business owners, consistent with patterns nationwide.

According to 2014–2018 ACS data, there were some differences in self-employment rates among groups in the Central Louisiana goods industry. These results are presented in Figure F-3. All minority groups were combined into a single category due to small sample size.

- The business ownership rate among people of color working in the goods industry (2.5%) was less than the business ownership rate among non-Hispanic whites (5.0%), a statistically significant difference.

- The self-employment rate for women in the goods industry (4.0%) was less than the rate for non-Hispanic whites (4.6%). This difference was not statistically significant.

Figure F-3.
Percentage of workers in the Central Louisiana goods industry who were self-employed, 2014–2018

Demographic group	2014-2018
Race/ethnicity	
Minority	2.5 % *
Non-Hispanic white	5.0
Gender	
Female	4.0 %
Male	4.6
All individuals	4.3 %

Note: Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 90% confidence level.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Other services industry. Figure F-4 presents the percentage of workers in the Central Louisiana other services industry who were self-employed. These results are also from ACS data for 2014–2018. Analysis of specific minority group is excluded due to small sample sizes.

There were some significant differences in business ownership rates across groups in Central Louisiana other services industry.

- About 22 percent of people of color working in the other services industry were business owners, less than the rate among non-Hispanic whites (30%). However, this difference was not statistically significant.

- The self-employment rate for women employed in the other services industry (34%) was greater than the rate among men (22%), a statistically significant difference.

Figure F-4.
Percentage of workers in the Central Louisiana other services industry who were self-employed, 2014–2018

Demographic group	2014-2018
Race/ethnicity	
Minority	22.1 %
Non-Hispanic white	29.6
Gender	
Female	34.2 % **
Male	22.3
All individuals	27.5 %

Note: ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Potential causes of differences in business ownership rates. Nationally, researchers have examined whether racial and gender differences in business ownership rates persist after considering personal characteristics such as education and age. Several studies have found that disparities in business ownership still exist even after accounting for such factors.

- Financial capital. Some studies have concluded that access to financial capital is a strong determinant of business ownership. Researchers have consistently found correlation between startup capital and business formation, expansion and survival.[4]

[4] See, e.g., Lofstrom, M., & Chunbei, W. (2006). Hispanic self-employment: A dynamic analysis of business ownership., *Forschungsinstitut zur Zukunft der Arbeit (Institute for the Study of Labor)*; Fairlie, R. W., & Robb, A. M. (2006). Race, families and

Additionally, studies suggest that housing appreciation has a positive effect on small business formation and employment.[5] However, unexplained racial and ethnic differences in financial capital remain after statistically controlling for those factors.[6] Recent studies have found that minorities (particularly African Americans and Hispanic Americans) experience greater barriers to accessing credit and face further credit constraints at business startup and throughout business ownership than non-Hispanic whites.[7] Access to capital is discussed in more detail in Appendix G.

- Education. Education has a positive effect on the probability of business ownership in most industries. Recent research confirms a significant relationship between education and ability to obtain startup capital.[8] However, results of multiple studies indicate that minorities are still less likely to own a business than non-minorities with similar levels of education.[9]

- Experience. Both prior self-employment and managerial experience are important indicators of re-entering or entering business ownership, respectively.[10] However, unexplained differences in self-employment between minorities and non-minorities still exist after accounting for business experience.[11]

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success in small business: A comparison of African-American-, Asian-, and white-owned businesses. *Russell Sage Foundation*; Chatterji, A. K., Chay, K. Y., & Fairlie, R. W. (2013). The impact of city contracting set-asides on black self-employment and employment. *Journal of Labor Economics,* 32(3), 507-561.

[5] Fairlie, R. W., & Krashinsky, H. A. (2012). Liquidity constraints, household wealth, and entrepreneurship revisited. *Review of Income and Wealth, 58,* 279-306. Retrieved from https://doi.org/10.1111/j.1475-4991.2011.00491.x

[6] Lofstrom, M., & Chunbei, W. (2006). Hispanic self-employment: A dynamic analysis of business ownership., *Forschungsinstitut zur Zukunft der Arbeit (Institute for the Study of Labor)*; Fairlie, R. W., & Robb, A. M. (2010). *Disparities in capital access between minority and non-minority-owned businesses: The troubling reality of capital limitations faced by MBEs* (Rep.). Retrieved from Minority Business Development Agency website: https://www.mbda.gov/sites/default/files/migrated/files-attachments/DisparitiesinCapitalAccessReport.pdf

[7] Lee, A., Mitchell, B., & Lederer, A. (2019). *Disinvestment, discouragement and inequity in small business lending* (Rep.) Retrieved from National Community Reinvestment Coalition website: https://ncrc.org/disinvestment/; Robb, A. M. (2013). *Access to capital among young firms, minority-owned firms, women-owned firms and high-tech firms* (Rep.). Retrieved from Small Business Administration, Office of Advocacy website: https://cdn.advocacy.sba.gov/wp-content/uploads/2019/05/15130241/rs403tot2.pdf; Chatterji, A. K., Chay, K. Y., & Fairlie, R. W. (2013). The impact of city contracting set-asides on black self-employment and employment. *Journal of Labor Economics,* 32(3), 507-561.

[8] Robb, A. M., Fairlie, R. W., & Robinson, D. T. (2009). *Financial capital injections among new black and white business ventures: Evidence from the Kauffman firm survey.* Retrieved from https://researchbank.swinburne.edu.au/file/aada046e-13eb-46e1-9b85-14bded636232/1/PDF%20(Published%20version).pdf

[9] See, e.g., Fairlie, R. W., & Meyer, B. D. (1996). Ethnic and racial self-employment differences and possible explanations. *The Journal of Human Resources*, *31*(4), 757-793; Butler, J. S., & Herring, C. (1991). Ethnicity and entrepreneurship in America: Toward an explanation of racial and ethnic group variations in self-employment. *Sociological Perspectives*, 34(1), 79-94. Retrieved from https://doi.org/10.2307%2F1389144

[10] Kim, P., Aldrich, H., & Keister, H. (2006). Access (not) denied: The impact of financial, human, and cultural capital on entrepreneurial entry in the United States. *Small Business Economics*, *27*(1), 5-22; Georgellis, Y., Sessions, J. G., & Tsitsianis, N. (2005). Windfalls, wealth, and the transition to self-employment. *Small Business Economics, 25*(5), 407-428.

[11] Fairlie, R., & Meyer, B. (2000). Trends in self-employment among white and black men during the twentieth century. *The Journal of Human Resources, 35*(4), 643-669. doi:10.2307/146366

- Intergenerational links. Intergenerational links affect one's likelihood of self-employment.[12] In fact, having an entrepreneurial parent can increase the likelihood of their offspring choosing to be self-employed by up to 200 percent.[13] One study found that experience working for a self-employed family member increases the likelihood of business ownership for minorities.[14]

Business Ownership Regression Analysis

As discussed above, race, ethnicity and gender can affect opportunities for business ownership, even when accounting for personal characteristics such as education, age and familial status.

To further examine business ownership for the study industries, Keen Independent developed multivariate regression models. Those models estimate the effect of race, ethnicity and gender on the probability of business ownership while statistically controlling for certain personal and family characteristics of the worker.

An extensive body of literature examines whether race- and gender-neutral personal factors such as access to financial capital, education, age and family characteristics (e.g., marital status) help explain differences in business ownership. That subject has also been examined in other disparity studies that have been upheld in court.[15] For example, prior studies in Minnesota and Illinois have used econometric analyses to investigate whether disparities in business ownership for minorities and women working in the construction and architecture and engineering industries persist after statistically controlling for race- and gender-neutral personal characteristics.[16, 17] Those studies developed probit econometric models using Census data, and have been among the materials that agencies have submitted to courts in subsequent litigation concerning implementation of the Federal DBE Program.

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[12] Andersson, L., & Hammarstedt, M. (2010). Intergenerational transmissions in immigrant self-employment: Evidence from three generations. *Small Business Economics*, *34*(3), 261–276.

[13] Lindquist, M. J., Sol, J., & Van Praag, M. (2015). Why do entrepreneurial parents have entrepreneurial children? *Journal of Labor Economics, 33*(2), 269-296.

[14] Fairlie, R. W., & Robb, A. M. (2006). Race, families and success in small business: A comparison of African-American-, Asian-, and white-owned businesses. *Russell Sage Foundation*; Fairlie, R. W., & Robb, A. M. (2007). Why are black-owned businesses less successful than white-owned businesses? The role of families, inheritances and business human capital. *Journal of Labor Economics*, *25*(2), 289-323.

[15] For example, National Economic Research Associates, Inc. (2012). *The state of minority- and women-owned business enterprise in construction: Evidence from Houston* (Rep.). Retrieved from City of Houston website: http://www.houstontx.gov/obo/disparitystudyfinalreport.pdf; Mason Tillman Associates. (2011). *Illinois Department of Transportation/Illinois Tollway disadvantaged business enterprises disparity study (Vols. 2)* (Rep.). Retrieved from Illinois Department of Transportation website: http://www.idot.illinois.gov/Assets/uploads/files/Doing-Business/Reports/OBWD/DBE/DBEDisparityStudy.pdf; National Economic Research Associates, Inc. (1997). *Disadvantaged Business Enterprise availability study.*

[16] National Economic Research Associates, Inc. (2000). *Disadvantaged Business Enterprise availability study* (Rep.). Prepared for the Minnesota Department of Transportation.

[17] National Economic Research Associates, Inc. (2004). *Disadvantaged Business Enterprise availability study* (Rep.). Prepared for the Illinois Department of Transportation.

Keen Independent used similar probit regression models to predict business ownership from multiple independent or "explanatory" variables, such as:

- Personal characteristics that are potentially linked to the likelihood of business ownership — age, age-squared, marital status, disability, number of children in the household, number of elderly people in the household and English-speaking ability;
- Educational attainment;
- Measures and indicators related to personal financial resources and constraints — home ownership, home value, monthly mortgage payment, dividend and interest income, and additional household income from a spouse or unmarried partner; and
- Race, ethnicity and gender.[18]

Keen Independent developed probit regression models for the study industries using PUMS data from the 2014–2018 ACS. The models were separated by industry and included the following number of observations:

- For the construction industry, 427 observations were included;
- For the professional services industry, 272 observations were included;
- For the goods industry, 825 observations were included; and
- For the other services industry, 471 observations were included.

Central Louisiana construction industry in 2014–2018. Figure F-7 presents the coefficients for the probit model for individuals working in the Central Louisiana construction industry in 2014–2018. Several race- and gender-neutral factors were statistically significant in predicting the probability of business ownership:

- Married individuals were more likely to own a business than non-married individuals in the construction industry;
- Homeowners were less likely to own a business than individuals who did not own a home;
- Higher home values and higher passive income through interest and dividends were associated with a higher probability of business ownership; and
- Having a four-year or advanced degree was associated with a lower probability of business ownership in the Central Louisiana construction industry.

[18] Probit models estimate the effects of multiple independent or "predictor" variables in terms of a single, dichotomous dependent or "outcome" variable — in this case, business ownership. The dependent variable is binary, coded as "1" for individuals in a particular industry who are self-employed and "0" for individuals who are not self-employed. The model enables estimation of the probability that workers in each sample are self-employed, based on their individual characteristics. Keen Independent excluded observations where the Census Bureau had imputed values for the dependent variable (business ownership).

After statistically controlling for certain factors other than race, ethnicity and gender, neither racial nor gender identification was important in explaining differences in business ownership rates (no statistically significant effects for these factors).

Important predictors of business ownership are related to capital, including home ownership, home value, passive income and marriage status. Figure F-5 provides additional detailed results of the regression model.

Figure F-5.
Construction industry business ownership model in Central Louisiana, 2014–2018

Variable	Coefficient
Constant	-2.281
Age	0.073
Age-squared	-0.001
Married	0.391 *
Disabled	0.091
Number of children in household	0.015
Number of people over 65 in household	0.140
Owns home	-0.810 **
Home value ($0,000s)	0.002 **
Monthly mortgage payment ($0,000s)	0.258
Interest and dividend income ($0,000s)	0.021 *
Income of spouse or partner ($0,000s)	-0.005
Speaks English well	-0.575
Less than high school education	-0.110
Some college	-0.039
Four-year degree	-0.413
Advanced degree	-5.230 **
Minority	0.531
White female	0.134

Note:
*,** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Source:
Keen Independent Research from 2014–2018 ACS Public Use Microdata samples.
The 2014–2018 ACS raw data extract was obtained through the IPUMS program of the MN Population Center:
http://usa.ipums.org/usa/.

Central Louisiana professional services industry in 2014 through 2018. Using the same data source as for the construction industry (2014–2018 ACS data), Keen Independent developed a business ownership regression model for people working in the Central Louisiana professional services industry.

Figure F-6 presents the coefficients for that probit model. After controlling for certain other personal and family characteristics, race and gender had no statistically significant effect on business ownership. Figure F-6 shows these results.

Figure F-6.
Professional services industry business ownership model in Central Louisiana, 2014–2018

Variable	Coefficient
Constant	-0.115
Age	-0.106
Age-squared	0.002
Married	0.338
Disabled	-1.116 *
Number of children in household	0.153
Number of people over 65 in household	-0.424
Owns home	-0.046
Home value ($0,000s)	0.001
Monthly mortgage payment ($0,000s)	-0.011
Interest and dividend income ($0,000s)	0.012
Income of spouse or partner ($0,000s)	-0.001
Less than high school education	-4.493 **
Some college	-0.038
Four-year degree	-0.407
Advanced degree	0.319
Minority	-0.238
White female	-0.148

Note:
*,** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Source:
Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Central Louisiana goods industry in 2014 through 2018. Coefficient estimates for a business ownership regression model for people working in the Central Louisiana goods industry are presented in Figure F-7. After controlling for other factors, minorities and women working in this industry had about the same rates of business ownership as non-Hispanic whites and men.

Figure F-7.
Goods industry business ownership model in Central Louisiana, 2014–2018

Variable	Coefficient
Constant	-7.148 **
Age	0.047
Age-squared	0.000
Married	0.181
Disabled	-0.010
Number of children in household	0.008
Number of people over 65 in household	-0.058
Owns home	-0.195
Home value ($0,000s)	0.002 **
Monthly mortgage payment ($0,000s)	0.367 *
Interest and dividend income ($0,000s)	0.000
Income of spouse or partner ($0,000s)	0.000
Speaks English well	3.254 **
Less than high school education	-0.110
Some college	0.104
Four-year degree	0.450
Advanced degree	0.728
Minority	-0.061
White female	0.022

Note:

*,** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Source:

Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Central Louisiana other services industry in 2014 through 2018. Figure F-8 presents the coefficients for the business ownership probit model for people working in the Central Louisiana other services industry. Using the same methodology as for other industries, the study team found that race and gender did not appear to influence business ownership rates in this industry (effects were not statistically significant).

Figure F-8.
Other services industry business ownership model in Central Louisiana, 2014–2018

Variable	Coefficient
Constant	-1.689
Age	0.055
Age-squared	0.000
Married	-0.092
Disabled	-0.483 **
Number of children in household	0.086
Number of people over 65 in household	0.210
Owns home	-0.307
Home value ($0,000s)	0.000
Monthly mortgage payment ($0,000s)	0.570 **
Interest and dividend income ($0,000s)	0.030
Income of spouse or partner ($0,000s)	-0.001
Speaks English well	-0.497
Less than high school education	0.023
Some college	-0.076
Four-year degree	-0.946 **
Advanced degree	-1.183 **
Minority	-0.085
White female	0.292

Note:

*,** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Source:

Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Summary of Business Ownership in Central Louisiana

Keen Independent examined whether there were differences in business ownership rates for workers in the Central Louisiana construction, professional services, goods and other services industries related to race, ethnicity and gender.

- People of color in the goods industry were less likely than non-Hispanic whites to own a business. The difference in ownership rates was statistically significant.
- Women in the other services industry were more likely than men to be self-employed. This difference was also statistically significant.
- However, these differences in business ownership rates based on race and gender were not statistically significant after controlling for factors including education, age, family status and homeownership.

It may be that some of the factors that do appear to affect the likelihood of business ownership are related to race and ethnicity, however. For example, several factors concerning homeownership increase the probability of being a business owner. As discussed in Appendix G, there are disparities in home ownership rates and home values for some minority groups in Central Louisiana.

APPENDIX G.
Access to Capital for Business Formation and Success

Access to capital is a key factor for initial formation and long-term success of businesses. Race- and gender-based discrimination in capital markets hinders people of color and women from acquiring the capital necessary to start, operate or expand businesses.[1, 2]

The amount of start-up capital can affect long-term business success, and studies have found that minority- and woman-owned businesses have, on average, less start-up capital than non-Hispanic white-owned businesses and male-owned businesses.[3] According to a 2012 national U.S. Census Bureau survey:

- About 25 percent of white-owned businesses indicated that they had start-up capital of $25,000 or more.
- Only 12 percent of African American-owned businesses indicated a comparable amount of start-up capital.
- Disparities in start-up capital were identified for every other minority group except Asian Americans.
- About 15 percent of woman-owned businesses reported start-up capital of $25,000 or more compared with 27 percent of male-owned businesses (not including businesses that were equally owned by men and women).[4]

Race- or gender-based discrimination affecting the availability of start-up capital can have long-term consequences, as can discrimination in access to business loans after businesses have been formed.[5] Discrimination in the traditional means of obtaining start-up capital (e.g., the ability to obtain a business loan and having equity in a home and the ability to borrow against that equity) also impacts business survival and success. Lack of access to credit, housing market discrimination and discrimination in mortgage lending have lasting effects for current or potential business owners.

Appendix G presents information about start-up capital and business credit markets nationally and in the region. It also provides information on the relationship between business success and mortgage

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[1]Fairlie, R. W., & Robb, A. M. (2010). *Disparities in capital access between minority and non-minority-owned businesses: The troubling reality of capital limitations faced by MBEs* (Rep.). Retrieved from Minority Business Development Agency website: https://www.mbda.gov/sites/default/files/migrated/files-attachments/DisparitiesinCapitalAccessReport.pdf

[2] Fairlie, R. W., & Robb, A. (2010). *Race and entrepreneurial success: Black-, Asian-, and white-owned businesses in the United States.* Cambridge, MA: The MIT Press.

[3] Ibid.

[4] United States Census Bureau. (2012). *2012 Survey of Business Owners* [Data file]. Retrieved from: https://www.census.gov/library/publications/2012/econ/2012-sbo.html

[5] Fairlie, R. W., & Robb, A. (2010). *Race and entrepreneurial success: Black-, Asian-, and white-owned businesses in the United States.* Cambridge, MA: The MIT Press.

lending, as home equity is often a vital source of capital to start and expand businesses. Note that all results based on secondary data pertain to pre-COVID-19 pandemic conditions.

Start-Up Capital

The study team analyzed financing patterns, with a focus on sources of start-up capital, to explore any differences in access to capital for people of color and women.

Sources of start-up capital. The most common sources of capital used to start or acquire a business according to the U.S. Census Bureau are:

- Personal or family savings of owner(s);
- Personal or family assets other than savings of owner(s);
- Personal or family home equity loan;
- Personal credit card(s) carrying balances;
- Business credit card(s) carrying balances;
- Business loan from federal, state or local government;
- Government-guaranteed business loan from a bank or financial institution;
- Business loan from a bank or financial institution;
- Business loan or investment from family or friends;
- Investment by venture capitalist(s); and
- Grants.

According to the U.S. Census Bureau's Annual Business Survey (ABS), the primary source of capital used to start or acquire a business in 2017 was personal and/or family savings.[6] National patterns among employer businesses (those with paid employees other than the owner) identified in the ABS include the following for 2017:

- Woman-owned firms were slightly more likely than male-owned businesses to report using personal and family savings for start-up capital (67% and 65%, respectively).

- African American-, Asian American- and Hispanic American-owned businesses were most likely to use personal/family savings as a source of start-up capital (72%).

- American Indian- and Alaska Native-owned businesses (69%) and Native Hawaiian and other Pacific Islander-owned businesses (67%) were also likely to rely on personal or family savings for start-up capital.

- Non-Hispanic white-owned businesses were the least likely to use personal/family savings for start-up capital (66%).

[6] The Annual Business Survey provides economic and demographic data for nonfarm employer businesses that file the 941, 944 or 1120 tax forms by ethnicity, race and gender. This differs from the U.S. Census Bureau's Survey of Business Owners which collects data on employer businesses and non-employer businesses with receipts of $1,000 or more. ABS data released in 2018 and referencing 2017 are the most recent data available.

Nationally, businesses owned by non-Hispanic whites and Asian American males reported lower reliance on the use of credit cards as a source of start-up capital than women and other people of color. The following ABS results pertain to employer businesses in 2017:

- About 15 percent of African American-owned businesses used personal credit cards as a source of start-up capital, followed by Native Hawaiian and other Pacific Islander- (14%), American Indian and Alaska Native-owned business (13%) and Hispanic American-owned firms (12%).

- Only 9 percent of Asian American- and non-Hispanic white-owned businesses reported using personal credit cards as a source of start-up capital.

- Female-owned businesses (10%) were somewhat more likely to use personal credit cards as a source of start-up capital compared with male-owned businesses (8%).

Credit card financing of debt is more expensive than business loans through financial institutions.[7] Reliance on this more expensive method of financing presents additional challenges to business success, which disproportionately affects women and most minority groups.

Wealth. Since personal and family savings were the most common source of start-up capital used to start or acquire a business, the study team examined data on wealth-holding to further explore implications for people of color and women.

In 2016, white households had, on average, higher income and net worth levels than African American and Hispanic American households.[8] White households were less likely to have zero or negative net worth and had more assets than African American and Hispanic American households.[9] White households also had greater mean net housing wealth than African American and Hispanic American households.[10] Figure G-1 provides household financial data by race and ethnicity for 2016.

Given the heavy dependence upon personal and family savings of the owner as the main source of start-up capital, lower levels of wealth among people of African Americans and Hispanic Americans may result in greater difficulty acquiring the capital necessary to start, operate or expand businesses.

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[7] Robb, A. (2018). *Financing patterns and credit market experiences: A comparison by race and ethnicity for U.S. employer firms* (Rep. No. SBAHQ-16-M-0175). Retrieved from U.S. Small Business Administration, Office of Advocacy website: https://www.sba.gov/sites/default/files/Financing_Patterns_and_Credit_Market_Experiences_report.pdf

[8] Dettling, L. J., Hsu, J. W., Jacobs, L., Moore, K. B., Thompson, J. P., & Llanes, E. (2017). *Recent trends in wealth-holding by race and ethnicity: Evidence from the Survey of Consumer Finances.* Retrieved from Board of Governors of the Federal Reserve System website: https://doi.org/10.17016/2380-7172.2083

[9] Ibid.

[10] Ibid.

Figure G-1.
U.S. household financial data by race/ethnicity, 2016

	White	African American	Hispanic American	Other minority
Income				
Median	$ 61,200	$ 35,400	$ 38,500	$ 50,600
Mean	123,400	54,000	57,300	86,900
Net worth				
Median	$ 171,000	$ 17,600	$ 20,700	$ 64,800
Mean	933,700	138,200	191,200	457,800
Percent of families with zero or negative net worth	9 %	19 %	13 %	14 %
Assets (percent of families with ...)				
Primary residence	73 %	45 %	46 %	54 %
Retirement accounts	60	34	30	48
Business equity	15	7	6	13
Wealth from housing (for homeowners)				
Percent of assets in housing	32 %	37 %	39 %	35 %
Mean net housing wealth	$ 215,800	$ 94,400	$ 129,800	$ 220,700

Note: "Other minority" includes Asian Americans, Native Americans and individuals of multiple races.

Source: Dettling, L. J., Hsu, J. W., Jacobs, L., Moore, K. B., Thompson, J. P., & Llanes, E. (2017). *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances.* Retrieved from Board of Governors of the Federal Reserve System website: https://doi.org/10.17016/2380-7172.2083.

In August 2016, much of Louisiana was affected by an extremely destructive flood. Louisiana Economic Development (LED) estimated the flood's total damage to be over $8.7 billion. This included considerable damage to personal assets, including about $1.3 billion in damage to residential housing contents, $3.8 billion in damage to residential housing structures, an estimated $379 million lost due to automobile damage, and more.[11] All parishes in the marketplace were impacted by the flood, with one parish (Avoyelles) designated as a federal disaster area by the Federal Emergency Management Agency (FEMA).

For this and other reasons, estimates of wealth, particularly regarding housing and other physical assets, are likely lower in the area than found nationwide. Experts also suggest that people of color may have been disproportionately affected by the flood.[12, 13] As such, the flood may have increased disparities in wealth for minorities in Central Louisiana.

[11] Terrell, D. *The Economic Impact of the August 2016 Floods on the State of Louisiana* (Rep.). Retrieved from Louisiana Economic Development website: https://gov.louisiana.gov/assets/docs/RestoreLA/SupportingDocs/Meeting-9-28-16/2016-August-Flood-Economic-Impact-Report_09-01-16.pdf

[12] Upton, J. (2017, August 8). One Year after the Great Flood, Louisiana's most vulnerable cope with the losses. *Grist*. Retrieved August 6, 2020 from https://grist.org/article/one-year-after-the-great-flood-louisianas-most-vulnerable-cope-with-the-losses/

[13] Thomas, D. S. K., Phillips, B. D., Lovekamp, W. E., & Fothergill, A. (2013). *Social Vulnerability to Disasters*. Boca Raton, FL: CRC Press.

Such substantial loss in assets may have limited the amount of start-up capital available for potential business owners. Note that because it occurred in August 2016, the flood's full effect on businesses and start-up capital may not be reflected in all data sources used in this analysis.

Business Credit

In addition to personal and family savings, businesses also rely on banks for start-up and expansion capital.[14] The study team analyzed data on business loans to identify any differences in business lending to minority-, female- and white male-owned companies.

As with overall household wealth, the business credit market in Central Louisiana may have been affected by the August 2016 flood, as substantial damage was done to assets, business profitability and other factors that may influence business credit..[15]

Successful acquisition of business loans. Data for employer businesses that secured business loans from a bank or financial institution are found in the 2016 Annual Survey of Entrepreneurs (ASE).[16] In Louisiana, 23 percent of businesses reported securing a business loan from a bank or financial institution. Although data by race, ethnicity and gender are not reported for individual states, data stratified by race and gender are available at the national level. These data give insight into the larger socio-economic context for firms owned by people of color in Louisiana.

[14] Robb, A. & Robinson, D. T. (2017). Testing for racial bias in business credit scores. *Small Business Economics, 50*(3), 429-443.

[15] Terrell, D. *The Economic Impact of the August 2016 Floods on the State of Louisiana* (Rep.). Retrieved from Louisiana Economic Development website: https://gov.louisiana.gov/assets/docs/RestoreLA/SupportingDocs/Meeting-9-28-16/2016-August-Flood-Economic-Impact-Report_09-01-16.pdf

[16] United States Census Bureau. (2016). *2016 Annual Survey of Entrepreneurs* [Data file]. Retrieved from https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk

Nationally, 16 percent of businesses in the 2016 ASE data obtained a business loan from a bank or financial institution. Minority-owned businesses were less likely than non-Hispanic white-owned firms to report securing a business loan. Figure G-2 displays the national rate of securing business loans by race and gender, according to 2016 ASE data. The figure indicates that women- and minority-owned businesses were less likely than male- and majority-owned businesses to obtain business loans from a bank or financial institution.

Figure G-2.
Percentage of U.S. employer businesses that secured business loans from a bank or financial institution, by ownership, 2016

Demographic group	Percent of respondents
Race	
African American	12.6 %
American Indian and Alaska Native	15.1
Asian American	14.5
Native Hawaiian and other Pacific Islander	14.0
White	17.2
Ethnicity	
Hispanic American	10.7 %
Non-Hispanic	17.2
Gender	
Female	14.3 %
Male	16.6
All individuals	16.5 %

Source: U.S. Census Bureau Annual Survey of Entrepreneurs, 2016.

One reason that women and people of color are less likely to secure loans is a greater reluctance to apply for business loans. The 2016 ASE collected data on whether a business needed additional financing and why the owner chose not to apply. One of the most frequently cited reasons for not applying for additional financial assistance even when needed is the firm owner's belief that the business would not be approved by a lender.

In Louisiana, 1.1 percent of all firms reported that they did not apply for additional financing because the owner believed they would not be approved by a lender. Nationally, 1.7 percent of all firms reported not applying for financing for the same reason.

Figure G-3 presents the national rate of opting out of a business loan application for fear of denial by for different groups of businesses. Nationally, business owners of color were more likely than white business owners to believe that they would not be approved by a lender. African American-owned firms were by far the most likely group to avoid seeking additional financing due to fear that they would not be approved. Likewise, women business owners (2.2%) were more likely to believe that they would not be approved by a lender when compared with male-owned firms (1.6%).

Figure G-3.
Percentage of U.S. employer businesses that avoided seeking additional financing because they did not think the business would be approved by lender, 2016

Demographic group	Percent of respondents
Race	
African American	6.2 %
American Indian and Alaska Native	3.9
Asian American	2.0
Native Hawaiian and other Pacific Islander	1.9
White	1.6
Ethnicity	
Hispanic American	3.2 %
Non-Hispanic	1.6
Gender	
Female	2.2 %
Male	1.6
All individuals	1.7 %

Source: U.S. Census Bureau Annual Survey of Entrepreneurs, 2016.

Lack of access to capital affects business profitability and long-term success. The 2016 ASE indicates that business owners of color were far more likely than non-Hispanic whites and men to cite access to capital as an issue negatively affecting the profitability of their company. Figure G-4 provides national results by race, ethnicity and gender of the business owner (data for employer firms).

Figure G-4.
Percentage of U.S. employer businesses that cited access to financial capital as negatively impacting the profitability of their business, 2016

Demographic group	Percent of respondents
Race	
African American	22.3 %
American Indian and Alaska Native	17.0
Asian American	13.3
Native Hawaiian and other Pacific Islander	19.6
White	8.9
Ethnicity	
Hispanic American	15.1 %
Non-Hispanic	9.3
Gender	
Female	10.0 %
Male	9.6
All individuals	9.5 %

Source: U.S. Census Bureau Annual Survey of Entrepreneurs, 2016.

In sum, minority- and woman-owned employer businesses were less likely to secure business loans from a bank or financial institution, less likely to apply for additional financing due to fear of denial and more likely to cite the issue of access to financial capital as having a negative impact on profitability. These indicators of credit market conditions demonstrate that some barriers to business success disproportionately affect women and people of color.

The ASE data related to business lending are consistent with the findings of recent research. In 2019, the National Community Reinvestment Coalition found that more significant barriers to accessing capital through the traditional banking market exist for African American and Hispanic American small business owners. For example, African American and Hispanic American applicants for small business loans are asked to provide more documentation and are given less information about the loans than their non-Hispanic white counterparts.[17]

Overall trends in small business lending are also important when considering credit market conditions. Small business lending was slow to recover from the Great Recession.[18] Among large banks, lending disproportionately went to large businesses, with bank lending to small businesses decreasing by nearly $100 billion from 2008 to 2016.[19] The decrease in small business lending coupled with greater barriers for people of color and women may have perpetuated an environment

[17] Lee, A., Mitchell, B., & Lederer, A. (2019). *Disinvestment, discouragement and inequity in small business lending* (Rep.). Retrieved from National Community Reinvestment Coalition website: https://ncrc.org/disinvestment/

[18] Cole, R. (2018). *How did bank lending to small business in the United States fare after the financial crisis?* (Rep. No. SBAHQ-15-M-0144). Retrieved from U.S. Small Business Administration, Office of Advocacy website: https://www.sba.gov/sites/default/files/439-How-Did-Bank-Lending-to-Small-Business-Fare.pdf

[19] Ibid.

where minorities and women have more difficulty acquiring the capital necessary to start, operate or expand businesses.

As of the writing of this portion of this report, the COVID-19 pandemic appeared to be substantially limiting small business access to credit. Recent research also suggests that minority-owned businesses are disproportionately affected by the COVID-19 pandemic and face additional barriers in accessing business support programs. For example, one study in spring 2020 found that about 12 percent of minority businesses applying for the Paycheck Protection Program (PPP), a federal loan program intended to help small business endure the immediate effects of the pandemic, had received the funds for which they applied at the time of that analysis.[20] The Center for Responsible Lending evaluated the lending criteria of the PPP, and found that about 95 percent of African American-owned businesses and 91 percent of Hispanic American-owned businesses would not qualify for federal assistance from this program due to a lack of prior relationship with a mainstream lending institution.[21]

2003 Survey of Small Business Finances (SSBF). Conducted by the U.S. Federal Reserve Board of Governors, the 2003 SSBF remains one of the most comprehensive sources of information to compare lending to minority- and nonminority-owned small businesses. Unlike previous surveys, the 2003 SSBF is unique in that it provides data on firm-level measurement of characteristics such as race, ethnicity, gender and ownership concentration. The 2003 SSBF surveyed 4,240 representative firms that were operating at the end of 2003.[22]

The SSBF collected information on businesses and business owners including:

- Information on firm and owner characteristics;
- An inventory of small businesses' use of financial services and of their financial service suppliers;
- Income and balance sheet information;
- Demographic characteristics for up to three individual owners;
- Information on the use of nonstandard work arrangements; and
- Details on the use of credit and debit card processing.

The SSBF records the geographic location of businesses by Census Division, not by city, county or state. The West South Central Division (or "WSC region") includes Arkansas, Louisiana, Oklahoma and Texas. The WSC region is the level of geographic detail most specific to Central Louisiana, and

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[20] Beer, T. (2020, May 18). Minority-owner small business struggle to gain equal access to PPP loan money. Forbes.com Retrieved July 7, 2020, from https://www.forbes.com/sites/tommybeer/2020/05/18/minority-owned-small-businesses-struggle-to-gain-equal-access-to-ppp-loan-money/

[21] Center for Responsible Lending. (2020, April 6). The Paycheck Protection Program continues to be disadvantageous to smaller businesses, especially businesses owned by people of color and the self-employed. Retrieved July 7, 2020, from https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-cares-act2-smallbusiness-apr2020.pdf?mod=article_inline

[22] The Federal Reserve Board. (2003). *2003 Survey of Small Business Finances*. [Data file]. Retrieved from https://www.federalreserve.gov/pubs/oss/oss3/ssbf03/ssbf03home.html#ssbf03dat

2003 is the most recent information available from the SSBF as the survey was discontinued after that year.

The SSBF collected information about access to capital for businesses including loan denial rates, businesses that did not apply for a loan due to fear of denial, loan values and interest rates. Results from the 2003 SSBF indicate disparities for some minorities and females within these categories. These results are largely consistent with analysis of 2016 ASE data.

Loan denial rates. The 2003 SSBF included information about rates of loan denial. Within the WSC region, the loan denial rate for minorities and women in 2003 (17%) was more than eight times that of non-minority male-owned businesses (2%). Because of a small sample size in the WSC region, the SSBF did not present data by race/ethnicity.

Nationally, SSBF data indicated that African American-owned businesses (51%) had loan denial rates significantly higher than the rate for non-Hispanic white males (8%). This difference was statistically significant. After statistically controlling for race- and gender-neutral factors including various firm characteristics, the firm's credit and financial health and business owner characteristics, businesses owned by African Americans in the U.S. were more likely to have their loans denied than other businesses.

Businesses owned by Asian Americans (12%), Hispanic Americans (16%), Native Americans (22%) and non-Hispanic white females (11%) all had higher loan denial rates when compared with businesses owned by non-Hispanic white males. These differences were not statistically significant and did not persist after controlling for various race- and gender-neutral factors.

Applying for loans. The 2003 SSBF also included a question that gauged whether a business owner did not apply for a loan due to fear of loan denial. In the WSC region, minority- and women-owned businesses that reported needing loans (32%) were more likely than non-Hispanic white-owned firms (15%) to report that they did not apply for those loans because of fear of loan denial. This difference was statistically significant. As with loan denial rates, responses for individual race/ethnicity and gender group are not available within the WSC region due to small sample size.

Nationwide, businesses owned by African Americans (47%), Asian Americans (19%), Hispanic Americans (29%), Native Americans (30%) and non-Hispanic white females (22%) were more likely to forgo applying for business loans due to fear of loan denial when compared with non-Hispanic white male business owners (14%). Except for Asian American business owners, differences between all other race and gender groups and non-Hispanic white males were statistically significant.

After statistically controlling for various race- and gender-neutral factors for the firm and firm ownership, African American- and female-owned businesses were more likely to forgo applying for a loan due to fear of denial. These results were statistically significant.

Loan values. Data regarding loan values for businesses that received loans were also included in the 2003 SSBF. Among firms that received loans in the WSC region, minority- and women-owned firms had lower average loan amounts when compared with majority-owned firms ($96,000 and $356,000, respectively). This trend was also seen nationwide, with non-Hispanic white male owned firms ($375,000) receiving higher loan values on average than minority- and women-owned firms ($161,000). Disparities within the WSC region and nationwide were statistically significant.

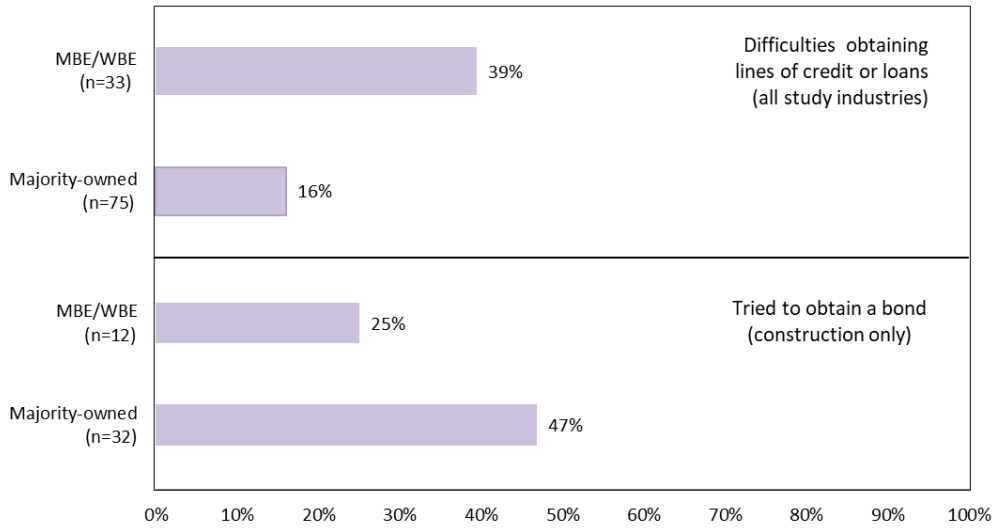
Interest rates. According to national 2003 SSBF data, minority- and female-owned businesses were issued loans with a higher interest rate on average than majority-owned businesses (7.5% and 6.4%, respectively). This difference was statistically significant. After accounting for various race- and gender-neutral business and business owner characteristics, statistically significant disparities persisted among African American- and Hispanic American-owned firms. African American-owned businesses received loans with interest rates approximately 2 percentage points higher than non-Hispanic white male-owned businesses, while businesses owned by Hispanic Americans received loans with interest rates approximately 1 percentage point higher than majority-owned businesses.

Although minorities and females were issued loans with a higher interest rate on average (7.1%) than non-Hispanic white males (6.7%) within the WSC region, the difference was not statistically significant.

Results from the Keen Independent 2020 availability surveys with firms in the study industries. In the Keen Independent 2020 availability surveys, the study team asked respondents a battery of questions regarding potential barriers or difficulties firms might have experienced in the Central Louisiana marketplace. The series of questions was introduced with the following statement: "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 five years in Central Louisiana as you answer these questions." Respondents were then asked about specific potential barriers or difficulties. Responses to questions about access to capital were combined for all industries.

Figure G-5 presents results for questions related to access to capital and bonding. The first question asks, "Has your company experienced any difficulties in obtaining lines of credit or loans?" As shown in Figure G-5, 39 percent of minority-owned and woman-owned firms and reported difficulties obtaining lines of credit or loans. About 16 percent of majority-owned businesses reported similar difficulties ("majority-owned" businesses in Figure G-5 are firms not owned by people of color or women).

Figure G-5.
Responses to availability interview questions concerning loans, Central Louisiana marketplace



Source: Keen Independent Research from 2020 availability survey.

Homeownership and Mortgage Lending

The study team also analyzed homeownership and the mortgage lending market to explore differences across race/ethnicity and gender that may lead to disparities in access to capital.

Homeownership. There is a strong relationship between the likelihood of starting a new business and the potential entrepreneur's home equity.[23] Wealth created through homeownership can be an important source of capital to start or expand a business.[24] Research has shown:

- Homeownership is a tool for building wealth;[25]
- More personal wealth provides additional options for financing because higher wealth enables both self-financing and wealth leveraging via borrowing from the equity in one's home;[26]
- Business owners tend to use home equity to finance business investments, confirming that home equity is an efficient means of business financing;[27]
- Homeownership is associated with an estimated 30 percent reduction in the probability of loan denial for small businesses;[28]
- Race and gender wealth inequality contributes to lower rates of homeownership among women and minorities; and
- The United States has a history of restrictive real estate covenants and property laws that affect the ownership rights of minorities and women.[29]

Barriers to homeownership and creation of home equity for certain groups can impact business opportunities. Similarly, barriers to accessing home equity through home mortgages can also affect available capital for new or expanding businesses. Recent research confirms the importance of homeownership on the likelihood of starting a business, even when examined separately from recent work history (this is done by independently examining workers that recently experienced a job loss

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[23] Corradin, S., & Popov, A. (2015). House prices, home equity borrowing, and entrepreneurship. *The Review of Financial Studies, 28*(8), 2399-2428.

[24] The housing and mortgage crisis beginning in late 2006 has substantially impacted the ability of small businesses to secure loans through home equity. Later in Appendix G, Keen Independent discusses the consequences of the housing and mortgage crisis on small businesses and MBE/WBEs.

[25] McCabe, B. J. (2018). Why buy a home? Race, ethnicity, and homeownership preferences in the United States. *Sociology of Race and Ethnicity*, *4*(4), 452-472.

[26] Bates, T., Bradford, W., & Jackson, W. E. (2018). Are minority-owned businesses underserved by financial markets? Evidence from the private-equity industry. *Small Business Economics, (50)*3, 445-461.

[27] Corradin, S., & Popov, A. (2015). House prices, home equity borrowing, and entrepreneurship. *The Review of Financial Studies, 28*(8), 2399-2428.

[28] Cavalluzzo, K., & Wolken, J. (2005). Small business loan turndowns, personal wealth and discrimination. *Journal of Business, 78*(6), 2153-2178.

[29] Baradaran, M. (2017). *The color of money: Black banks and the racial wealth gap.* London, England: The Belknap Press of Harvard University Press.

and those that did not). A study focusing in minorities and women found a strong relationship between increases in home equity and entry into self-employment for both groups.[30]

The study team analyzed homeownership rates, home values and the home mortgage market in Central Louisiana from 2014–2018.

Homeownership rates. The study team used 2014–2018 American Community Survey (ACS) data to examine homeownership rates in Central Louisiana. About 72 percent of nonminority heads of households owned homes. As shown in Figure G-6 on the following page, homeownership rates for all minority groups are lower than for non-Hispanic whites. For example, just 42 percent of African American heads of households in Central Louisiana were homeowners during that time period. Differences were statistically significant for African Americans, Hispanic Americans and Asian Americans.

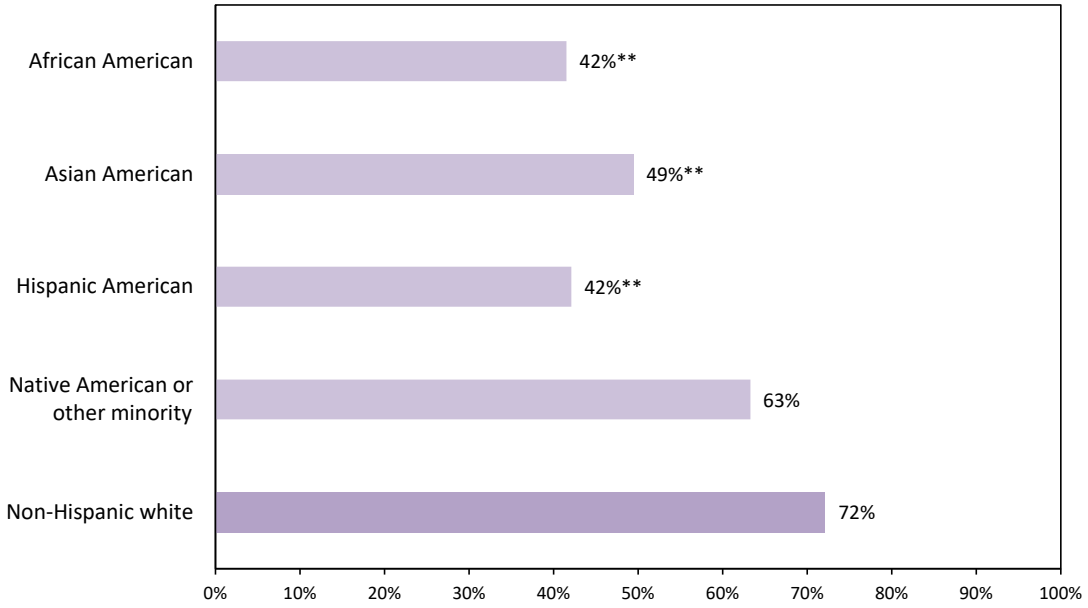
Lower rates of homeownership may reflect lower incomes and wealth for people of color. That relationship may be self-reinforcing, as low wealth puts individuals at a disadvantage in becoming homeowners, which has historically been a path to building wealth. For example, the probability of homeownership is considerably lower for African Americans than it is for comparable non-Hispanic whites throughout the United States.[31] Recent research shows that while African Americans narrowed the homeownership gap in the 1990s, the first half of the following decade brought little change and the second half of the decade brought significant losses (which included the Great Recession), resulting in a widening of the gap between African Americans and non-Hispanic whites.[32]

[30] Fairlie, R. W., & Krashinsky, H. A. (2012). Liquidity constraints, household wealth and entrepreneurship revisited. *Review of Income and Wealth, 58*(2), 279-306. Retrieved from https://doi.org/10.1111/j.1475-4991.2011.00491.x

[31] Board of Governors of the Federal Reserve System. (2017). Residential mortgage lending in 2016: Evidence from the Home Mortgage Disclosure Act. *Federal Reserve Bulletin, 103*(6).

[32] Rosenbaum, E. (2012). *Home ownership's wild ride, 2001-2011* (Rep.). New York, NY: Russell Sage Foundation.

Figure G-6.
Percentage of Central Louisiana households that are homeowners, 2014–2018



Note: ** Denotes that the difference in proportions between the minority group and non-Hispanic whites for the given Census/ACS year is statistically significant at the 95% confidence level.

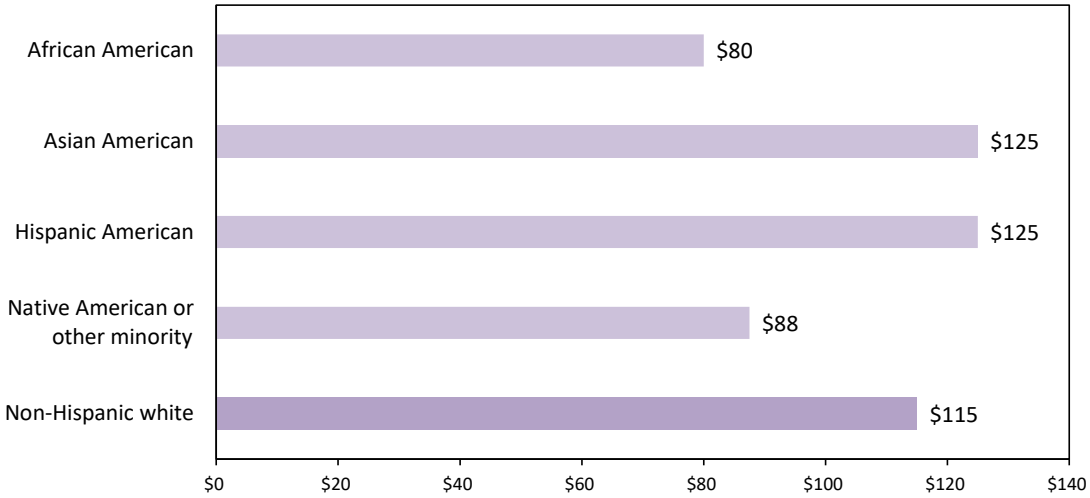
Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata sample. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Home values. Research has shown that increases in home equity encourage business ownership.[33] Using 2014 through 2018 ACS data, the study team compared median home values by race/ethnicity group and disability status.

Figure G-7 presents median home values by group in Central Louisiana for 2014 to 2018. African Americans ($80,000) and Native Americans ($88,000) who owned homes had lower median home values than non-Hispanic whites ($115,000). The median value of Asian American and Hispanic American homeowners' homes ($125,000) exceeded that of non-Hispanic whites.

[33] Harding, J., & Rosenthal, S. S. (2017). Homeownership, housing capital gains and self-employment. *Journal of Urban Economics, 99,* 120-135.

Figure G-7.
Median home values in Louisiana, 2014–2018, thousands



Note: The sample universe is all owner-occupied housing units.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata sample. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Mortgage lending. People of color may be denied opportunities to own homes, to purchase more expensive homes or to access equity in their homes if they are discriminated against when applying for home mortgages. For example, Bank of America paid $335 million to settle allegations that its Countrywide Financial unit discriminated against African American and Hispanic American borrowers between 2004 and 2008. The case was brought to the Securities and Exchange Commission after finding evidence of "statistically significant disparities by race and ethnicity" among Countrywide Financial customers.[34]

The study team explored market conditions for mortgage lending in Louisiana. The best available source of information concerning mortgage lending is Home Mortgage Disclosure Act (HMDA) data, which contain information on mortgage loan applications that financial institutions, savings banks, credit unions and some mortgage companies receive.[35] Those data include information about the location, dollar amount and types of loans made, as well as race/ethnicity, income and credit characteristics of all loan applicants. The data are available for home purchases, loan refinances and home improvement loans. The most recent year of HMDA data available are from 2018.

[34] Savage, C. (2011, December 21). $335 million settlement on countrywide lending bias. *The New York Times*. Retrieved March 1, 2018, from http://www.nytimes.com/2011/12/22/business/us-settlement-reported-on-countrywide-lending.html

[35] Depository institutions were required to report 2017 HMDA data if they had assets of more than $44 million on the preceding December 31 ($42 million for 2013), had a home or branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Non-depository mortgage companies were required to report HMDA if they are for-profit institutions, had home purchase loan originations (including refinancing) either a.) exceeding 10 percent of all loan obligations originations in the past year or b.) exceeding $25 million, had a home or branch office located in an MSA (or receive applications for, purchase or originated five or more home purchase loans mortgages in an MSA), and either had more than $10 million in assets or made at least 100 home purchase or refinance loans in the preceding calendar year.

The study team examined HMDA statistics provided by the Federal Financial Institutions Examination Council (FFIEC) for 2013, 2017 and 2018. There were 7,190 lending institutions included in the 2013 data.[36] The number of institutions decreased to 5,852 in 2017 and to 5,683 by 2018.[37, 38]

Mortgage denials. The study team examined mortgage denial rates on conventional loan applications made by high-income households. Conventional loans are loans that are not insured by a government program. High-income applicants are those households with 120 percent or more of the U.S. Department of Housing and Urban Development (HUD) area median family income.[39] Loan denial rates are calculated as the percentage of mortgage loan applications that were denied, excluding applications that the potential borrowers terminated and applications that were closed due to incompleteness.[40]

Figure G-8 presents loan denial rates for high-income households in Louisiana in 2013, 2017 and 2018.

- In each year, the loan denial rate was higher for people of color who had high incomes than for non-Hispanic white applicants who had high incomes, except for Native Hawaiians and Asian Americans.
- In 2018, the loan denial rate among Hispanic American applicants with high incomes (30%) was twice the rate for non-Hispanic white applicants with high incomes (15%).
- In addition, in 2018 African American high-income applicants (45%) were denied at about three times the rate for non-Hispanic white high-income applicants.

[36] Bhutta, N., & Ringo, D. R. (2015). The 2013 Home Mortgage Disclosure Act data. *Federal Reserve Bulletin, 102*(6).

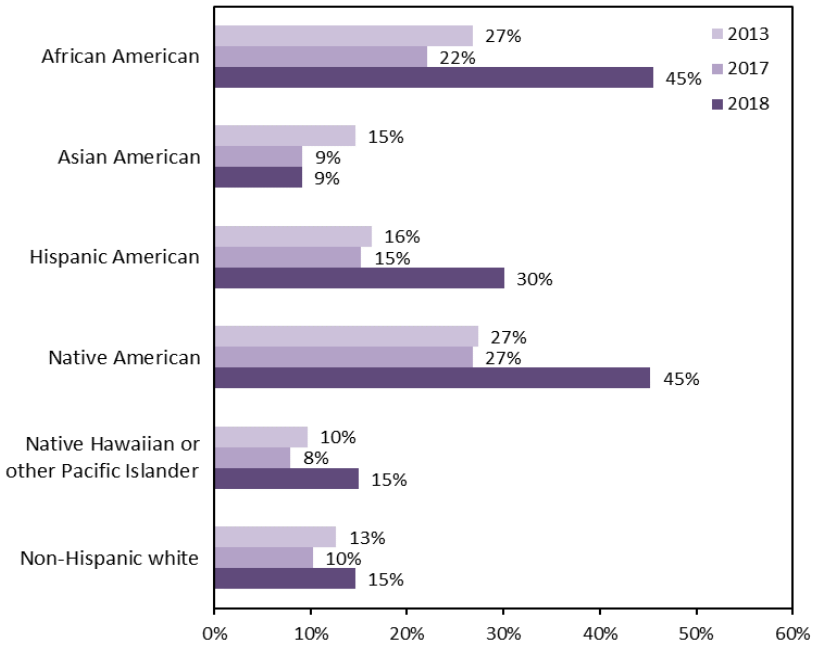
[37] Consumer Financial Protection Bureau. (2018). FFIEC announces availability of 2017 data on mortgage lending. Retrieved from https://www.consumerfinance.gov/about-us/newsroom/ffiec-announces-availability-2017-data-mortgage-lending/

[38] Consumer Financial Protection Bureau. (2019). FFIEC announces availability of 2018 data on mortgage lending. Retrieved from https://www.consumerfinance.gov/about-us/newsroom/ffiec-announces-availability-2018-data-mortgage-lending/

[39] Median family income for the Alexandria, LA MSA was about $53,000 in 2013 and $54,000 in 2017. However, median family income for the non-metro portion of Louisiana was about $48,000 in 2013 and $47,000 in 2017. Source: FFIEC Census and FFIEC estimated MSA/MD median family income for the 2013 and 2017 CRA/HMDA reports.

[40] For this analysis, loan applications are considered to be applications for which a specific property was identified, thus excluding preapproval requests.

Figure G-8.
Denial rates of conventional purchase loans to high-income households in Louisiana, 2013, 2017 and 2018



Note:

High-income borrowers are those households with 120% or more than the HUD area median family income (MFI).

Source:

FFIEC HMDA 2013, 2017 and 2018.

Subprime lending. Loan denial is one of several ways people might be discriminated against in the home mortgage market. Mortgage lending discrimination can also occur through higher fees and interest rates. Subprime lending provides a unique example of such types of discrimination through fees associated with various loan types.

Subprime lending grew rapidly in the late 1990s and early 2000s and accounted for large growth in the home mortgage industry. From 1994 through 2003, subprime mortgage activity grew by 25 percent per year and accounted for $330 billion of U.S. mortgages in 2003, up from $35 billion a decade earlier. In 2006, subprime loans represented about one-fifth of all mortgages in the United States.[41]

With interest rates higher than prime loans, subprime loans were historically marketed to customers with blemished or limited credit histories who would not typically qualify for prime loans. Over time, subprime loans were made available to home buyers without requirements for such as a down payment or proof of income and assets; subprime loans were also made available for home buyers purchasing property at a cost above that for which they would qualify from a prime lender.[42]

[41] Avery, B., Brevoort, K. P., & Canner, G. B. (2007). The 2006 HMDA data. *Federal Reserve Bulletin, 93,* A73–A109.

[42] Gerardi, K., Shapiro, A. H., & Willen, P. S. (2007). *Subprime outcomes: Risky mortgages, homeownership experiences, and foreclosures* (Working Paper No. 07–15). Boston, MA: Federal Reserve Bank of Boston. Retrieved from Federal Reserve Bank of Boston website: https://www.bostonfed.org/publications/research-department-working-paper/2007/subprime-outcomes-risky-mortgages-homeownership-experiences-and-foreclosures.aspx

Because of higher interest rates and additional costs, subprime loans affected homeowners' ability to grow home equity and increased their risks of foreclosure. Fair-lending enforcement mechanisms have historically tended to overlook disparate impact and treatment and shielded some lenders with discriminating practices from investigations.[43]

Although there is no standard definition of a subprime loan, there are several commonly used approaches to examining rates of subprime lending. The study team used a "rate-spread method" — in which subprime loans are identified as those loans with substantially above-average interest rates — to measure rates of subprime lending in 2013, 2017 and 2018.[44] Because lending patterns and borrower motivations differ depending on the type of loan being sought, the study team separately considered home purchase loans and refinance loans.

Figure G-9 shows the percent of conventional home purchase loans that were subprime in Louisiana, based on 2013, 2017 and 2018 HMDA data. A higher percentage of borrows receiving subprime loans may indicate predatory lending.

- African Americans, Hispanic Americans and Native Americans receiving home purchase loans were more likely to receive subprime loans than non-Hispanic whites in each of these years.

- Native Hawaiians and other Pacific Islanders and Asian American borrowers were less likely to receive subprime home purchase loans than white non-Hispanic borrowers.

[43] Ross, S. L., & Yinger, J. (2002). *The color of credit: Mortgage discrimination, research methodology, and fair-lending enforcement.* Cambridge, MA: MIT Press.

[44] Prior to October 2009, first lien loans were identified as subprime if they had an annual percentage rate (APR) that was 3.0 percentage points or greater than the federal treasury security rate of like maturity. As of October 2009, rate spreads in HMDA data were calculated as the difference between APR and Average Prime Offer Rate, with subprime loans defined as 1.5 percentage points of rate spread or more. The study team identified subprime loans according to those measures in the corresponding time periods.

Figure G-9.
Percent of conventional home purchase loans in Louisiana that were subprime, 2013, 2017 and 2018

Note:
Subprime rates are calculated as the percentage of originated loans that were subprime.

Source:
FFIEC HMDA data 2013, 2017 and 2018.

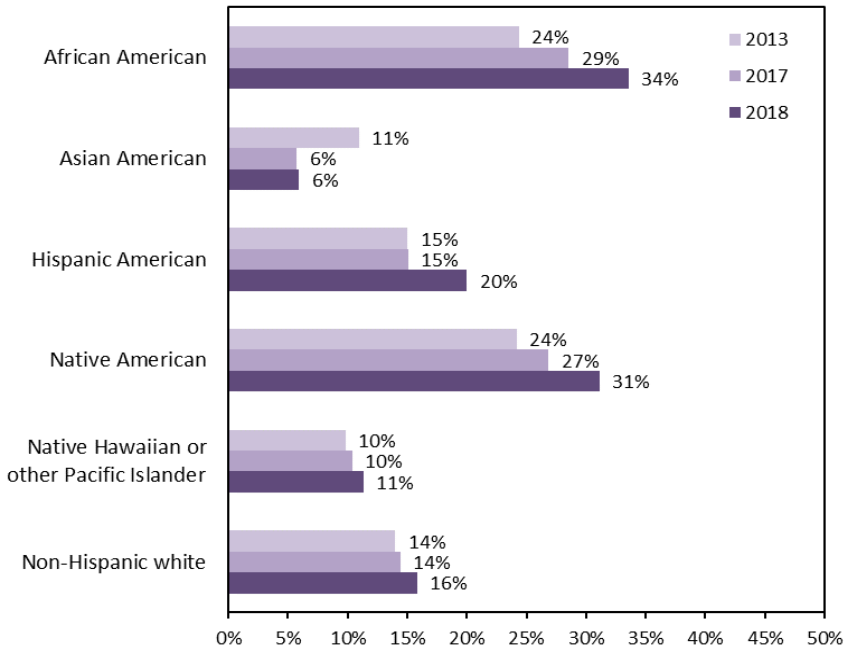
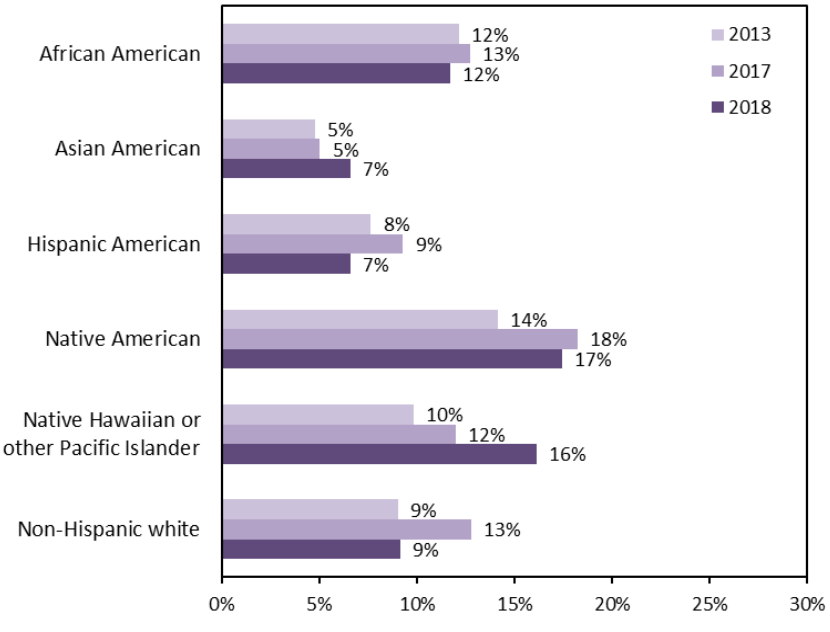


Figure G-10 examines the percentage of conventional home refinance loans that were subprime in Louisiana in 2013, 2017 and 2018. There was significant usage of subprime refinance loans across all three years, although the rates were higher for most racial minorities than non-Hispanic whites.

Figure G-10.
Percent of conventional refinance loans in Louisiana that were subprime, 2013, 2017 and 2018

Note:
Subprime rates are calculated as the percentage of originated loans that were subprime.

Source:
FFIEC HMDA data 2013, 2017 and 2018.



Additional research. Studies across the country have examined barriers to homeownership for people of color. For example:

- A study that analyzed more than two million home sale transactions over the course of 18 years in four major metropolitan areas — Chicago, Baltimore/Maryland, Los Angeles and San Francisco — showed that African American and Hispanic American buyers pay more for the price of their house than their white counterparts in almost every purchase scenario.[45]

- Researchers found that between 1999 and 2011, socioeconomic and demographic factors could only partially explain the gap in homeownership that existed between white and African Americans homeowners, and that discrimination in the mortgage process was a likely explanation.[46]

- Results of a mystery-shopping field study conducted at several national banks in a major metropolitan U.S. city showed that minority loan applicants were provided less comprehensive information about financing options, required to provide more information to apply for a loan and received less encouragement and assistance compared to white potential loan applicants.[47]

- An analysis of U.S. Survey of Consumer Finance data shows that African American borrowers on average pay about 29 basis points more in interest on mortgage loans than comparable white borrowers.[48]

Some evidence suggests that lenders sought out and offered subprime loans to individuals who often would not be able to pay off the loan, a form of "predatory lending."[49] Furthermore, some research has found that many recipients of subprime loans could have qualified for prime loans.[50] Previous studies of subprime lending suggest that predatory lenders have disproportionately targeted minorities.[51] A 2018 study, for example, examined subprime mortgage loans in seven metropolitan areas across the country. The study found that African American borrowers were 103 percent more likely and Hispanic American borrowers were 78 percent more likely than white borrowers to receive

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[45] Bayer, C., Casey, M., Ferreira, F., & McMillan F. (2017). Racial and ethnic price differentials in the housing market. *Journal of Urban Economics, 102*, 91–105.

[46] Fuller, C. (2015). *Race and homeownership: How much of the differences are explainable by economics alone?* Retrieved from Zillow Research website: https://www.zillow.com/research/racial-homeownership-differences-10155/

[47] Bone, S. A., Christensen, G. L., & Williams, J. D. (2014). Rejected, shackled, and alone: The impact of systemic restricted choice on minority consumers' construction of self. *Journal of Consumer Research, 41*(2), 451-474.

[48] Cheng, P., Lin, Z., & Liu, Y. (2015). Racial discrepancy in mortgage interest rates. *Journal of Real Estate Finance and Economics, 51*(1), 101-120.

[49] See, e.g., Hull, N.R. (2017). Crossing the line: Prime, subprime, and predatory lending. *Maine Law Review, 61*(1), 288-318; Morgan, D. P. (2007). *Defining and detecting predatory lending* (Staff rep. No. 273). New York, NY: Federal Reserve Bank of New York.

[50] Faber, J. W. (2013). Racial dynamics of subprime mortgage lending at the peak. *Housing Policy Debate, 23*(2), 328-349.

[51] Ibid; Been, V., Ellen, I., & Madar, J. (2009). The high cost of segregation: Exploring racial disparities in high-cost lending. *Fordham Urb. LJ, 36*(3), 361.

a high-cost loan for home purchases. Disparities were found for both low- and high-risk borrowers, regardless of age.[52]

A 2007 study released from the Federal Reserve Bank of Boston found that "homeownerships that begin with a subprime purchase mortgage end up in foreclosure almost 20 percent of the time, or more than six times as often as experiences that begin with prime purchase mortgages."[53]

Implications of the mortgage lending crisis during the Great Recession. The ramifications of the mortgage lending crisis in the Great Recession not only continued to substantially impact the ability of homeowners to secure capital through home mortgages to start or expand small businesses but also created a nationwide retreat in dynamism in nearly every measurable respect.[54] (Dynamism consists of the rate and scale at which the process of reallocating the economy's resources across firms and industries according to their most productive use occurs.) Note that all of this research was conducted before the COVID-19 pandemic.

- On July 19, 2017, Karen Kerrigan, President and CEO of the Small Business and Entrepreneurship (SBE) Council, testified before the U.S. House of Representatives Committee on Small Business that there has been a continuing dearth of entrepreneurial activity and substantial decline over the past ten years due to the financial crises, Great Recession and a weak economic recovery that continues to negatively influence the American psyche.[55]

- According to research conducted by economists for the U.S. Federal Reserve System, loan origination activity remained well below pre-Great Recession levels.[56]

- Startup rates have dropped for years, but the effects of the Great Recession were so detrimental that firm deaths exceeded births for the first time in more than 40 years.[57]

- Despite a progressive decline in new business formation, 117,300 more firms opened than closed on average each year from 1977 to 2007; however, firm deaths have outpaced firm births on average since 2008.[58]

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[52] Bayer, P., Ferreira, F., & Ross, S. (2018). What drives racial and ethnic differences in high-cost mortgages? The role of high-risk lenders. *Review of Financial Studies, 31*(1), 175-205.

[53] Gerardi, K., Shapiro, A. H., & Willen, P. S. (2007). *Subprime outcomes: Risky mortgages, homeownership experiences, and foreclosures* (Working Paper No. 07–15). Boston, MA: Federal Reserve Bank of Boston. Retrieved from Federal Reserve Bank of Boston website: https://www.bostonfed.org/publications/research-department-working-paper/2007/subprime-outcomes-risky-mortgages-homeownership-experiences-and-foreclosures.aspx

[54] Economic Innovation Group. (2017). *Dynamism in retreat: Consequences for regions, markets, and workers*. Retrieved from the Economic Innovation Group website: http://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf

[55] *Reversing the Entrepreneurship Decline: Hearing before the Committee on Small Business*, House of Representatives, 115th cong. Page 3 (2017) (testimony of Ms. Karen Kerrigan).

[56] Dore, T., & Mach, T. (2018). *Recent trends in small business lending and the Community Reinvestment Act*. Retrieved from the Board of Governors of the Federal Reserve System website: https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-small-business-lending-and-the-community-reinvestment-act-20180102.htm

[57] Economic Innovation Group. (2017). *Dynamism in retreat: Consequences for regions, markets, and workers*. Retrieved from the Economic Innovation Group website: http://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf

[58] Ibid.

- Small firms suffer more during financial crises due to dependence on bank capital to fund growth.[59]

- Major surveys identify access to credit as a problem and top growth concern for small firms during the recovery, including surveys conducted by the National Federation of Independent Businesses (NFIB) and the Federal Reserve.[60]

- Commercial and residential real estate — which represent two-thirds of the assets of small business owners and are frequently used as collateral for loans — were hit hard during the financial crisis, making small business borrowers less creditworthy today.[61]

The mortgage-lending crisis and the Great Recession have had lasting effects as they limited opportunities for homeowners with little home equity to obtain business capital through home mortgages. Furthermore, the historically higher rates of default and foreclosure for homeowners with subprime loans impacted the ability of those individuals to access to capital. Those consequences have disproportionately impacted people of color. It may be that the COVID-19 pandemic will resulting in widening these disparities.

Redlining. Historically, redlining referred to mortgage lending discrimination against geographic areas based on racial or ethnic characteristics of a neighborhood.[62] Presently, the concept of redlining includes an examination of the availability of and access to credit in predominantly minority neighborhoods, and the credit terms offered within a lender's assessment area.[63]

The practice of reverse redlining consists of extending high-cost credit. This discriminatory practice involves charging minority borrowers higher mortgage fee costs compared to white borrowers and was the subject of multiple lawsuits brought by the U.S. Department of Justice from the late 1990s through the early 2000s.[64] As a result of reverse redlining, some researchers argue that mortgage discrimination has shifted from being an access to credit issue to being a discretionary pricing issue.[65]

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[59] Mills, K.G., & McCarthy, B. (2016). *The state of small business lending: Innovation and technology and the implications for regulation* (Working Paper 17-042). Cambridge, MA. Retrieved from Harvard Business School website: http://www.hbs.edu/faculty/Publication%20Files/17-042_30393d52-3c61-41cb-a78a-ebbe3e040e55.pdf

[60] Ibid.

[61] Ibid.

[62] Burnison, T. R., & Boccia, B. (2017). Redlining everything old is new again. *ABA Banking Journal, 109*(2).

[63] Ibid.

[64] Brescia, R. H. (2009). Subprime communities: Reverse redlining, the Fair Housing Act and emerging issues in litigation regarding the subprime mortgage crisis. *Albany Government Law Review*, *2*(1), 164-216.

[65] Ibid.

As evidenced by settlements in recent court cases, the practice of redlining continues against minority mortgage applicants. For example:

- In 2015, New York Attorney General Eric Schneiderman settled with Evans Bank for $0.8 million after learning that Evans Bank erased African American neighborhoods from maps used to determine mortgage lending.[66]

- In 2015, the U.S. Department of Housing and Urban Development reached a $200 million settlement with Associated Bank for denying mortgage loans to African American and Hispanic American applicants in Chicago and Milwaukee.[67]

- In November 2016, Hudson City Savings Bank was subject to a record redlining settlement due to disparities suffered by African American and Hispanic American loan applicants.[68] According to the Consumer Financial Protection Bureau (CFPB) and the Department of Justice (DOJ), Hudson City Savings Bank avoided locating branches and loan officers, and using mortgage brokers in majority African American and Hispanic communities.[69] Hudson City Savings Bank also excluded majority-African American and Hispanic communities from its marketing strategy and credit assessment areas.[70]

- In a different 2016 redlining legal action, the CFPB and DOJ ordered BancorpSouth Bank to pay millions to harmed minorities for illegally denying them access to credit in minority neighborhoods and denying African Americans applicants certain mortgage loans and over charging them, among other things.[71]

- In a reverse redlining case tried in federal court in 2016, a federal jury found that Emigrant Savings Bank and Emigrant Mortgage Company violated the Fair Housing Act, Equal Credit Opportunity Act, and New York City Human Rights Law by aggressively promoting toxic mortgages to African American and Hispanic American applicants with poor credit.[72]

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[66] Mock, B. (2015, September 28). Redlining is alive and well—and evolving. *City Lab*. Retrieved from https://www.citylab.com/equity/2015/09/redlining-is-alive-and-welland-evolving/407497//

[67] Ibid.

[68] Burnison, T. R., & Boccia, B. (2017). Redlining everything old is new again. *ABA Banking Journal, 109*(2).

[69] Consumer Financial Protection Bureau. (2015, September 24). *CFPB and DOJ order Hudson City Savings Bank to pay $27 million to increase mortgage credit access in communities illegally redlined* [Press release]. Retrieved November 3, 2020 from https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-order-hudson-city-savings-bank-to-pay-27-million-to-increase-mortgage-credit-access-in-communities-illegally-redlined/

[70] Ibid.

[71] Dodd-Ramirez, D., & Ficklin, P. (2016, June 29). Redlining: CFPB and DOJ action requires BancorpSouth Bank to pay millions to harmed consumers [Web log post]. Retrieved November 3, 2020 from https://www.consumerfinance.gov/about-us/blog/redlining-cfpb-and-doj-action-requires-bancorpsouth-bank-pay-millions-harmed-consumers/ /

[72] Lane, B. (2016, June 30). Groundbreaking ruling? Federal jury finds Emigrant Bank liable for predatory lending. *Housingwire*. Retrieved November 3, 2020 from https://www.housingwire.com/articles/37419-groundbreaking-ruling-federal-jury-finds-emigrant-bank-liable-for-predatory-lending

- In 2017, the DOJ filed a lawsuit against KleinBank for redlining minority neighborhoods in Minnesota. According to the DOJ, KleinBank structured its residential mortgage lending business in a manner that excluded the credit needs of minority neighborhoods.[73]

Steering by real estate agents. The illegal act of steering can be defined as actions by real estate agents that differentially direct customers to certain neighborhoods and away from others based on race or ethnicity.[74] Mortgage loan originators can also engage in steering. Prior to the mortgage loan crisis, mortgage loan originators engaged in steering to generate higher profits for themselves[75] by directing minority loan applicants to less desirable and toxic loan instruments. Such steering can affect minority borrowers' perception of the availability of mortgage loans. Additionally, explicit steering can drive racially/ethnically housing prices and result in segregation.[76]

Although it is difficult to pursue cases involving steering; however, several steering cases have been prosecuted by federal and state agencies over the past decade:

- In 2011, the U.S. Department of Justice (DOJ) reached a $335 million settlement with Countrywide Financial Corporation for steering thousands of African American and Hispanic American borrowers into subprime mortgages when white borrowers with comparable credit received prime loans.[77]

- In 2012, the DOJ reached a $184 million settlement with Wells Fargo for steering African American and Hispanic American borrowers into subprime mortgages and charging higher fees and rates than white borrowers with comparable credit profiles.[78]

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[73] Department of Justice, Office of Public Affairs. (2017, January 13). *Justice Department sues KleinBank for redlining minority neighborhoods in Minnesota* [Press release]. Retrieved November 3, 2020 from https://www.justice.gov/opa/pr/justice-department-sues-kleinbank-redlining-minority-neighborhoods-minnesota

[74] Galster, G., & Godfrey, E. (2005) By words and deeds: Racial steering by real estate agents in the U.S. in 2000. *Journal of the American Planning Association, 71*(3), 251-268.

[75] Consumer Financial Protection Bureau. (2013, January 18). *CFPB issuing rules to prevent loan originators from steering consumers into risky mortgages* [Press release]. Retrieved November 3, 2020 from https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-rules-to-prevent-loan-originators-from-steering-consumers-into-risky-mortgages/

[76] Besbris, M., & Faber, J.W. (2017). Investigating the relationship between real estate agents, segregation, and house prices: Steering and upselling in New York State. *Sociological Forum, 32*(4), 850-873. Retrieved from https://doi.org/10.1111/socf.12378

[77] Department of Justice, Office of Public Affairs. (2011, December 21). *Justice Department reaches $335 Million settlement to resolve allegations of lending discrimination by Countrywide Financial Corporation* [Press release]. Retrieved November 3, 2020 from https://www.justice.gov/opa/pr/justice-department-reaches-335-million-settlement-resolve-allegations-lending-discrimination

[78] Department of Justice, Office of Public Affairs. (2012, July 12). *Justice Department reaches settlement with Wells Fargo resulting in more than $175 Million in relief for homeowners to resolve fair lending claims* [Press release]. Retrieved November 3, 2020 from https://www.justice.gov/opa/pr/justice-department-reaches-settlement-wells-fargo-resulting-more-175-million-relief

- In 2015, M&T Bank agreed to pay $485,000 to plaintiffs in a settlement for a case involving racial discrimination and steering.[79]

- In 2015, the City of Oakland, California sued Wells Fargo & Co for steering minorities into costly mortgage loans that supposedly led to foreclosures, abandoned properties and blight.[80] The City of Philadelphia filed a lawsuit with similar allegations against Wells Fargo & Co in 2017.[81]

- In 2017, the U.S. Attorney settled a federal civil rights lawsuit against JP Morgan Chase Bank for $53 million for steering and discrimination based on race and national origin after it was discovered that African Americans and Hispanic Americans paid higher mortgage loan rates compared with whites with comparable credit profiles.[82]

Gender discrimination in mortgage lending. Historically, lending practices overtly discriminated against women by requiring information on marital and childbearing status. The Equal Credit Opportunity Act in 1973 suspended such discriminatory lending practices. However, certain barriers affecting women have persisted after 1973 in mortgage lending markets.

Recent studies and lawsuits indicate unequal access to mortgage loans for women. For example, a 2013 study by the Woodstock Institute found that women within the six-county Chicago area were far less likely to be approved for mortgage loans than men, and even male-female joint applications were less likely to be originated if the female applicant was listed first. This disparity persisted for mortgage refinancing.[83]

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[79] Stempel, J. (2015, August 31). M&T Bank settles lawsuit claiming New York City lending bias. *Reuters*. Retrieved November 3, 2020 from https://www.reuters.com/article/us-usa-guns-dicks-sporting/walmart-joins-dicks-sporting-goods-in-raising-age-to-buy-guns-idUSKCN1GC1R1

[80] Aubin, D. (2015, September 22). Oakland lawsuit accuses Wells Fargo of mortgage discrimination. *Reuters*. Retrieved November 3, 2020 from https://www.reuters.com/article/us-wellsfargo-discrimination/oakland-lawsuit-accuses-wells-fargo-of-mortgage-discrimination-idUSKCN0RM28L20150922

[81] City of Philadelphia, Office of the Mayor. (2015, May 15). *City files lawsuit against Wells Fargo* [Press release]. Retrieved from https://beta.phila.gov/press-releases/mayor/city-files-lawsuit-against-wells-fargo/

[82] Department of Justice, U.S. Attorney's Office, Southern District of New York. (2017, January 20). *Manhattan U.S. Attorney settles lending discrimination suit against JPMorgan Chase for $53 Million* [Press release]. Retrieved November 3, 2020 from https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-settles-lending-discrimination-suit-against-jpmorgan-chase-53

[83] Woodstock Institute. (2013). *Unequal opportunity: Disparate mortgage origination patterns for women in the Chicago area* [Fact sheet]. Retrieved from https://woodstockinst.org/wp-content/uploads/2013/05/unequalopportunity_factsheet_march2013_0.pdf

Research has confirmed that on average, women are better than men at paying their mortgages; however, women on average pay more for mortgages relative to their risk, and women of color pay the most.[84] Although disparities in mortgage interest rates are prevalent between African American and white borrowers, African American women are the most likely to experience this type of mortgage loan discrimination.[85]

Recent lawsuits and studies suggest that gender-based lending discrimination continues:

- In 2017, Bellco Credit Union settled a lawsuit for alleged discrimination against women on maternity leave.[86]
- In 2014 the U.S. Department of Housing & Urban Development (HUD) settled a lawsuit against Mountain America Credit Union over allegations of discrimination against prospective borrowers on maternity leave.[87]
- In 2011, HUD engaged in litigation against a company that revoked a pregnant woman's mortgage insurance once the company learned that the woman was on leave from work.[88]
- In 2010, Dr. Budde, an oncologist from Washington State, was initially granted a mortgage loan and later denied once her lender learned she was on maternity leave.[89]

Summary

Business start-up and long-term business success depend on access to capital. Discrimination at any link in that chain may produce cascading effects that result in racial and gender disparities in business formation and success.

The evidence presented here illustrates that people of color and women continued to face disadvantages in accessing capital that is necessary to start, operate and expand businesses as of early 2020. The COVID-19 pandemic may have the effect of widening these disparities, but data were not available at the time of writing this report.

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[84] Goodman, L., Zhu, J., & Bai, B. (2016). *Women are better than men at paying their mortgages* (Rep.). Retrieved from Urban Institute website: https://www.urban.org/sites/default/files/publication/84206/2000930-Women-Are-Better-Than-Men-At-Paying-Their-Mortgages.pdf

[85] Cheng, P., Lin, Z., & Liu, Y. (2015). Racial discrepancy in mortgage interest rates. *Journal of Real Estate Finance and Economics, 51*(1), 101-120.

[86] Strozniak, P. (2017, October 17). Bellco CU settles alleged discriminatory housing lawsuit. *Credit Union Times*. Retrieved November 3, 2020 from https://www.cutimes.com/2017/10/17/bellco-cu-settles-alleged-discriminatory-housing-l

[87] National Mortgage Professional Magazine. (2014, June 25). HUD hits Mountain America Credit Union with $25,000 fine. *National Mortgage Professional Magazine*. Retrieved November 3, 2020 from https://nationalmortgageprofessional.com/news/41558/hud-hits-mountain-america-credit-union-25000-fine

[88] Hanson, K. (2016). Disparate impact discrimination in residential lending and mortgage servicing based on sex: Insidious evil. *Florida Coastal Law Review, 17*(3), 421-447.

[89] Siegel Bernard, T. (2010, July 19). Need a mortgage? Don't get pregnant. *New York Times*. Retrieved November 3, 2020 from http://www.nytimes.com/2010/07/20/your-money/mortgages/20mortgage.html

Capital is required to start companies, so barriers to accessing capital can affect the number of people of color and women who are able to start businesses. In addition, minority and female entrepreneurs start their businesses with less capital (based on national data). Several studies have demonstrated that lower start-up capital adversely affects prospects for those businesses. Key results include:

- Nationally, minority- and woman-owned employer businesses (except Asian American-owned businesses) were more likely to use personal credit cards as a source of start-up capital, which is a more expensive form of debt than business loans from financial institutions.

- Personal and family savings of the owner was the main source of capital for startups among many U.S. businesses, but African American and Hispanic American households had significantly lower amounts of wealth than non-Hispanic white households.

- Among employer firms across the country, female- and minority-owned companies were less likely than non-Hispanic white male-owned companies to secure business loans from a bank or financial institution as a source of start-up capital.

- Nationally, female- and minority-owned firms were more likely to not apply for additional financing because firm owners believed that they would not be approved by a lender. These firms were also more likely to indicate that access to financial capital negatively impacted firm profitability.

- Availability survey results for Central Louisiana businesses indicate that minority- and women-owned companies were more likely than majority-owned firms to report difficulties obtaining lines of credit or loans.

- Home equity is an important source of funds for business start-up and growth. Fewer people of color in Louisiana own homes compared with nonminorities. African American and Native American homeowners tended to have lower home values than non-Hispanic white homeowners.

- High-income African American, Hispanic American and Native American households applying for conventional home mortgages in Louisiana were more likely to have their applications denied than high-income non-Hispanic whites. Loan denial rates for high-income African Americans and Native Americans were at least twice as high as the loan denial rate for non-Hispanic whites in all years studied. This may indicate discrimination in mortgage lending and may affect access to capital to start and expand businesses.

- Subprime lending in Louisiana has remained significant, especially for people of color. Some minority groups in 2018 were about twice as likely as non-Hispanic whites to have subprime loans. This may be evidence of predatory lending practices affecting people of color in the state.

Any discrimination against people of color in the home purchase and home mortgage markets can negatively affect the formation of firms by minorities in Central Louisiana and the success and growth of those companies.

APPENDIX H.
Success of Businesses in Central Louisiana Study Industries

The study team examined the success of businesses owned by people of color and women in the Central Louisiana construction, professional services, goods and other services industries (the "study industries") and assessed whether outcomes for business owned by these individuals differ from business outcomes for other groups. The study team examined outcomes in terms of:

- Business closures, expansions and contractions;
- Business receipts and earnings;
- Bid capacity; and
- Potential barriers to starting or expanding businesses.

Because most of these analyses are based on secondary data, Keen Independent was limited to the business owner characteristics reported in those data. Certain data sources do not provide information for Native American-owned firms or consolidate results for all minority-owned businesses.

Most of the research based on secondary data reflects marketplace outcomes before the COVID-19 pandemic.

Business Closures, Expansions and Contractions

The study team used Small Business Administration (SBA) data to examine business outcomes — including closures, expansions and contractions — for minority-owned businesses nationally and statewide. The SBA analyses compare business outcomes for minority-owned businesses (by demographic group) to business outcomes for all businesses.

Business closures. High rates of business closures may reflect adverse business conditions for minority business owners.

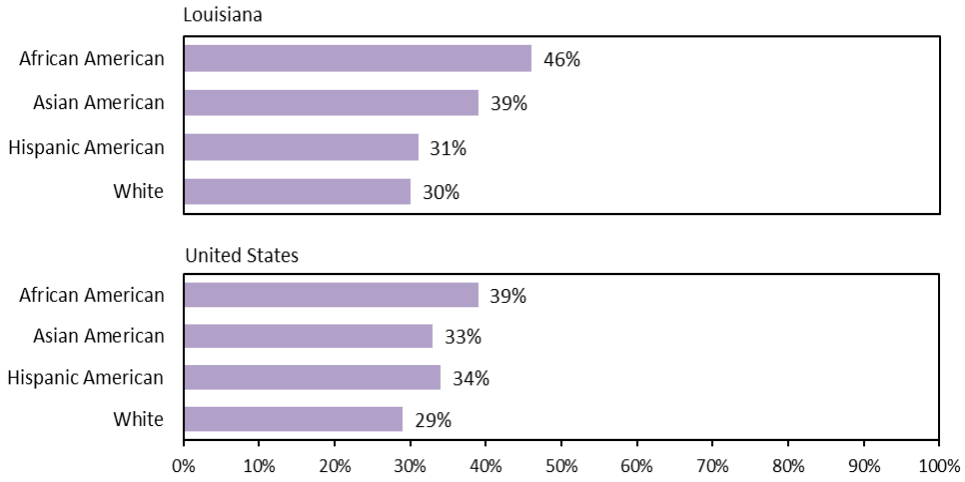
Overall rates of business closures in Louisiana. A 2010 SBA report investigated business dynamics and whether minority-owned businesses were more likely to close than other businesses. By matching data from business owners who responded to the 2002 U.S. Census Bureau Survey of Business Owners (SBO) to data from the Census Bureau's 1989–2006 Business Information Tracking Series, the SBA reported on business closure rates between 2002 and 2006 across different sectors of the economy.[1, 2] The SBA report examined patterns in each state.

[1] Lowrey, Y. (2010) *Race/ethnicity and establishment dynamics, 2002–2006* (Rep. No. 369). U.S. Small Business Administration, Office of Advocacy.

[2] Businesses classifiable by race/ethnicity exclude publicly traded companies. The study team did not categorize racial groups by ethnicity. As a result, some Hispanic Americans may also be included in statistics for African Americans, Asian Americans and whites.

Figure H-1 presents those data for African American-, Asian American- and Hispanic American-owned businesses as well as for white-owned businesses. The rate of business closure among minority-owned businesses in Louisiana in 2002 exceeded the closure rate of majority-owned businesses by as much as 16 percentage points. About 46 percent of African American-owned businesses operating in 2002 had closed by the end of 2006 compared with 30 percent of businesses owned by whites. The rate of business closure among Hispanic American- and Asian American-owned firms also exceeded that of majority-owned businesses in Louisiana.

Figure H-1.
Rates of business closure, 2002 through 2006, Louisiana and the U.S.



Note: Data refer to non-publicly held businesses only.

As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010) Race/ethnicity and establishment dynamics, 2002–2006 (Rep. No. 369). U.S. Small Business Administration, Office of Advocacy.

The recent COVID-19 pandemic has only exacerbated potential small business closures over the first months of 2020, especially for small businesses in Louisiana. One survey indicated that about 31 percent of small businesses in the state are in danger of closing permanently within three months if economic conditions do not improve. This figure almost doubles if the time frame is slightly increased, with 59 percent of small businesses reporting that they may have to close permanently if business conditions remain the same.[3]

[3] Louisiana Main Street. *The impact of COVID-19 on small businesses in Louisiana* [Press release]. Retrieved August 8, 2020, from https://www.crt.state.la.us/Assets/press-releases/COVID-19_Impact_on_Louisiana_Small_Businesses.pdf

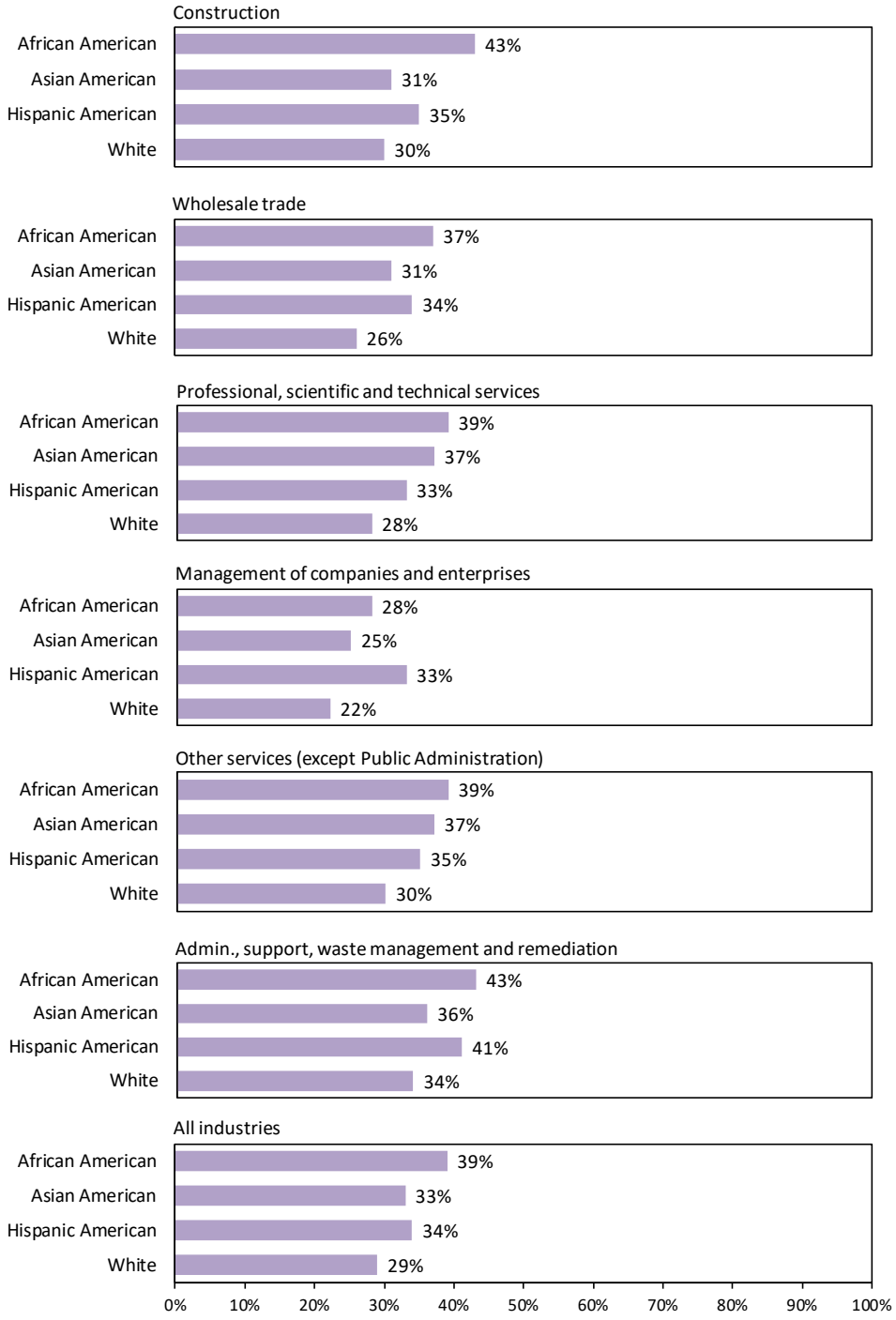
Rates of business closures by industry. The SBA report also examined national business closure rates by race/ethnicity for 21 different industry classifications (these data are not reported by state). Figure H-2 compares rates of firm closure for administration, support, waste management and remediation; construction; management of companies and enterprises; other services; professional, scientific and technical services; and wholesale trade. Figure H-2 also presents closure rates for all industries by race/ethnicity.

- Across different industries, minority-owned businesses that were operating in 2002 had higher rates of closure from 2002 to 2006 relative to white-owned businesses.

- African American-owned businesses had the highest rate of closure among all racial/ethnic groups. For all industries, 39 percent of African American-owned firms in business in 2002 had closed by 2006 compared with 29 percent of business owned by whites.

- The study team could not examine whether those differences also existed in Louisiana because the SBA analysis by industry was not available for individual states.

Figure H-2.
Rates of business closure, 2002 through 2006, relevant study industries and all industries in the U.S.



Note: Data refer to non-publicly held businesses only.

As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010) Race/ethnicity and establishment dynamics, 2002–2006 (Rep. No. 369). U.S. Small Business Administration, Office of Advocacy.

Unsuccessful closures. Not all business closures can be interpreted as "unsuccessful closures." Businesses may close when an owner retires or a more profitable business opportunity emerges, both of which represent "successful closures." Even though data are from years ago, the 1992 Characteristics of Business Owners (CBO) Survey is one of the few Census Bureau sources to classify business closures into successful and unsuccessful subsets.[4] The 1992 CBO combines data from the 1992 Economic Census and a survey of business owners conducted in 1996. The survey portion of the 1992 CBO asked owners of businesses that had closed between 1992 and 1995, "Which item below describes the status of this business at the time the decision was made to cease operations?" Only the responses "successful" and "unsuccessful" were permitted. A firm that reported being unsuccessful at the time of closure was understood to have failed.

Figure H-3 presents CBO data on the proportion of businesses that closed due to failure between 1992 and 1995 in construction, wholesale trade, services and all industries.[5, 6]

According to CBO data, African American-owned businesses were the most likely to report being "unsuccessful" at the time at which their businesses closed. About 77 percent of African American-owned business closures in all industries were reported to be unsuccessful between 1992 and 1995, compared with only 61 percent of non-Hispanic white male-owned business closures. Unsuccessful closure rates were also relatively high for Hispanic American-owned businesses (71%) and for businesses owned by other minority groups (73%). The rate of unsuccessful closures for women-owned businesses (61%) was similar to that of non-Hispanic white male-owned businesses.

In the construction industry, minority- and women-owned businesses were more likely to report unsuccessful business closures (82% and 66%, respectively) than non-Hispanic white male-owned businesses (58%). Those trends were similar in the wholesale trade and services industries with one exception — women-owned businesses in the services industry (52%) were less likely to report unsuccessful closures than non-Hispanic white male-owned businesses (59%).

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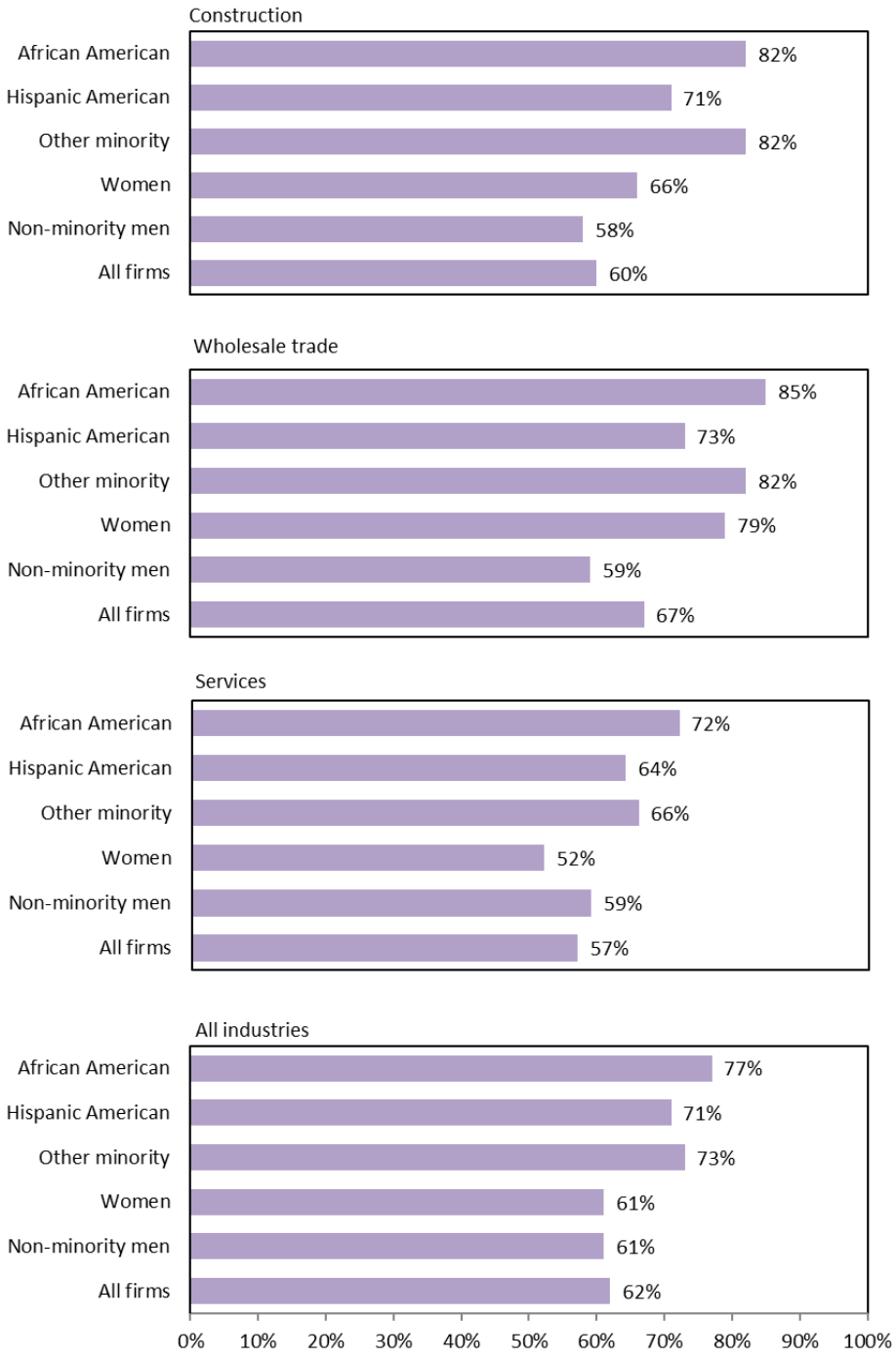
[4] CBO data from the 1997 and 2002 Economic Censuses do not include statistics on successful and unsuccessful business closures. To date, the 1992 CBO is the only U.S. Census dataset that includes such statistics.

[5] All CBO data should be interpreted with caution as businesses that did not respond to the survey cannot be assumed to have the same characteristics of ones that did. For further explanation, see Holmes, T.J., & Schmitz, J. A. (1996). Nonresponse Bias and Business Turnover Rates: The case of the Characteristics of Business Owners Survey. *Journal of Business & Economic Statistics, 14*(2), 231–241; Headd, B. (2001). *Business success: Factors leading to surviving and closing successfully* (Working Paper No. 01-01. Center for Economic Studies, U.S. Census Bureau. Retrieved from the U.S. Census Bureau website: https://www.census.gov/library/working-papers/2001/adrm/ces-wp-01-01.html

[6] Data for firms operating in the management of companies and enterprises and administrative, support, waste management and remediation industries were not available in the CBO survey.

Figure H-3.
Proportions of closures reported as unsuccessful between 1992 and 1995 in the U.S.



Source: U.S. Census Bureau, 1996 Characteristics of Business Owners Survey (CBO).

Reasons for differences in unsuccessful closure rates. Several researchers have offered explanations for higher rates of unsuccessful closures among minority- and women-owned businesses compared with non-Hispanic white-owned businesses:

- Unsuccessful business failures of minority-owned businesses may be due to barriers in access to capital. Regression analyses have identified initial capitalization as a significant factor in determining firm viability.[7] Because minority-owned businesses secure smaller amounts of debt equity in the form of loans, they may be more liable to fail. Difficulty in accessing capital is particularly acute for minority-owned businesses in the construction industry.[8] Access to capital is discussed in more detail in Appendix G.
- Prior work experience in a family member's business or similar experiences are determinants of business viability.[9] Because minority business owners are much less likely to have such experience, their businesses are less likely to survive.[10] Similar gaps exist in the likelihood of business survival among women-owned firms.[11]
- A business owner's education level is a strong determinant of business survival. Educational attainment explains a substantial portion of the gap in business closure rates between African American-owned and nonminority-owned businesses.[12]
- Nonminority business owners have broader business opportunities, increasing their likelihood of closing successful businesses to pursue more profitable business alternatives. Minority business owners, especially those who do not speak English, have limited employment options and are less likely to close a successful business.[13]
- Possession of greater initial capital and generally higher levels of education among Asian Americans are related to a higher rate of survival of Asian American-owned businesses compared to other minority-owned businesses.[14]

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[7] See, e.g., Fairlie, R. W., & Robb, A. M. (2010). *Disparities in capital access between minority and non-minority-owned businesses: The troubling reality of capital limitations faced by MBEs* (Rep.). Retrieved from Minority Business Development Agency website: https://www.mbda.gov/sites/default/files/migrated/files-attachments/DisparitiesinCapitalAccessReport.pdf; Robb, A. M., and Fairlie, R. W. (2009). Determinants of business success: An examination of Asian-owned businesses in the USA. *Journal of Population Economics, 22*(4), 827–858.

[8] Blanchflower, D. (2008). *Minority self-employment in the United States and the impact of affirmative action programs* (Working paper No. 12972). NBER Working Paper Series. Cambridge, MA: National Bureau of Economic Research. Retrieved from https://www.nber.org/papers/w13972

[9] Fairlie, R. W., & Robb, A. (2010). *Race and entrepreneurial success: Black-, Asian-, and white-owned businesses in the United States*. Cambridge, MA: The MIT Press.

[10] Fairlie, R. W., & Robb, A. M. (2007). Why are black-owned businesses less successful than white-owned businesses? The role of families, inheritances and business human capital. *Journal of Labor Economics*, *25*(2), 289-323.

[11] Fairlie, R. W., & Robb, A. M. (2009). Gender differences in business performance: Evidence from the Characteristics of Business Owners survey. *Small Business Economics, 33*(4), 375–395.

[12] Ibid.; Fairlie, R., & Woodruff, C. M. (2010). Mexican-American entrepreneurship. *The BE Journal of Economic Analysis & Policy, 10*(1).

[13] Bates, T. (2005). Analysis of young, small firms that have closed: Delineating successful from unsuccessful closures. *Journal of Business Venturing, 20*(3), 343–358.

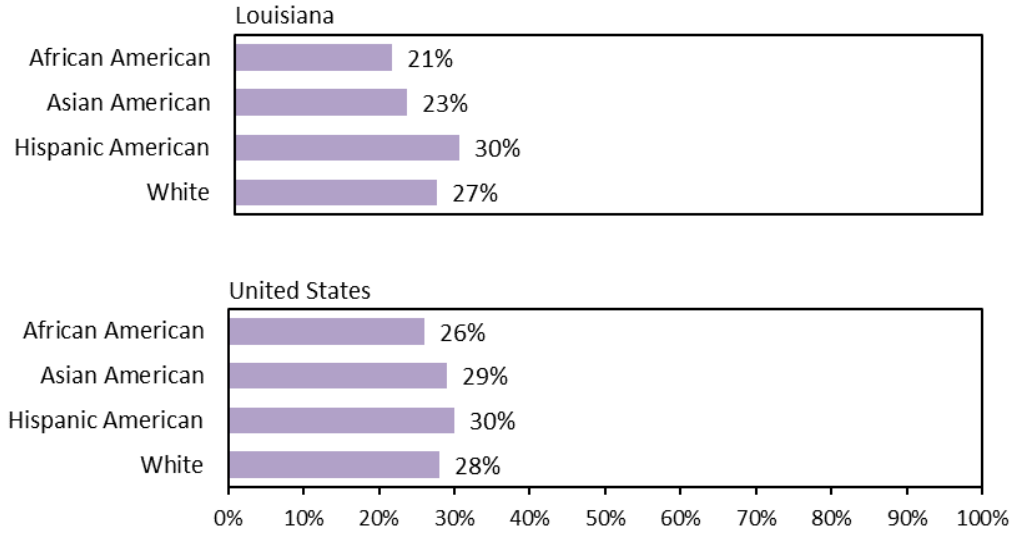
[14] Robb, A. M., & Fairlie, R. W. (2009). Determinants of business success: An examination of Asian-owned businesses in the USA. *Journal of Population Economics, 22*(4), 827–858; Fairlie, R. W., Zissimopoulos, J., & Krashinsky, H. (2010). The international Asian business success story? A comparison of Chinese, Indian and other Asian businesses in the United

Expansions and contractions. Comparing rates of expansion and contraction between firms owned by different groups is also useful in assessing the success of minority-owned businesses. As with closure data, only some data on expansions and contractions available for the nation were available at the state level.

Expansions. The 2010 SBA study of minority business dynamics from 2002 through 2006 examined the number of privately held Louisiana businesses that expanded and contracted between 2002 and 2006.

Figure H-4 presents the percentage of all businesses that increased their total employment between 2002 and 2006. African American-owned businesses (21%) and Asian American-owned businesses (23%) expanded at a lower rate than white-owned businesses (27%).

Figure H-4.
Percentage of businesses that expanded, 2002 through 2006, Louisiana and the U.S.



Note: Data refer to non-publicly held businesses only.
As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010) Race/ethnicity and establishment dynamics, 2002–2006 (Rep. No. 369). U.S. Small Business Administration, Office of Advocacy.

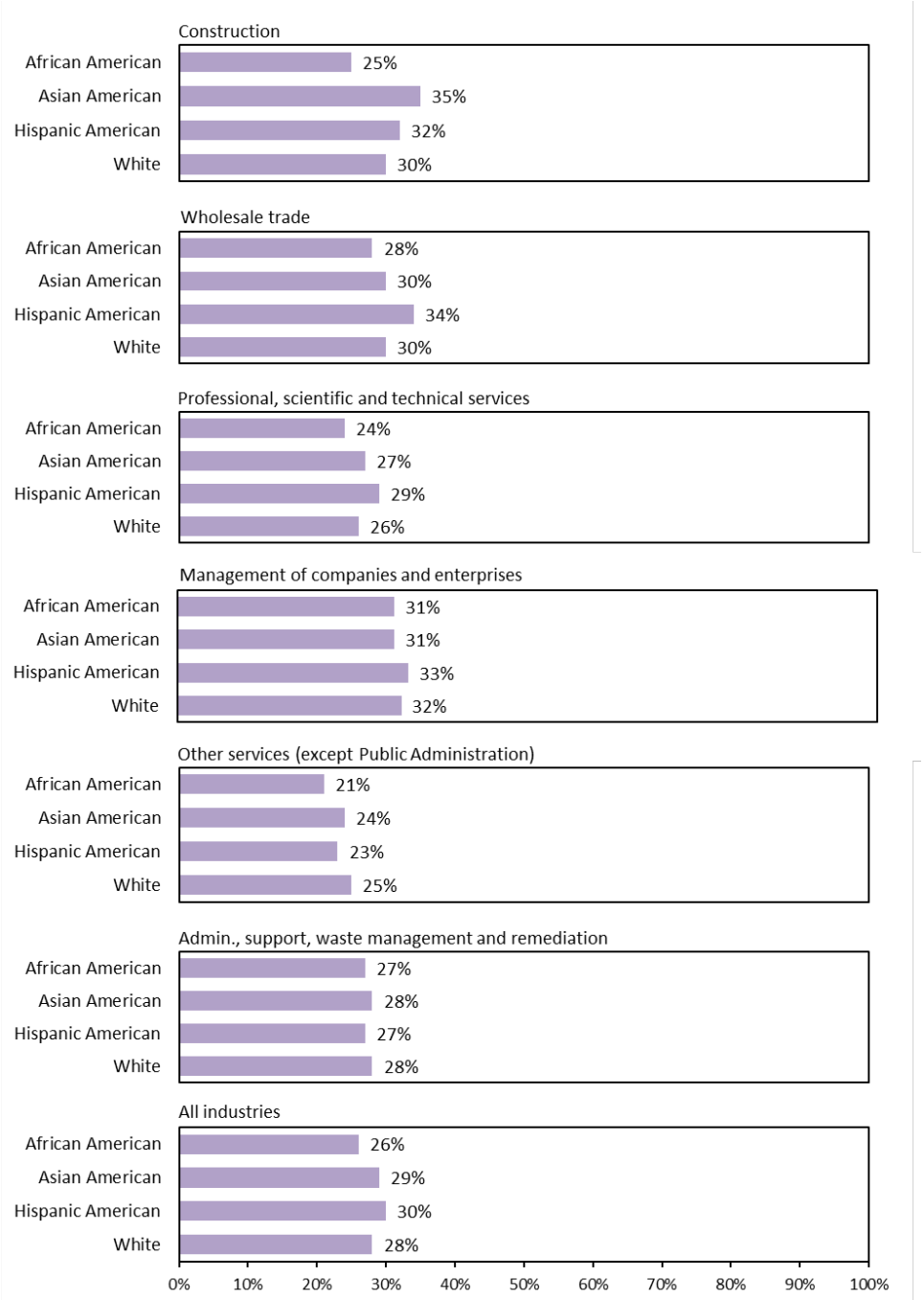
Figure H-5 presents the percentage of businesses that expanded in construction; wholesale trade; professional, scientific and technical services; management of companies and enterprises; other services; administration, support, waste management and remediation and in all industries in the United States. (The SBA study did not report results for businesses in individual industries at the state level.)

In each industry examined, a smaller percentage of African American-owned firms expanded compared to white-owned companies. There was no similar pattern of differences in the percentage

States, Canada and United Kingdom. In *International Differences in Entrepreneurship* (pp. 179–208). University of Chicago Press; Fairlie, R. W., & Robb, A. (2010). *Race and entrepreneurial success: Black-, Asian-, and white-owned businesses in the United States.* Cambridge, MA: The MIT Press.

of firms expanding for Asian American- or Hispanic American-owned firms compared with nonminority-owned businesses.

Figure H-5.
Percentage of businesses that expanded, 2002 through 2006, relevant study industries and all industries in the U.S.



Note: Data refer to non-publicly held businesses only.

As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

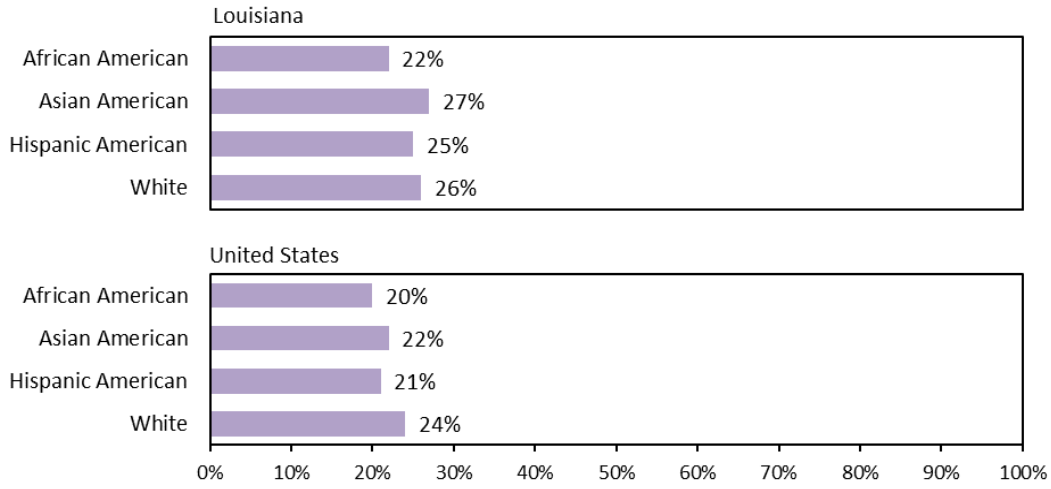
Source: Lowrey, Y. (2010) Race/ethnicity and establishment dynamics, 2002–2006 (Rep. No. 369). U.S. Small Business Administration, Office of Advocacy.

Contraction. Figure H-6 shows the percentage of privately held businesses operating in 2002 that reduced their employment (i.e., contracted) between 2002 and 2006 in Louisiana and in the nation.

- Asian American-owned businesses were more likely than nonminority-owned business to have contracted in 2002 through 2006 in Louisiana.
- Hispanic American- and African American-owned firms in Louisiana were less likely to contract between 2002 and 2006 than nonminority-owned businesses.

Trends in business contraction for Louisiana differ from those for the United States as a whole. Nationally, relatively fewer businesses owned by individuals in each minority group contracted compared with white-owned companies.

Figure H-6.
Percentage of businesses that contracted, 2002 through 2006, Louisiana and the U.S.

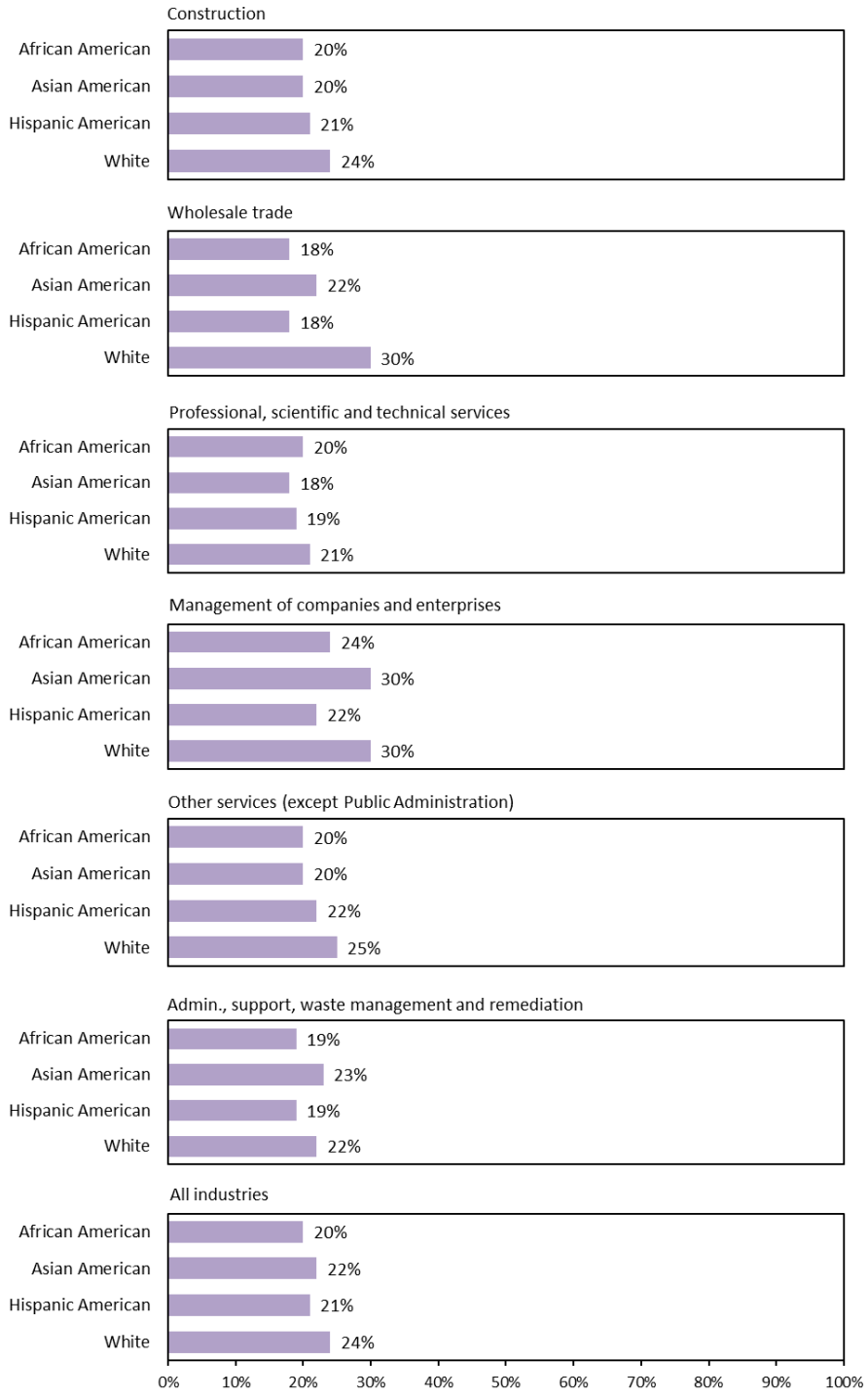


Note: Data refer to non-publicly held businesses only.
As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010) Race/ethnicity and establishment dynamics, 2002–2006 (Rep. No. 369). U.S. Small Business Administration, Office of Advocacy.

The SBA study did not report state-specific results relating to contractions in individual industries. Figure H-7 displays the percentage of businesses that contracted in the relevant study industries and in all industries at the national level. Compared to white-owned businesses in the United States, in general, a smaller percentage of minority-owned businesses in the relevant study industries and in all industries contracted between 2002 and 2006.

Figure H-7.
Percentage of businesses that contracted, 2002 through 2006, relevant study industries and all industries in the U.S.



Note: Data refer to non-publicly held businesses only.

As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010) Race/ethnicity and establishment dynamics, 2002–2006 (Rep. No. 369). U.S. Small Business Administration, Office of Advocacy.

Business Receipts and Earnings

Annual business receipts and earnings for business owners are also indicators of the success of businesses. The study team examined:

- Business receipts data from the U.S. Census Bureau 2012 Survey of Business Owners (SBO);
- Business earnings data for business owners from the 2014–2018 American Community Survey (ACS); and
- Annual revenue data for firms in the study industries located in the Central Louisiana market area that the study team collected as part of the 2020 availability surveys.

Business receipts. The study team examined receipts for businesses using data from the 2012 SBO, conducted by the U.S. Census Bureau. The study team also analyzed receipts for businesses in individual industries. The SBO reports business receipts separately for employer businesses (with paid employees other than owner and family members) and all businesses.[15]

Receipts for all businesses. Figure H-8 presents 2012 mean annual receipts for employer and non-employer businesses by race, ethnicity and gender.[16] The SBO data across all industries in Louisiana show lower receipts for minority- and women-owned businesses than for nonminority and male-owned businesses, respectively.

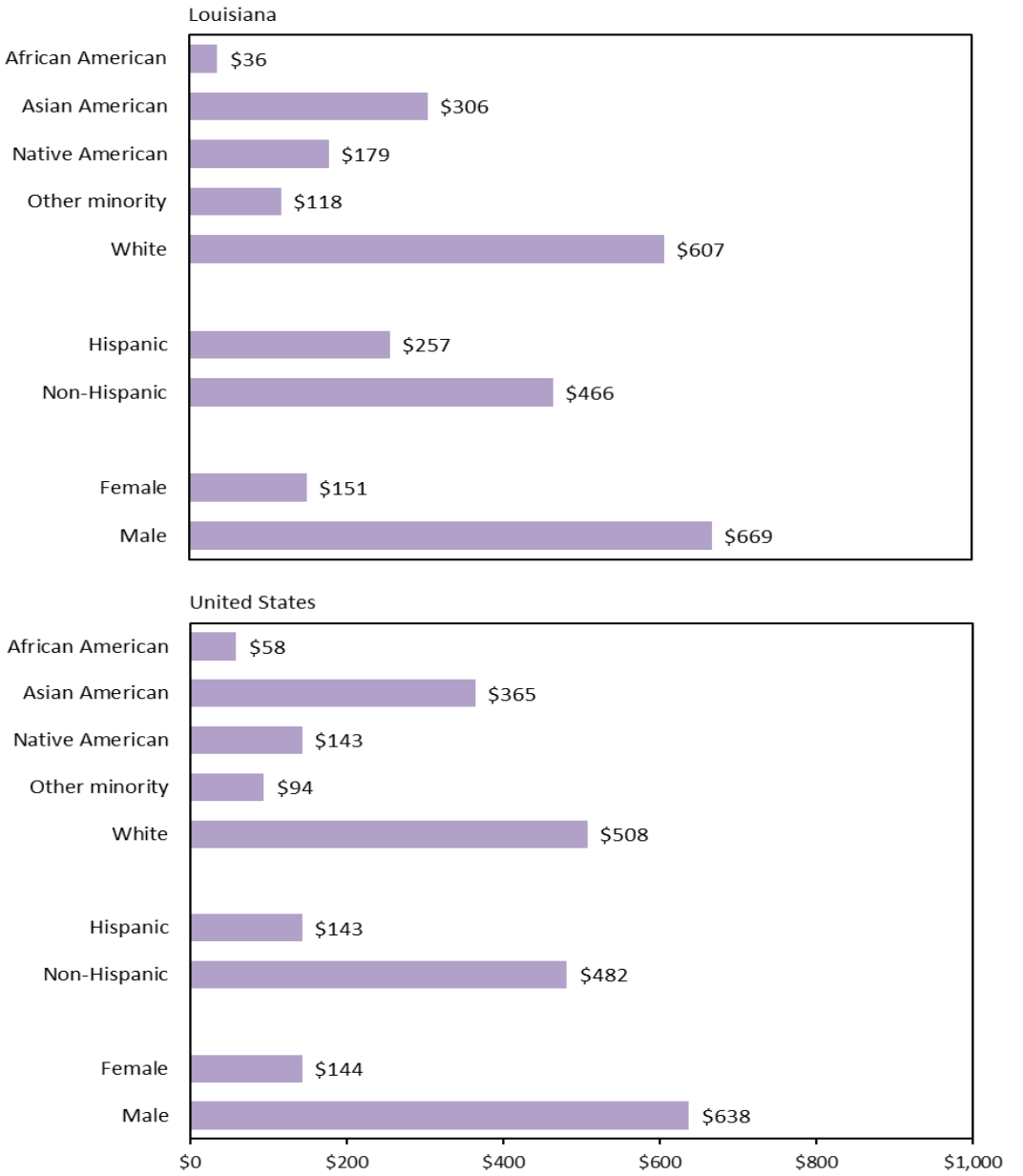
- Average receipts of African American-owned businesses ($36,000) were about 6 percent of white-owned businesses ($607,000).
- Native American-owned businesses ($179,000) reported receipts that were less than one-third of white-owned businesses.
- Hispanic-owned businesses ($257,000) had receipts that were just over one-half of the average of non-Hispanic-owned businesses ($466,000).
- Average receipts for women-owned businesses ($151,000) were about one-fourth of receipts for male-owned businesses ($669,000).

As shown in Figure H-8, the patterns of disparities for minority- and women-owned businesses for are similar to those for the nation.

[15] Keen Independent uses "all businesses" to denote SBO data used in this analysis. Data include incorporated and unincorporated businesses, but not publicly traded companies or other businesses not classifiable by race/ethnicity and gender.

[16] Racial categories are not available by both race and ethnicity. As such, the racial categories shown may include Hispanic Americans.

Figure H-8.
Mean annual receipts (thousands) for all businesses, by race/ethnicity and gender of owners, 2012



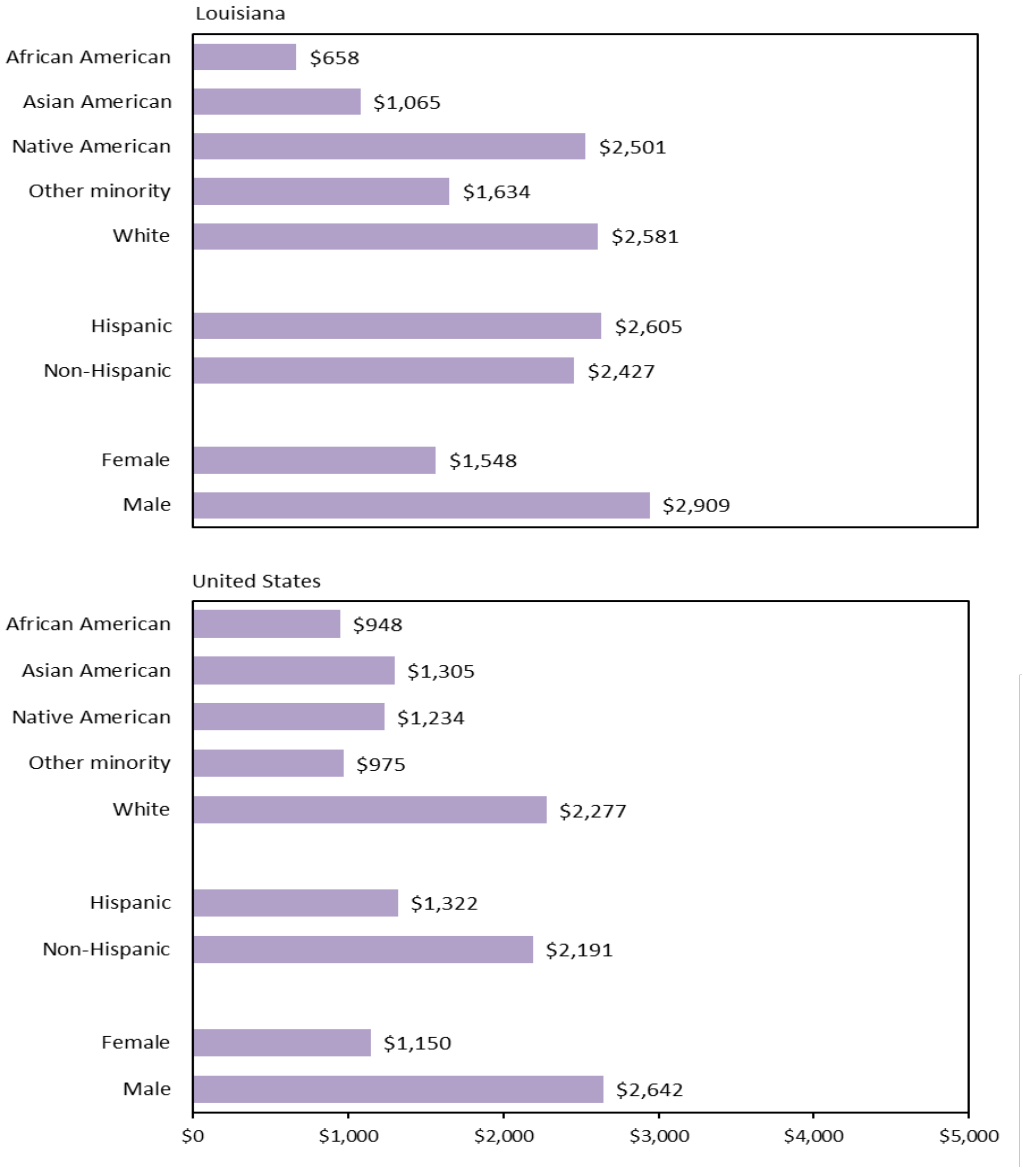
Note: Includes employer and non-employer businesses. Does not include publicly traded companies or other businesses not classifiable by race/ethnicity and gender.

As sample sizes are not reported, statistical significance of these results cannot be determined.

Source: 2012 Survey of Business Owners, part of the U.S. Census Bureau's 2012 Economic Census.

Figure H-9 presents average annual receipts in 2012 for employer businesses (firms with paid employees). In both Louisiana and in the United States, minority- and women-owned businesses had lower average business receipts than white- and male-owned employer businesses. For example, average receipts for African American-owned employer businesses in Louisiana ($658,000) were about 25 percent those of white-owned businesses ($2.58 million).

Figure H-9.
Mean annual receipts (thousands) for employer businesses,
by race/ethnicity and gender of owners, 2012



Note: Includes only employer businesses.
Does not include publicly traded companies or other businesses not classifiable by race/ethnicity and gender.
As sample sizes are not reported, statistical significance of these results cannot be determined.
Source: 2012 Survey of Business Owners, part of the U.S. Census Bureau's 2012 Economic Census.

Receipts by industry. The study team also analyzed SBO receipts data for businesses in construction, professional services, goods and other services. Figure H-10 presents mean annual receipts in 2012 for firms in the economic sectors that correspond to the study industries. Figure H-11 shows results for businesses with paid employees. Disparities for minority- and women-owned businesses seen in all industries combined (Figure H-8) persist when examining results for most industries.

Figure H-10.
Mean annual receipts (thousands) for all firms in the relevant study industries,
by race/ethnicity and gender of owners, 2012, United States

Demographic group	Construction	Professional, scientific and technical services	Wholesale trade	Other services
Louisiana				
Race				
African American	$ 46	$ 48	$ N/A	$ 15
Asian American	89	168	2,650	44
Native American	160	124	N/A	35
Other minority	60	51	N/A	26
White	659	293	4,832	118
Ethnicity				
Hispanic	$ 311	$ 213	$ 6,283	$ 28
Non-Hispanic	552	262	4,431	72
Gender				
Female	$ 398	$ 84	$ 2,236	$ 27
Male	532	362	5,675	117
United States				
Race				
African American	$ 81	$ 76	$ 529	$ 17
Asian American	200	245	2,654	59
Native American	215	110	930	41
Other minority	86	105	852	30
White	455	235	4,422	94
Ethnicity				
Hispanic	$ 117	$ 121	$ 1,502	$ 37
Non-Hispanic	467	235	4,289	80
Gender				
Female	$ 350	$ 104	$ 1,778	$ 32
Male	415	301	5,060	111

Note: Does not include publicly traded companies or other businesses not classifiable by race/ethnicity and gender.
As sample sizes are not reported, statistical significance of these results cannot be determined.
"N/A" indicates that estimates were suppressed by the SBO because publication standards were not met.

Source: 2012 Survey of Business Owners, part of the U.S. Census Bureau's 2012 Economic Census.

Figure H-11.
Mean annual receipts (thousands) for employer firms in the relevant study industries, by race/ethnicity and gender of owners, 2012, United States

Demographic group	Construction	Professional, scientific and technical services	Wholesale trade	Other services
Louisiana				
Race				
African American	$ 891	$ 438	$ N/A	$ N/A
Asian American	1,927	710	8,473	237
Native American	1,576	897	N/A	N/A
Other minority	N/A	292	N/A	N/A
White	2,950	1,042	9,485	772
Ethnicity				
Hispanic	$ 5,739	$ 1,270	$ 20,641	$ 327
Non-Hispanic	2,813	1,012	9,330	737
Gender				
Female	$ 2,350	$ 537	$ 7,673	$ 471
Male	3,178	1,176	10,807	870
United States				
Race				
African American	$ 1,096	$ 816	$ 5,134	$ 321
Asian American	1,223	1,154	5,061	275
Native American	1,327	700	5,374	387
Other minority	839	1,139	3,764	326
White	1,730	983	9,774	564
Ethnicity				
Hispanic	$ 1,005	$ 865	$ 5,431	$ 383
Non-Hispanic	1,749	999	9,367	528
Gender				
Female	$ 1,561	$ 620	$ 6,471	$ 293
Male	1,842	1,167	10,421	636

Note: Does not include publicly traded companies or other businesses not classifiable by race/ethnicity and gender.
As sample sizes are not reported, statistical significance of these results cannot be determined.
"N/A" indicates that estimates were suppressed by the SBO because publication standards were not met.

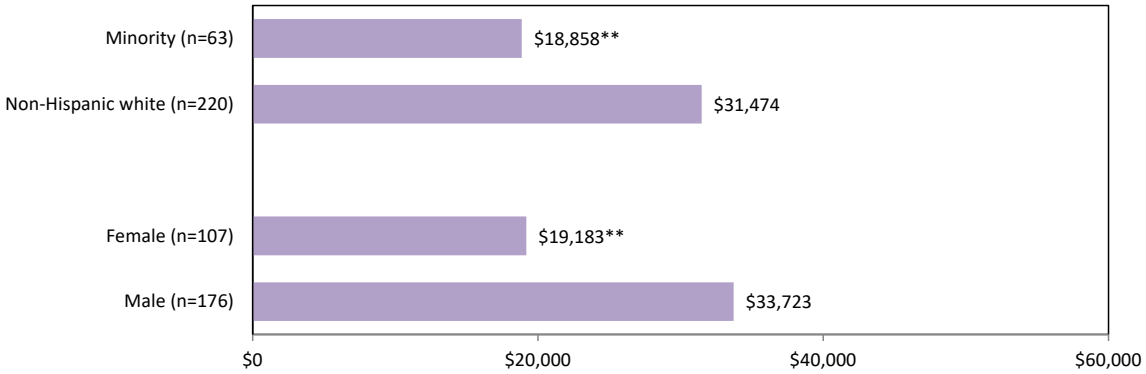
Source: 2012 Survey of Business Owners, part of the U.S. Census Bureau's 2012 Economic Census

Business earnings. To assess the success of self-employed minorities and women in the relevant study industries, the study team examined earnings of business owners using Public Use Microdata Series (PUMS) data from the 2014–2018 ACS. The study team analyzed earnings of incorporated and unincorporated business owners age 16 and older who reported positive business earnings. All results are presented in 2018 dollars.

Figure H-12 shows mean annual business owner earnings for 2014 through 2018 for relevant study industries by race/ethnicity and gender. Due to small sample size in the individual Central Louisiana study industries, results are presented for all study industries combined.

On average, earnings for minority business owners ($18,858) were less than earnings for non-Hispanic white business owners ($31,474). Average earnings for female business owners ($19,183) were less than those of male business owners ($33,723). Both differences were statistically significant.

Figure H-12.
Mean annual business owner earnings in all study industries, 2014 through 2018, Central Louisiana



Note: ** Denotes statistically significant differences between groups at the 95% confidence level.
The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2018 dollars.

Source: Keen Independent Research from 2014–2018 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Regression analysis of business earnings. Differences in business earnings across groups may be at least partially attributable to race- and gender-neutral factors such as age, marital status and educational attainment. The study team created a statistical model through regression analysis to examine whether there were differences in average business earnings between people of color and non-Hispanic whites, and women and men after accounting for certain neutral factors. Data came from the ACS for Central Louisiana between 2014 and 2018.

The study team applied an ordinary least squares regression model to the data that was very similar to models reviewed by courts after other disparity studies.[17] The dependent variable in the model was the natural logarithm of business earnings. Business owners that reported zero or negative business

[17] For example, National Economic Research Associates, Inc. (2012). *The state of minority- and women-owned business enterprise in construction: Evidence from Houston* (Rep.). Retrieved from City of Houston website: http://www.houstontx.gov/obo/disparitystudyfinalreport.pdf; BBC Research & Consulting. (2012). *Availability and disparity study* (Rep.). Retrieved from the California Department of Transportation website: https://dot.ca.gov/-/media/dot-media/documents/2012-caltrans-availability-and-disparity-study-a11y.pdf

earnings were excluded, as were observations for which the U.S. Census Bureau had imputed values of business earnings. Along with variables for the race, ethnicity and gender of business owners, the model also included measures of factors that are likely to affect earnings, including age, marital status, ability to speak English well and educational attainment.

The study team developed a model for business owner earnings in 2014 through 2018 for all Central Louisiana study industries. All study industries were combined for Central Louisiana due to small sample size in individual industries. This model included 283 observations.

Figure H-13 includes coefficient estimates for the regression model for all study industries combined in Central Louisiana. Both minority business owners and women business owners had lower business revenue after accounting for other factors. Both of these results were statistically significant.

Figure H-13.
Mean annual business owner earnings, 2014 through 2018, Central Louisiana study industries

Variable	Coefficient
Constant	5.876 **
Age	0.119 **
Age-squared	-0.001 **
Married	0.421 **
Disability status	-1.242 **
Speaks English well	0.943
Less than high school	0.048
Some college	0.030
Four-year degree	0.395
Advanced degree	0.535
Minority	-0.833 **
Female	-0.643 **

Note:

*,** Denote statistically significant differences between groups at the 90% and 95% confidence level, respectively.

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2018 dollars. All minorities were combined into a single category due to small sample size.

Source:

Keen Independent Research from 2014–2018 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Gross revenue of firms from availability surveys. As discussed previously, total revenue is a key measure of the economic success of businesses. In the availability telephone surveys the study team conducted in spring 2020 (discussed in Appendix D), firm owners and managers were asked to identify the size range of their average annual gross revenue in the previous five years (2015 through 2019). Availability survey results pertain to firms indicating qualifications and interest in public sector work in Central Louisiana. (Surveyed firms were identified as being in the Central Louisiana marketplace.)

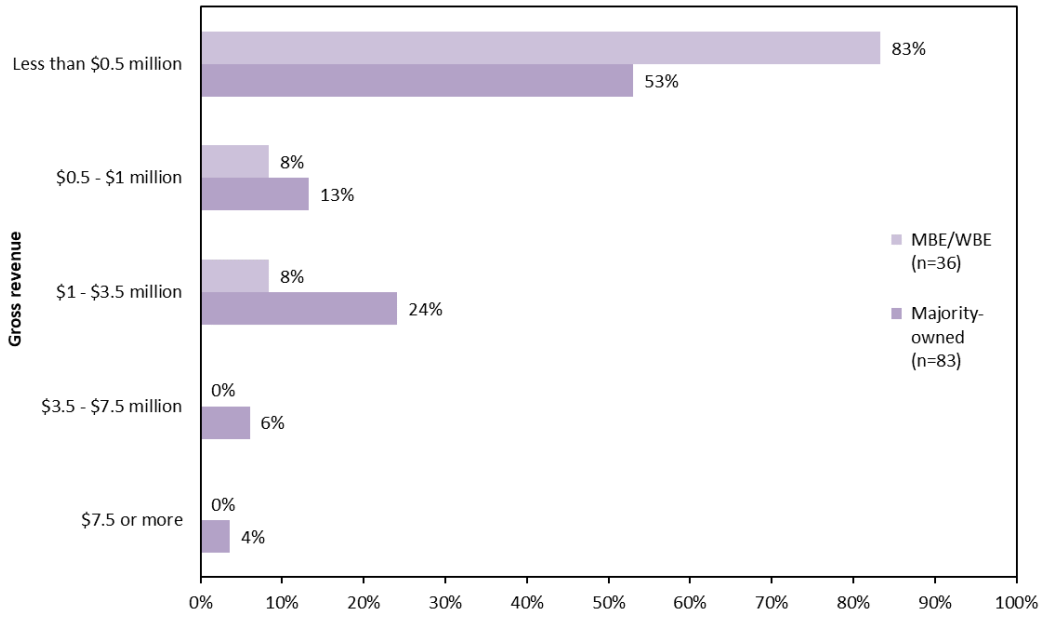
The availability survey encompasses firms working in the construction, professional services, goods and other services industries. Because of small sample size, results for all surveyed industries are combined.

Figure H-14 presents the reported annual revenue for MBE/WBE and majority-owned businesses in the availability surveys. Minority- and women-owned firms in Central Louisiana generally reported lower revenue than majority-owned companies.

- A greater percentage of minority- and women-owned firms (83%) than majority-owned firms (53%) reported average revenue of less than $0.5 million per year.

- After combining the highest revenue categories, no MBEs or WBEs reported average revenue of $3.5 million or more per year. About 10 percent of majority-owned firms reported such average revenue.

Figure H-14.
Average annual gross revenue of company over previous five years,
Central Louisiana study industries



Note: "MBE/WBE" represents minority-owned firms and white women-owned firms, "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2020 availability surveys.

Relative Bid Capacity

Some legal cases regarding race- and gender-conscious contracting programs have considered the importance of the "relative capacity" of businesses included in an availability analysis.[18] The study team directly measured bid capacity in its availability analysis.[19]

Through this analysis, Keen Independent was able to distinguish firms based on the largest contracts or subcontracts they had performed or bid on (i.e., "bid capacity" as used in this study). Although additional measures of capacity might be theoretically possible, the bid capacity concept can be articulated and quantified for individual firms for specific time periods.

Data. The availability analysis produced a database of construction, professional service, goods and other service businesses for which bid capacity could be examined.

"Relative bid capacity" for a business is measured as the largest contract or subcontract that the business performed or reported that they had bid on within the five years preceding when the study team interviewed it.

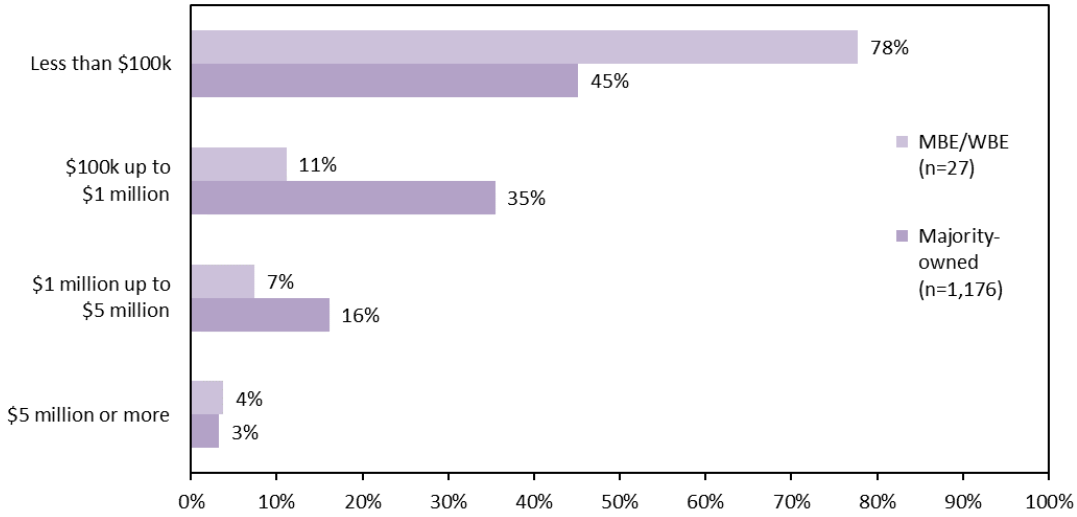
Results. In general, majority-owned firms were more likely than minority- and woman-owned firms to report bidding on or being awarded larger contracts, as shown in Figure H-15. Results for all study industries are combined due to small sample size

- More than three-fourths of MBE and WBE firms reported that the largest contract they had bid on or been awarded was $100,000 or less, while less than one-half of majority-owned firms reported a bid capacity in that range.
- After combining ranges of bid capacity, about one-half of majority-owned firms indicated that their largest contract (won or bid on) was between $100,000 and $5 million. About 18 percent of minority- and woman-owned firms reported bid capacity in that range.
- Relatively few MBE/WBE firms (4%) or majority-owned firms (3%) reported performing or bidding on contracts of $5 million or more.

[18] For example, see the decision of the United States Court of appeals for the Federal Circuit in *Rothe Development Corp. v. U.S. Department of Defense, et al.,* 545 F.3d 1023 (Fed. Cir. 2008).

[19] See Appendix D for details about the availability interview process.

Figure H-15.
Largest contract bid on or awarded (bid capacity) by industry for firms in Central Louisiana, MBE, WBE and majority-owned firms



Note: "MBE/WBE" represents minority-owned firms and white women-owned firms, "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2020 availability surveys.

Above median bid capacity. The study team further explored bid capacity on a subindustry level. Subindustries such as office and public building construction tend to involve relatively large projects. Other subindustries, such as plumbing, heating and air conditioning, typically involve smaller contracts.

Figure H-16 below reports the median relative bid capacity among Central Louisiana businesses in 22 subindustries. Results categorized companies according to their primary line of business.

Figure H-16.
Median relative capacity of Central Louisiana businesses by subindustry

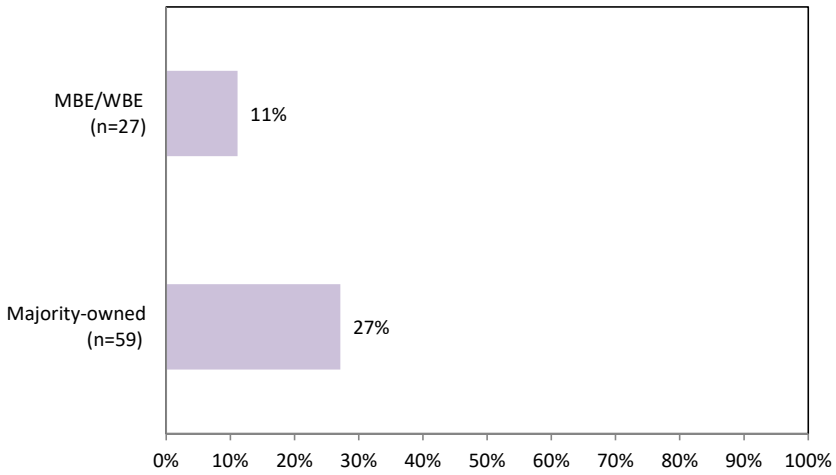
Subindustry	Median bid capacity
Construction	
Office and public building construction	More than $1 million up to $2 million
Underground utilities such as water, sewer and utilities lines	More than $1 million up to $2 million
Electrical work	More than $0.1 million up to $0.5 million
Wrecking and demolition	More than $0.1 million up to $0.5 million
Excavation, site prep, grading and drainage	$0.1 million
Plumbing, heating and air conditioning	Up to $0.1 million
Concrete flatwork (including sidewalk, curb and gutter)	Up to $0.1 million
Other construction-related work	More than $0.1 million up to $0.5 million
Professional services	
Architecture and engineering	More than $0.1 million up to $0.5 million
Other professional services	Up to $0.1 million
Goods	
Building materials and supplies	More than $5 million
Cars and trucks	More than $0.1 million up to $0.5 million
Heavy construction equipment	More than $0.1 million up to $0.5 million
Tires	Up to $0.1 million
Clothing and uniforms	Up to $0.1 million
Horticultural materials and supplies	Up to $0.1 million
Other goods	Up to $0.1 million
Other services	
Staffing services	More than $1 million up to $2 million
Equipment repair services	Up to $0.1 million
Vehicle repair services	Up to $0.1 million
Building cleaning and maintenance	Up to $0.1 million
Other services	Up to $0.1 million

Source: Keen Independent Research from 2020 availability surveys.

Comparison of above median bid capacity for firms owned by minorities and women. Based on the median bid capacity figures identified in Figure H-17, the study team classified firms into "above median bid capacity," "at median bid capacity" and "below median bid capacity" for the subindustry that described their primarily line of business.

Relatively fewer MBE/WBEs (11%) had above median bid capacity for their subindustries than found for majority-owned firms (27%).

Figure H-17.
Percent of firms above median bid capacity for their subindustry, Central Louisiana, 2020



Note:
"MBE/WBE" represents minority-owned firms and white women-owned firms, "Majority-owned" represents non-Hispanic white male-owned firms.

Source:
Keen Independent Research from 2020 availability surveys.

Regression analyses found that disparities in bid capacity for MBE/WBEs persisted after controlling for length of time in business (in addition to subindustry). The differences for MBE/WBEs were statistically significant at the 90 percent confidence level. The study team conducted this analysis using the following approach:

- Data for minority- and women-owned firm were combined due to small sample sizes.
- Keen Independent developed a probit regression model of whether a firm had above median bid capacity for its subindustry that included two independent variables: MBE/WBE status and age of firm.

In sum, there is some evidence that minority- and women-owned firms have lower bid capacity than majority-owned firms after accounting for the types of work they perform and how long a firm had been in business.

Availability Survey Results Concerning Potential Barriers

As part of the availability surveys conducted with Central Louisiana businesses, the study team asked firm owners and managers if they had experienced barriers or difficulties associated with starting or expanding a business or with obtaining work. (See Appendix D for additional information.)

Because of a small number of survey responses in individual study industries, results are presented for all industries combined. Results for MBEs and WBEs are also combined. Keen Independent grouped results for these survey questions into three sets of potential barriers:

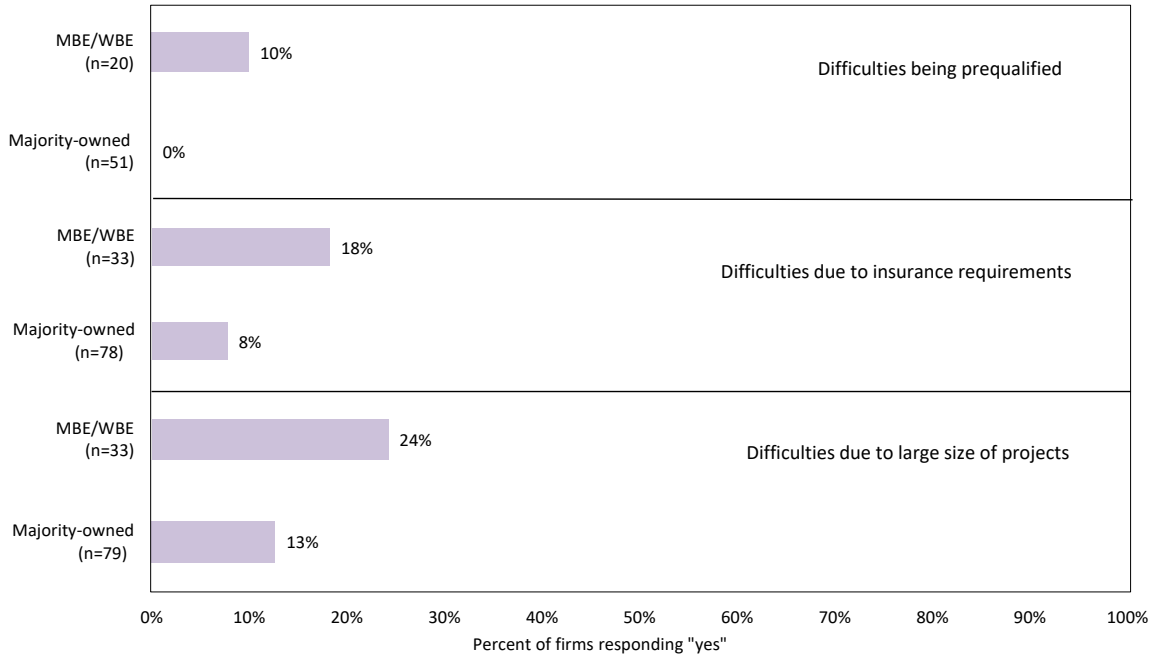
- Bidding requirements and project size,
- Learning about bid opportunities, and
- Receiving payment for projects.

Appendix G provides results to the survey question about access to capital.

Barriers related to bidding requirements and project size. In the availability survey, firms were asked about being prequalified for work, insurance requirements and other barriers to bidding. Results are presented in Figure H-18.

- Minority- and woman-owned firms were more likely than majority-owned firms to report difficulties being prequalified (10% and 0%, respectively).
- MBE/WBEs were more than twice as likely as majority-owned firms to indicate difficulties due to insurance requirements.
- Relatively more MBE/WBEs (24%) reported difficulties related to large project size when compared to majority-owned firms (13%).

Figure H-18.
Responses to availability survey questions concerning prequalification, insurance requirements and project size, Central Louisiana MBE/WBEs and majority-owned firms



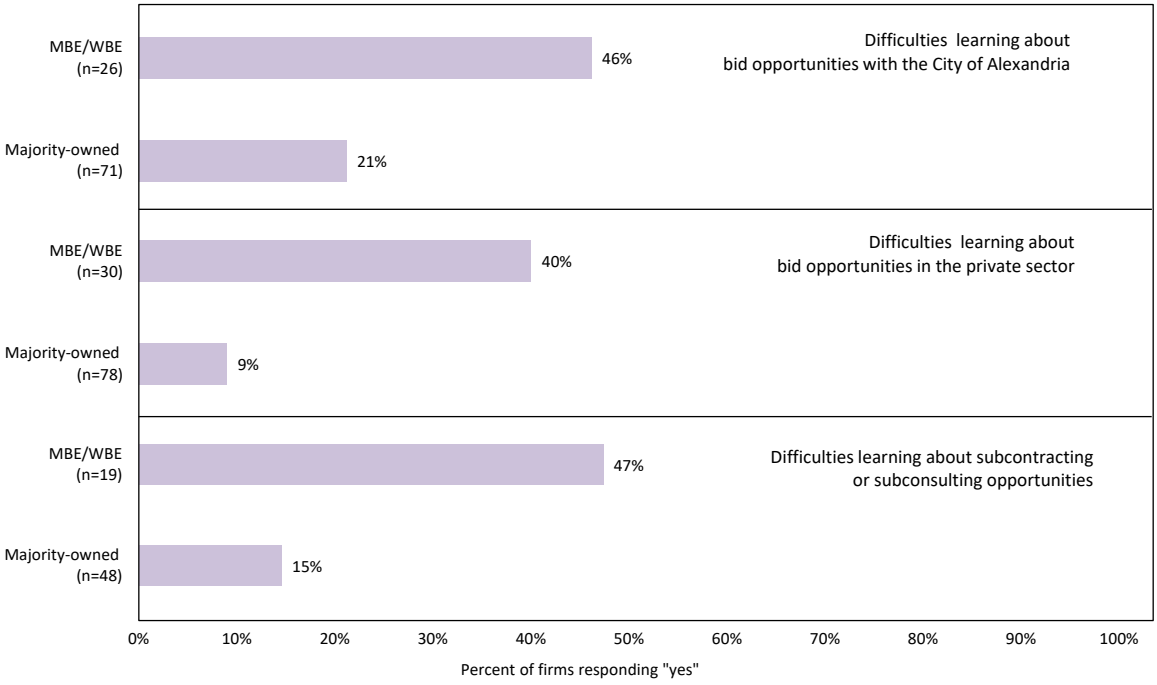
Note: "MBE/WBE" represents minority-owned firms and white women-owned firms, "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2020 availability surveys.

Barriers related to learning about bid opportunities. The availability survey asked firms about difficulties learning about work. These questions included difficulties learning about bid opportunities with the City of Alexandria, difficulties learning about bid opportunities in the private sector and difficulties learning about subcontracting or subconsulting opportunities. Results are presented in Figure H-19.

- MBE/WBEs (46%) were more than twice as likely as majority-owned firms (21%) to report difficulties learning about bid opportunities with the City of Alexandria.
- Considerably more minority- and woman-owned firms (40%) indicated difficulties learning about bid opportunities in the private sector when compared to majority-owned firms (9%).
- Minority- and woman-owned firms (47%) were more than three times as likely as majority-owned firms (15%) to report difficulties learning about subcontracting or subconsulting opportunities.

Figure H-19.
Responses to availability survey question concerning difficulties learning about bid or contract opportunities, Central Louisiana MBE/WBEs and majority-owned firms



Note: "MBE/WBE" represents minority-owned firms and white women-owned firms, "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2020 availability surveys.

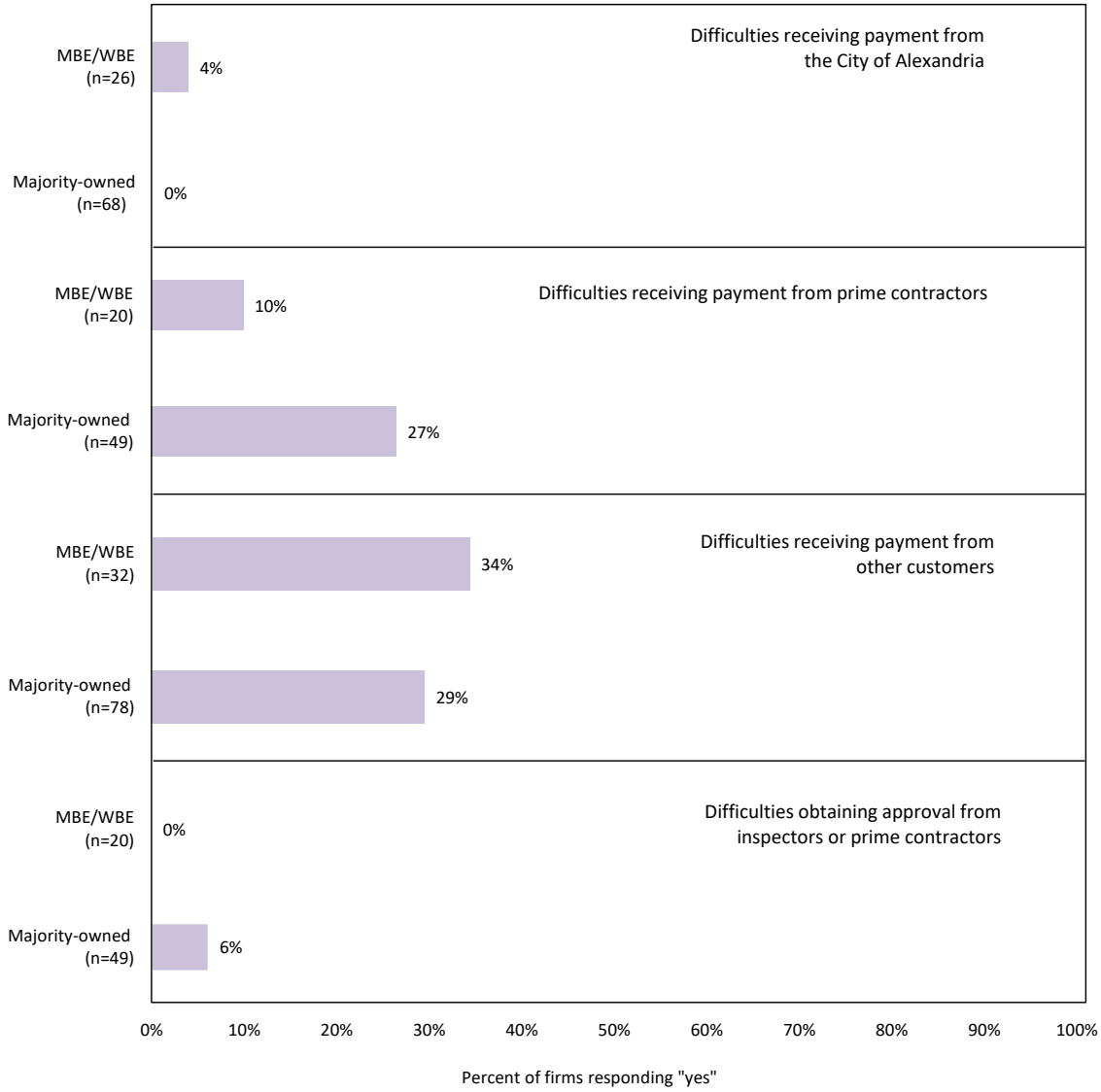
Barriers related to receiving payment for projects. In the availability survey, firms were asked about difficulties with the following:

- Receiving payment from the City of Alexandria;
- Receiving payment from prime contractors;
- Receiving payment from other customers; and
- Obtaining approval from inspectors or prime contractors.

Results are presented in Figure H-20 presents these results. Few firms reported difficulties receiving payment from the City of Alexandria. (although few reported such difficulties) and difficulties receiving payment from other customers when compared to majority-owned firms.

When compared with MBEs and WBEs, relatively more majority-owned firms indicated difficulties receiving payment from prime contractors and difficulties obtaining approval from inspectors or prime contractors.

Figure H-20.
Responses to availability survey question concerning difficulties receiving payment, Central Louisiana MBE/WBEs and majority-owned firms



Note: "MBE/WBE" represents minority-owned firms and white women-owned firms, "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2020 availability surveys.

Summary

The study team used the 2010 SBA study of minority business dynamics to examine business closures, expansions and contractions. That study found that, between 2002 and 2006, 27 percent of privately held businesses in Central Louisiana that were nonminority-owned had expanded their employment, 26 percent had contracted and 30 percent had closed. In comparison:

- African American- and Asian American-owned firms were less likely to expand.
- Asian American-owned firms were more likely to contract.
- Hispanic American-, Asian American- and African American-owned businesses were more likely to close than non-Hispanic white-owned firms.

The study team used data from several different sources to analyze business receipts and earnings for businesses owned by minorities and women.

- In general, analysis of U.S. Census Bureau data from the 2012 Survey of Business Owners showed lower average receipts for businesses owned by racial and ethnic minorities and women in Louisiana than businesses owned by non-minorities or men. National data indicated that these general patterns persist across the study industries.
- Data from 2014–2018 American Community Survey indicated that, in Central Louisiana:
  - Business owners who were racial and ethnic minorities reported lower earnings than non-Hispanic white business owners in all study industries (a statistically significant difference); and
  - Women business owners had lower earnings than men (this difference was also statistically significant).
- Regression analyses using U.S. Census Bureau data for business owner earnings indicated that there were statistically significant negative effects of race and gender on business earnings in Central Louisiana in the study industries.
- Data from availability surveys conducted for this study showed that more than 80 percent of MBE/WBEs reported annual gross revenue of less than $500,000 as compared to only 53 percent of majority-owned firms reporting similar revenues.
- There was some evidence that MBEs and WBEs have somewhat lower bid capacity than majority-owned firms after controlling for subindustry.

Answers to questions concerning marketplace barriers in the availability survey indicated that among all study industries combined, relatively more MBEs and WBEs than majority-owned firms face difficulties related to the following barriers:

- Being prequalified;
- Insurance requirements;
- Large project size;
- Learning about bid opportunities with the City of Alexandria;
- Learning about bid opportunities in the private sector;
- Learning about subcontracting or subconsulting opportunities;
- Receiving payment from the City of Alexandria; and
- Receiving payment from other customers.

In summary, analyses of many different data sources and measures indicate evidence of disparities in some marketplace outcomes and some evidence of barriers for firms owned by minorities and women in the Central Louisiana marketplace.

APPENDIX I.
Description of Data Sources for Marketplace Analyses

To perform the marketplace analyses presented in Appendices E through H, the study team used data from a range of sources, including:

- The 2014–2018 five-year American Community Survey (ACS), conducted by the U.S. Census Bureau;
- The 2012 Survey of Business Owners (SBO), conducted by the U.S. Census Bureau;
- The 2016 Annual Survey of Entrepreneurs (ASE), conducted by the U.S. Census Bureau;
- The 2018 Annual Business Survey (ABS), conducted by the U.S. Census Bureau; and
- Home Mortgage Disclosure Act (HMDA) data provided by the Federal Financial Institutions Examination Council (FFIEC).

The following sections provide further detail on each data source, including how the study team used it in its marketplace analyses. (See Appendix D for a description of the availability survey.)

U.S. Census Bureau American Community Survey PUMS Data

Focusing on the study industries, Keen Independent used PUMS data to analyze:

- Demographic characteristics;
- Measures of financial resources; and
- Self-employment (business ownership).

PUMS data offer several features ideal for the analyses reported in this study, including historical cross-sectional data, stratified national and local samples, and large sample sizes that enable many estimates to be made with a high level of statistical confidence, even for subsets of the population (e.g., racial/ethnic and occupational groups).

The study team obtained selected Census and ACS data from the Minnesota Population Center's Integrated Public Use Microdata Series (IPUMS). The IPUMS program provides online access to customized, accurate datasets.[1] For the analyses contained in this report, the study team used the 2014–2018 five-year ACS sample.

[1] Ruggles, S., Flood, S., Goeken, R., Grover, J., Meyer, E,, Pacas, J., and Sobek, M., IPUMS USA: Version 9.0 [dataset]. Minneapolis, MN: IPUMS, 2019. https://doi.org/10.18128/D010.V9.0

2014–2018 American Community Survey. The study team examined ACS data obtained through IPUMS. The U.S. Census Bureau conducts the ACS which uses monthly samples to produce annually updated data for the same small areas as the 2000 Census long form.[2] Since 2005, the Census has conducted monthly surveys based on a random sample of housing units in every county in the U.S. Currently, these surveys cover roughly 1 percent of the population per year. The 2014–2018 ACS five-year estimates represent average characteristics over the five-year period of time and correspond to roughly 5 percent of the population. For Central Louisiana, the 2014–2018 ACS dataset includes 18,696 observations which — according to person-level weights — represent about 305,00 individuals.

Categorizing individual race/ethnicity. To define race/ethnicity, the study team used the IPUMS race/ethnicity variables — RACED and HISPAN — to categorize individuals into seven groups:

- African American;
- Asian-Pacific American;
- Subcontinent Asian American;
- Hispanic American;
- Native American;
- Other minority (unspecified); and
- Non-Hispanic white.

The study team created the race definitions using a rank ordering methodology similar to that used in the 2000 Census data dictionary. An individual was considered "non-Hispanic white" if they did not report Hispanic ethnicity and indicated being white only — not in combination with any other race group. Using the rank ordering methodology, an individual who identified multiple races or ethnicities was placed in the reported category with the highest ranking in the study team's ordering. African American is first, followed by Native American, Asian-Pacific American, and then Subcontinent Asian American. For example, if an individual identified herself as "Korean," she was placed in the Asian-Pacific American category. If the individual identified herself as "Korean" in combination with "Black," the individual was considered African American.

- The Asian-Pacific category included the following race groups: Burmese, Cambodian, Chamorro, Chinese, Fijian, Filipino, Guamanian, Hmong, Indonesian, Japanese, Korean, Laotian, Malaysian, Mongolian, Samoan, Taiwanese, Thai, Tongan and Vietnamese. This category also included other Polynesian, Melanesian and Micronesian races, as well as individuals identified as Pacific Islanders.

[2] U.S. Census Bureau. *Design and Methodology: American Community Survey*. Washington D.C.: U.S. Government Printing, 2009. Available at https://www.census.gov/content/dam/Census/library/publications/2010/acs/acs_design_methodology.pdf

- The Subcontinent Asian American category included: Asian Indian (Hindu), Bangladeshi, Bhutanese, Nepalis, Pakistani and Sri Lankan. Individuals who identified themselves as "Asian," but who were not clearly categorized as Subcontinent Asian, were placed in the Asian-Pacific American group.

- American Indian, Alaska Native, Native Hawaiian and Latin American Indian groups were considered Native American.

- If an individual was identified with any of the above groups and an "other race" group, the individual was categorized into the known category. Individuals identified as "other race," "Hispanic and other race" or "white and other race" were categorized as "other minority."

For some analyses — those in which sample sizes were small — the study team combined minority groups.

Education variables. The study team used the variable indicating respondents' highest level of educational attainment (EDUCD) to classify individuals into four categories: less than high school, high school diploma (or equivalent), some college or associate degree, and bachelor's degree or higher.[3]

Home ownership and home value. Rates of home ownership were analyzed using the RELATED variable to identify heads of household and the OWNERSHPD variable to define tenure. Heads of households living in dwellings owned free and clear, and dwellings owned with a mortgage or loan (OWNERSHPD codes 12 or 13) were considered homeowners. Median home values are estimated using the VALUEH variable, which reports the value of housing units in contemporary dollars. In the 2014–2018 ACS, home value is a continuous variable (rounded to the nearest $1,000) and median estimation is straightforward.

Definition of workers. Analyses involving worker class, industry and occupation include workers 16 years of age or older who are employed within the industry or occupation in question. Analyses involving all workers regardless of industry, occupation or class include both employed persons and those who are unemployed but seeking work.

[3] In the 1940–1980 samples, respondents were classified according to the highest year of school completed (HIGRADE). In the years after 1980, that method was used only for individuals who did not complete high school, and all high school graduates were categorized based on the highest degree earned (EDUC99). The EDUCD variable merges two different schemes for measuring educational attainment by assigning to each degree the typical number of years it takes to earn it.

Business ownership. The study team used the Census-detailed "class of worker" variable (CLASSWKD) to determine self-employment. The variable classifies individuals into one of eight categories, shown in Figure I-1. The study team counted individuals who reported being self-employed — either for an incorporated or a non-incorporated business — as business owners.

Figure I-1.
Class of worker variable code in the 2014–2018 ACS

Source:
Keen Independent Research from the IPUMS program: http://usa.ipums.org/usa/.

Description	2014–2018 ACS CLASSWKRD codes
N/A	0
Self-employed, not incorporated	13
Self-employed, incorporated	14
Wage/salary, private	22
Wage/salary at nonprofit	23
Federal government employee	25
State government employee	27
Local government employee	28
Unpaid family worker	29

Business earnings. The study team used the Census "business earnings" variable (INCBUS00) to analyze business income by race/ethnicity and gender. The study team included business owners age 16 and over with positive earnings in the analyses.

Study industries. The marketplace analyses focus on four industries: construction, professional services, goods and other services. The study team used the IND variable to identify individuals as working in one of these industries. That variable includes several hundred industry and sub-industry categories. Figure I-2 identifies the IND codes used to define each study area.

Figure I-2.
2014–2018 Census industry codes used for construction, professional services, goods and other services

Study industry	2014–2018 ACS IND codes	Description
Construction	0770	Construction industry
Professional services	7270–7490	Professional, scientific and technical services
Goods	4070–4590, 4670–5790	Wholesale trade; retail trade
Other services	7580–7790, 8770–9290	Administrative and support and waste management services; other services, except public administration

Source: Keen Independent Research from the IPUMS program: http://usa.ipums.org/usa/.

Industry occupations. The study team also examined workers by occupation within the construction industry using the PUMS variable OCC. Figure I-3 summarizes the 2014–2018 ACS OCC codes used in the study team's analyses.

Figure I-3.
2014–2018 ACS occupation codes used to examine workers in construction

2014–2018 ACS occupational title and code	Job description
Construction managers 2014-18 Code: 20, 220	Plan, direct, or coordinate, usually through subordinate supervisory personnel, activities concerned with the construction and maintenance of structures, facilities, and systems. Participate in the conceptual development of a construction project and oversee its organization, scheduling, budgeting, and implementation. Includes managers in specialized construction fields, such as carpentry or plumbing. Include general superintendents, project managers and constructors who manage, coordinate and supervise the construction process.
First-line supervisors 2014-18 Code: 6200	Directly supervise and coordinate the activities of construction or extraction workers.
Carpenters 2014-18 Code: 6230	Construct, erect, install, or repair structures and fixtures made of wood and comparable materials, such as concrete forms. Build frameworks, including partitions, joists, studding, and rafters; and wood stairways, window and door frames, and hardwood floors.
Construction laborers 2014-18 Code: 6260	Perform tasks involving physical labor at construction sites. May operate hand and power tools of all types: air hammers, earth tampers, cement mixers, small mechanical hoists, surveying and measuring equipment, and a variety of other equipment and instruments. May clean and prepare sites, dig trenches, set braces to support the sides of excavations, erect scaffolding, and clean up rubble, debris, and other waste materials. May assist other craft workers. Construction laborers who primarily assist a particular craft worker are classified under "Helpers, Construction Trades."
Construction equipment operators 2014-18 Code: 6305	Drive, maneuver or control the heavy machinery used to construct roads, buildings and other structures. Includes surfacing and tamping equipment operators, pile-driver operators, operative engineers and other construction equipment operators.
Electricians 2014-18 Code: 6355	Install, maintain, and repair electrical wiring, equipment, and fixtures. Ensure that work is in accordance with relevant codes. May install or service street lights, intercom systems or electrical control systems.
Plumbers, pipefitters and steamfitters 2014-18 Code: 6442	Assemble, install, alter, and repair pipelines or pipe systems that carry water, steam, air, or other liquids or gases. May install heating and cooling equipment and mechanical control systems. Includes sprinkler fitters.

Survey of Business Owners (SBO)

The study team used data from the 2012 SBO to analyze mean annual firm receipts. The U.S. Census Bureau conducted the SBO every five years but stopped after 2012. Response to the survey is mandatory, which ensures comprehensive economic and demographic information for business and business owners in the U.S. All tax-filing businesses and nonprofits were eligible to be surveyed, including firms with and without paid employees. In 2012, approximately 1.75 million firms were surveyed. The study team examined SBO data relating to the number of firms, number of firms with paid employees, and total receipts. That information is available by geographic location, industry, gender, race and ethnicity.

The SBO uses the 2002 North American Industry Classification System (NAICS) to classify industries. The study team analyzed data for firms in all industries and for firms in selected industries that corresponded closely to construction, architecture and engineering, and food, beverage and selected retail.

To categorize the business ownership of firms reported in the SBO, the Census Bureau uses standard definitions for women-owned and minority-owned businesses. A business is defined as women-owned if more than half of the ownership and control is by women. Firms with joint male-/female-ownership were tabulated as an independent gender category. A business is defined as minority-owned if more than half of the ownership and control is by African Americans, Asian Pacific or Native Hawaiians, Subcontinent Asian Americans, Hispanic Americans, American Indian or Alaska Native or by another minority group. Respondents had the option of selecting one or more racial groups when reporting business ownership. Racial categories are not available by both race and ethnicity, so race and ethnicity were analyzed independently. The study team reported business receipts for the following racial, ethnic and gender groups according to Census Bureau definitions:

- Racial groups — African Americans, Asian Americans, Asian Pacific or Native Hawaiians, Subcontinent Asian American, American Indian or Alaska Native, other minority groups and whites.
- Ethnic groups — Hispanic Americans and non-Hispanics.
- Gender groups — men and women.

Annual Survey of Entrepreneurs (ASE) Data

Keen Independent analyzed selected economic and demographic characteristics for business owners collected through the ASE. The ASE includes nonfarm businesses that file tax forms as individual proprietorships, partnerships or any type of corporation, have paid employees, and have receipts of $1,000 or more. Unlike the SBO, the ASE samples only firms with paid employees (the SBO includes both employer firms and non-employer firms). The 2016 ASE sampled approximately 290,000 businesses that operated at any time during that year. Response to the survey is mandatory, ensuring comprehensive data for surveyed businesses and business owners.

The ASE collects information on businesses as well as business ownership (defined as having 51 percent or more of the stock or equity in the business). Data regarding demographic characteristics of business owners include gender, ethnicity, race and veteran status. Race/ethnicity and gender categories in the ASE are the same as those used in SBO and Census data. Because ethnicity is reported separately and respondents have the option of selecting one or more racial groups when reporting business ownership, all ASE calculations use non-mutually exclusive race/ethnicity definitions.

Topics within the ASE include some business information covered in the SBO, as well as information relating to the businesses' sources of capital and financing. Keen Independent used ASE data to analyze main sources of capital used to start or acquire a firm, firms that secured business loans from a bank or financial institution, firms that avoided additional financing because they did not think the business would be approved by lender, and firms that cited access to financial capital as negatively impacting the profitability of their business. Analyses included comparisons across race/ethnicity and gender groups.

Annual Business Survey (ABS) Data

Keen Independent used 2018 ABS data to examine sources of capital used to start or acquire a business. The 2018 Annual Business Survey (ABS) is a recent collaborative effort between the Census Bureau and the National Science Foundation (NSF). The ABS includes a variety of topics, as it replaces both the ASE and SBO, as well as the Business R&D and Innovation for Microbusiness (BRDI-M) and the innovation section of the Business R&D and Innovation Survey (BRDI-S) surveys. However, the marketplace analyses continue to use data from the ASE and SBO because the 2018 ABS data released for public use is limited and does not provide sufficient detail for the analyses.

The 2018 ABS data were collected in 2018 but refer to conditions in 2017. The ABS includes all nonfarm employer businesses filing the 941, 944, or 1120 tax forms. This survey is conducted on a company or firm basis rather than an establishment. The 2018 ABS sampled approximately 300,000 businesses that operated at any time during that year. Response to the survey is mandatory, ensuring comprehensive data for surveyed businesses and business owners.

Like the ASE, the ABS collects business ownership information. Data regarding demographic characteristics of business owners include gender, ethnicity, race and veteran status. Race/ethnicity and gender categories provided in the ABS are the same as those provided in ASE, SBO and Census data.

Home Mortgage Disclosure Act (HMDA) Data

The study team analyzed mortgage lending in Louisiana using HMDA data that the Federal Financial Institutions Examination Council (FFIEC) provides. HMDA data provide information on mortgage loan applications that financial institutions, savings banks, credit unions and some mortgage companies receive. Those data include information about the location, dollar amount and types of loans made, as well as race/ethnicity, income and credit characteristics of loan applicants. Data are available for home purchase, home improvement and refinance loans.

Depository institutions were required to report 2018 HMDA data if they had assets of more than $45 million on the preceding December 31 ($42 million for 2013 and $44 million for 2017), had a home or branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Non-depository mortgage companies were required to report HMDA if they were for-profit institutions, had home purchase loan originations (including refinancing) either a.) exceeding 10 percent of all loan originations in the past year or b.) exceeding $25 million, had a home or branch office in an MSA (or received applications for, purchase or originate five or more mortgages in an MSA), and either had more than $10 million in assets or made at least 100 home purchase or refinance loans in the preceding calendar year.

The study team used those data to examine differences in racial and ethnic groups for loan denial rates and subprime lending rates in 2013, 2017 and 2018. Note that the HMDA data represent the entirety of home mortgage loan applications reported by participating financial institutions in each year examined. Those data are not a sample. Appendix G provides a detailed explanation of the methodology that the study team used for measuring loan denial and subprime lending rates.

APPENDIX J.
Qualitative Information from In-depth Interviews, Availability Survey, Focus Groups and Other Public Comments

Appendix J presents qualitative information that Keen Independent collected as part of the disparity study. It is based on anecdotal input from nearly 220 businesses, trade association representatives, business assistance providers, City of Alexandria staff and others. Appendix J includes:

A. Introduction and methodology;
B. Background on the firm and industry;
C. Keys to business success;
D. Prime-subcontractor relationships;
E. Working on projects with the City of Alexandria;
F. Whether there is a level playing field in the City of Alexandria marketplace;
G. Insights regarding contract goals, business assistance programs and certification; and
H. Any other insights and recommendations for the City of Alexandria.

A. Introduction and Methodology

From May 2020 through March 2021, the Keen Independent study team gathered input from in-depth interviews and open-ended responses from telephone, online and fax availability surveys.

The study team also collected additional public comments through the study website, telephone hotline and email address hosted by Keen Independent, as well as mail.[1] A study fact sheet was posted to the website and available for sharing to the public.

Keen Independent conducted three focus groups with City of Alexandria representatives familiar with City procurement and business services initiatives. Throughout the study period, Keen Independent met and regularly communicated with City of Alexandria leadership and key staff. Additionally, the study team met with Mayor Jeffrey W. Hall on March 10, 2020 and again on March 31, 2021.

Through in-depth interviews, availability surveys, three focus groups and the public comment process, business owners, trade association representatives and others had the opportunity to discuss their experience with construction, professional services, goods and other services; experiences working with City of Alexandria and other public agencies; perceptions of certification programs; and other topics important to them.

[1] https://www.keenindependent.com/alexandrialadisparitystudy; (318) 261-8923; AlexandriaLaDisparityStudy@keenindependent.com.

For anonymity of interviewees, Keen Independent coded in-depth interviews from businesses as #I-01, #I-02 and so on. Responses from trade associations/organizations and other business assistance providers are coded as "#TO." Open-ended responses analyzed from availability survey respondent comments and focus group participants are coded as "#AS" and "#FG," respectively.

B. Background on the Firm and Industry

The Keen Independent study team asked business owners to report on their business history and industry. Topics included:

- Business history;
- Barriers to industry entry and starting, sustaining and growing a business;
- Geographic scope, opportunities and any changes over time;
- Business size, and any expansion and contraction over time;
- Size of contracts and changes over time;
- Public or private sector work;
- Prime or subcontractor/subconsultant; and
- Current economic conditions in the City of Alexandria marketplace.

Business history. The Keen Independent study team asked business owners and representatives about their business start-up history and any barriers they faced at business launch and beyond.

Many business owners reported working in the industry, or a related industry, before starting their firms. [e.g., #I-01, #I-05, #I-06, #I-07, #I-09, #I-15, #I-18, #TO-02] For example:

- When discussing business history, an African American owner of a DBE professional services firm reported that he became a partner in the mid-2000s and is now the sole owner. He added, "I was fortunate enough to get into an established business" with opportunity to take a leadership role. [#I-03]

- An African American owner of a specialty services firm indicated that his partner and he began their company in the late 1990s after retiring from careers with a publicly traded company in the same field. He added that the firm began working with the City in the late 1990s through a referral by a competitor who could not complete a job. [#I-04b]

- The Hispanic American woman owner of a construction-related firm reported that she had to close a business she owned in another state during the Great Recession before moving to Central Louisiana and starting her current business. [#I-17a]

One minority women business representative reported no previous experience in the current industry. Working in an unrelated industry, An African American woman business representative of a certified goods and services firm reported that the start of the firm was more of a desire to "… sell a thing … that everybody needs." [#I-20]

Barriers to industry entry and starting, sustaining and growing a business. Business owners and representatives described many different experiences regarding barriers they faced at start-up and beyond.

Some reported challenges that included barriers to entry into the industry as well as lack of experience and business acuity at start up and beyond. For example:

- When interviewed, an African American part owner of a construction-related firm remarked that there are "always barriers of entry in [my] industry." [#I-01]

- "New firms face challenges in accessing capital, [gaining] experience, how to market their firms, proposal writing and' who you know,"' commented the representative of a trade association. [#TO-02]

- A white woman owner of a specialty services firm reported that there was a "learning curve" to understanding the operations and purchasing side of the industry. She added that she prepared herself for what she described as "a man's world." She remarked, "You don't get any training … [it's] sink or swim." [#I-08]

- "Lack of experience caused challenges at start-up," commented an African American woman representative of a certified goods and services firm. [#I-20]

  The same business representative added that due to lack of experience, "… people sort of looked 'cockeyed' at her." [#I-20]

- The African American owner of a specialty services firm reported that he "tapped his 401k" and started his business after Hurricane Katrina hit Louisiana. He added, "I didn't know anything …. I just knew how to do the work." [#I-06]

- When asked if there were any challenges at the outset, the African American co-owner of a specialty services firm reported that he had signed a two-year non-compete contract with his previous employer, which initially "handicapped" the firm. [#I-04b]

Several women businesses owners reported "time" as a challenge. For example, three women business owners indicated that they were time-challenged. One explained, "[Even] 30 to 45 minutes is hard to spare." [#I-13, #I-14, #I-20]

Some business owners and representatives reported difficulties specific to people of color or women starting businesses in the marketplace. [e.g., #FG-13, #TO-01] Comments include:

- "As an independent, minority-, female-, Black-owned business … you tend to run into barriers," commented an African American woman owner of a professional services firm when asked about barriers in the marketplace. [#I-18]

- An African American man and co-owner of a specialty services firm commented that the start-up process was difficult, particularly as an African American owner of a small business. He attributed these race-based barriers to the dynamics of American society that continue to systemically disadvantage people of color and women. "It's two different processes," he remarked, referring to the differences between how white men and people of color and women are treated. [#I-04b]

- "We've had our share of hardship from being a [minority woman-owned business]," remarked the Hispanic woman owner of a construction-related firm. [#I-17a]

A few business owners and representatives reported that competition from more established firms or non-local businesses was challenging. Some remarked that larger and more established firms benefit from long-standing relationships and connections that smaller, newer firms do not have. [e.g., #AS-09, #AS-31] For example:

- "There are three large firms that usually get the larger projects," remarked a representative of a local trade association when asked about barriers. [#TO-03]

- A white man and owner of a construction-related firm reported that it can be "hard to break in" to the local market for smaller firms. [#I-07]

- "Tight market, a lot of competition. We are a union shop, we are competing with contractors outside the city and state for work," remarked a representative of a majority-owned construction-related firm when surveyed. [#AS-04]

- "This is a small market …. For the volume of work here, there is an abundance of competition," commented the African American part owner of a construction-related firm. [#I-01]

Some business owners and representatives indicated that they had difficulty hiring qualified employees. A number reported a limited pool of qualified employees in the marketplace. Examples include:

- A white owner of a specialty services firm indicated that it is difficult to find dedicated and qualified staff in his line of work. [#I-12]

- When interviewed, a representative of a local chapter of a trade association reported, "The biggest challenge in starting [in this industry] in Alexandria now would be finding personnel." [#TO-03]

Restrictive regulations, insurance and permitting requirements and taxes caused challenges for a number of business owners and representatives. Some reported how government policies affected their firms. [e.g., #AS-05, #AS-18] Some examples follow:

- When surveyed, a representative of a woman-owned construction-related firm remarked, "Louisiana is not a company-friendly state." [#AS-17]

- "Government outreach is too much; [the] government wants to be involved too much," reported a white owner of a construction-related firm. [#AS-25]

- "Permitting [is a barrier]," commented a white woman representative of a construction-related firm. A white man and owner of a specialty services firm stated that insurance and licensing requirements can be overly restrictive. [#I-10, #I-12]

- "Tax burden [is] too high. Taxes are too high in Alexandria," commented a representative of a woman-owned goods and services firm. [#AS-08]

Many small businesses interviewed have limited access to capital and bonding. Some interviewees indicated that finance and bonding challenges limited opportunities in their respective industries. For example:

- When interviewed, one African American representative of a trade organization reported that access to capital and insurance requirements are the biggest issues based on his previous experience. An African American owner of a specialty services firm reported that access to capital is particularly difficult for new business owners. [#TO-04, #I-06]

- An African American part owner of a construction-related firm indicated that barriers in the marketplace include "bonding" limits and "access to capital." He added that the types and sizes of contracts he pursues in the region are determined by his access to bonding, capital and "human capital" and that he needs to increase his opportunities to pursue local work to succeed. [#I-01]

- The representative of a chamber of commerce commented, "The biggest challenge for a business owner would be their access to capital, which is mostly the case for minority-owned businesses [as they often do not have a relationship with a bank or a lender willing to finance the business] … she added that the Chamber offers coaching to businesses before they go to seek capital …. If the venture is too grand, the Chamber will refer them to another business for coaching in that area." [#TO-01]

- "Biggest challenges are access to capital (and relationships with clientele)," commented one representative of a trade association. [#TO-05]

- Regarding disadvantages, the white woman owner of a specialty services firm indicated that access to financial backing is an advantage for larger franchises. She added, "I don't have the ability to go to the bank and borrow as much money …." [#I-08]

Several small business owners and representatives spoke of lending practices that disadvantaged businesses owned by people of color and women or other small businesses. Examples follow:

- One business service provider indicated that access to capital is particularly challenging for minority- and woman-owned firms. A representative of a chamber of commerce commented that access to capital is particularly challenging for minority-owned businesses that are disadvantaged by lenders unwilling to finance their businesses. [#TO-04, #TO-01]

- Responding to a survey, a representative of a majority specialty services firm commented, "I've had the bank say my line of business … is flagged and couldn't give me credit because it's 'up and down' or whatever." [#AS-21]

- An owner of a construction-related firm reported that not being able to build credit made "getting more equipment, more volume, more work" a challenge. [#AS-26]

Some business owners and representatives reported that securing work is a challenge for them. One indicated difficulty securing work as a minority business owner. Another reported the "Catch-22" that the only way to secure work is to have work. Comments include:

- When asked about business success, an African American man and owner of a specialty services firm reported, "It's a challenge. I find it hard as a minority to get the good work." [#I-06]

- When surveyed, an African American woman owner of a goods and services firm remarked, "Apparently the goods that we provide, very few suppliers carry it, and the prices are high. Some of the merchants cannot work with us …." [#AS-32]

- "City of Alexandria, they tend to give it only to people in the City of Alexandria," remarked a representative of a majority professional services firm. [#AS-12]

- "My experience, once I get work, I am awarded other work," commented the white man and owner of a construction-related firm when surveyed. [#AS-15]

A few business owners and representatives reported evidence of "racism" and misogyny in the marketplace that disadvantages businesses owned by people of color and woman. For example:

- "Racism," was a barrier reported by a representative of an African American woman-owned construction-related firm when surveyed. [#AS-10]

- An African American woman representative of a certified goods and services firm commented, "… this is a very male, very white dominated field … in an environment like … Louisiana … where decisions are made primarily by 'who you know.'" [#I-20]

Geographic scope, opportunities and any changes over time. Some business owners and representatives reported working mostly in the City of Alexandria Metropolitan Area. Others expanded their geographic scope to take advantage of available opportunities regionally and beyond. [e.g., #I-05, #I-09, #I-10, #I-15]

For example, a Hispanic American woman owner of a construction-related firm specifically moved to Alexandria to start her firm and do work in the City. [#I-11c] The African American part owner of a construction-related firm reported a wider reach explaining that the location of his work is "based on market availability." [#I-01]]

Business size, and any expansion and contraction over time. Business owners discussed any changes in company size, staffing, capacity and revenue over time. [e.g., #I-10, #I-11c, #I-20] Factors that affect size include work opportunities and market conditions. Some reported staffing up project-by-project or seasonally. Examples include, for instance:

- "If a business is doing well, they will most likely expand. Manufacturers will create new jobs if the products being sold are successful," remarked the representative of a business assistance association. [#TO-01]

- "I plan on expanding the company," remarked the white owner of a goods and services firm. Another white business owner of a specialty services firm commented on his seasonal expansion and contraction remarking that there is greater demand for work in his industry in the summer months than in the colder months. [#AS-02, #I-12]

- "Economic conditions" will determine if the African American woman representative of a certified goods and services firm expands the firm. [#I-20]

Size of contracts and any changes over time. Some business owners reported a range of contract sizes. [e.g., #I-10, #I-11c, #I-20]

Project sizes ranged from$100 to $1 billion. For example:

- "It varies. It can range from $100 … up to $20,000," remarked the African American owner of a DBE-certified professional services firm. [#I-03]

- Regarding contract sizes that members perform, a representative of a trade association reported that members' projects average in the $150,000 range. [#TO-02]

- Giving his own firm as an example, a representative of a local chapter of a trade association reported, "My firm's projects fall between $500,000 and $30 million." [#TO-03]

- A representative of a trade organization reported, "Firms represented are construction and construction-related firms. Their sizes range from $800 million to $1 billion in billing." [#TO-05]

Some reported that their capacity and ability to hire qualified staff is limiting. Others reported pursuing only larger contracts. Comments include:

- When asked how he determines whether to bid on a project, a white owner of a specialty services firm highlighted the importance of "capacity." He remarked that his firm only bids on projects where he has a chance of winning adding that his firm lacks the "manpower to pursue large contracts." [#I-12]

- A white partner at a professional services firm reported that his firm bids on jobs of all sizes, but due to "overhead and efficiency" certain jobs are "too small." He added that residential projects are a good example of projects that are "too small," as they require more staff hours to complete than commercial or municipal projects and tend to yield smaller revenue. [#I-05]

Public or private sector work. Most business owners and representatives interviewed reported working in both public and private sectors. [e.g., #I-03, #TO-01, #TO-03, #TO-05]

Despite working in both sectors, some reported a preference for one sector over the other. For example, the white partner of a professional services firm indicated that the firm seeks both public- and private-sector work but prefers "private over public work any day of the week." When asked to explain, he remarked, "For myself, private-sector clients are people who are playing with their own money … they're much more invested." [#I-05]

Other business owners and representatives reported work primarily in the public sector. [e.g., #I-01, #I-11c] For example:

- When interviewed, the African American part owner of a construction-related firm reported primarily public sector work stating that his firm performs work for the Department of Transportation as well as city and parish governments. [#I-01]

- "The types of projects we work on are mainly public projects for municipalities, state, ports, commercial entities and industrial. Some firms will do private work, as well," commented a representative of a trade association. [#TO-02]

Prime or subcontractor/subconsultant. The study team asked business owners and representatives if they worked as prime contractors, subcontractors or both. Only a few indicated that they or the firms they represent regularly work as both a prime and a sub. [e.g., #I-03, #TO-05]

Current economic conditions in the City of Alexandria marketplace. Overall, business owners and representatives reported unfavorable economic conditions in the City of Alexandria marketplace, some indicated that the COVID-19 pandemic was a contributing factor. For example:

- Regarding economic conditions, the representative of a local chapter of a trade association reported that the local marketplace is "stagnant." [#TO-03]

- "There's no, or at least little, development [and] construction by the City …. north of Alexandria there is no development and that condition creeps into Alexandria," commented the representative of a trade association. [#TO-05]

- When interviewed, the African American part owner of a construction-related firm indicated that due to the current economic conditions his firm is experiencing the combined loss of human capital and slowdown of procurement opportunities. [#I-01]

- The white owner of a construction-related firm commented, "People are not really excited about the City of Alexandria as a place to be …." He indicated that consequently residents have been leaving the City for places due the "almost nonexistent" economic growth in Central Louisiana. [#I-07]

- "It's a very tight market. COVID made it worse …. Rapides Parish had a very high infection rate … the pandemic really hurt everyone … even the big companies, not just me," reported the African American woman representative of a certified goods and services firm. [#I-20]

- The African American woman owner of a professional services firm indicated that the poverty level is high in the area. She added that the COVID-19 crisis has worsened local economic conditions. She indicated that consequently she must seek out players in the marketplace with an ability to pay more. [#I-18]

- A white woman owner of a specialty services firm reported that she employed two part-time employees prior to the COVID-19 pandemic. She added that the pandemic forced her to lay them off. [#I-08]

  The same business owner remarked, "When the economy took a turn in March, it was pretty quick [to affect] the [industry] …. This year we all had to scale back. Budgeting has always been a key." She added, "I knew in the back of my mind when I saw [the economy] take a dip that we needed to pull the reins back, that we had to make some decisions … I didn't want to put my family in financial jeopardy." [#I-08]

- The white partner of a professional services firm reported that projects in the local marketplace tend to be infrequent and "smaller." He added that there are lulls in business when his firm has "no work" in the City. The white owner of a specialty services firm reported a $100,000 drop in sales this year when compared to the previous year. [#I-05, #I-12]

As a result of the past political climate in Alexandria, one business owner indicated that he had been shut out from securing work with the City of Alexandria. A white partner of a small professional services firm reported that his company does not do business with the City. He explained that the company had been denied opportunities during the past administration due to the firm's non-participation in political donations. [#I-05]

Many business owners and representatives reported that the pandemic and subsequent recession had negatively affected small businesses in the marketplace. [e.g., #AS-20, #I-15] Comments include:

- "Overall economic health [is a barrier]," commented the part owner of a majority professional services firm when surveyed. [#AS-11]

- Regarding hiring and expanding her firm, the white woman owner of a specialty services firm reported that she had plans grow her business and hire more employees but has been unable to do so since the pandemic began in March 2020. [#I-08]

- A white owner of a goods and services firm commented, "If you travel to the small towns of the USA, you will see small stores closed … with the virus they are finding that out." [#AS-23]

- The white owner of a construction-related firm reported that the COVID-19 pandemic has "not been good for anybody" in Alexandria. He indicated that during this time, his firm has experienced supply chain availability issues and potential clients "hunker[ing] down" and putting a hold on contracts or larger projects. He added that the city marketplace "hadn't been doing too great" before the pandemic. [#I-07]

- "COVID-19 has had a tremendous impact on the City of Alexandria, specifically for small businesses …. These small businesses had to determine whether they were going to permanently close their doors or keep their doors open, which was usually determined through whether they gained a loan passed in the CARE Act," remarked a representative of a chamber of commerce. [#TO-01]

  The same representative commented, "Essential businesses which have remained open and have needed additional workers have sought out the [chamber of commerce] to advertise those job openings to the public." [#TO-01]

- "There is tremendous concern for 2021 because of COVID-19. The shutdown of business and industry to restrict the spread of the virus makes future tax revenue and funding in doubt," stated a representative of a trade association, regarding the future after COVID-19. [#TO-05]

Some business owners and representatives reported that their firms had not been affected by the pandemic; some even saw improvements. [e.g., #I-04a, #I-04b, #I-11c] Comments include:

- With multiple hurricanes hitting Louisiana and the COVID-19 pandemic, a white owner of a professional services firm remarked that his firm is "thankfully doing better than most of [the firm's] competition." He added, "Things have slowed down a bit, but not too badly. We have been staying pretty busy. Their bad luck is our fortune." [#I-09]

- "Generally, during election years like 2020, our business is extremely slow. Construction just slows to a snail's pace. 2020 started out in January as being very slow …. In February it started to pick up, then COVID hit," remarked the white woman representative of a construction-related firm. [#I-10]

  She added, "We thought, 'Man, this is going to kill our business,' but actually it picked up … a whole lot, and it wasn't just our business it was other … firms in this area as well. Then … in August, Hurricane Laura hit, and since then it has just been constant non-stop work." [#I-10]

- An African American owner of a specialty services firm commented that the pandemic has not negatively affected his business. He added, "As a matter of fact, through this COVID-thing, I've had probably one of the better years that I've had." [#I-06]

  When asked if COVID-19 has changed how he performs his work, the same business owner indicated that he performs business as usual with clients remaining at a safe distance as he works. [#I-06]

C. Keys to Business Success

The study team asked business owners and representatives to describe factors that contribute to business success. They were asked generally about what gives one firm in the industry an advantage over another. Topics include:

- Strong business plan;
- Relationships;
- Quality work;
- Employees;
- Financing, capital and bonding;
- Insurance.
- Fair pricing and credit;
- Equipment;
- Profit; and
- Other keys to business success.

Strong business plan. A few interviewees reported that a strong business plan and sound management led to their business success. [e.g., #I-15, #I-20] For example:

- The African American owner of a DBE-certified professional services firm stated that a good business plan helps a business "sustain a viable business … keep the doors open." [#I-03]

- The representative of a chamber of commerce commented, "Having access to capital and or a loan can be difficult for a small business to gain unless they have a solid business plan and good credit." [#TO-01]

Relationships. Most business owners and representatives indicated that success was achieved through relationship building with lenders, customers and other business owners, as well as securing repeat customers. [e.g., #I-01, #I-04 #I-10, #I-11c, #I-12, #I-15, #I-20]

Building relationships and connections. When seeking to build relationships, a number of business owners reported that older, more established firms have an advantage over newer, less established firms that have limited "contacts" and client base. For example:

- "Pairing women- and minority-owned businesses with coaches who can help them to forge relationships with lenders is key," commented a local chamber of commerce representative. [#TO-01]

- When interviewed, an African American part owner of a construction-related firm indicated that business connections give firms an advantage. He explained that older companies have more "connections and can connect to more capital." [#I-01]

- The white owner of a specialty services firm indicated that personal relationships are important to business success. He added that a firm has an advantage in his field if that business has built "contacts" and is well-liked by its customers. [#I-12]

- Regarding advantages, the white owner of a construction-related firm indicated that older firms with a trusted presence in the marketplace have an advantage over smaller, lesser-known firms. [#I-07]

  He added that firms that maintain relationships with past clients have an advantage over those that have not had the opportunity to build long-term relationships. He added that when bids are limited, firms can turn to old clients they have relationships with for more work. [#I-07]

- "I'm a service business, so relationships with customers [and] others are key. That's what draws people to your business …. If you've got a good relationship with people, not only will they come, but they're going to refer other people … so that's key," remarked the African American woman owner of a professional services firm. [#I-18]

- "Relationships developed between firms is an advantage. The more "contacts" and "relationships," the better chance of the prime calling on the sub to submit a bid and contract with them," remarked a representative of a trade association. [#TO-05]

Marketing and networking. Trade association representatives reported on the importance of strong marketing and networking for business success and retaining high quality businesses in City of Alexandria. For example, the white woman owner of a specialty services firm indicated that marketing, sales, outreach and customer trust are key to a firm's success, especially for new and smaller businesses. She remarked, "Some people think that just because you open up a business that customers will just flock to you … 'that's not the real world.'" The same business owner commented that building trust with customers is crucial for success. [#I-08]

Mentoring and coaching. A few described coaching as a benefit to minority- and woman-owned businesses. For example, a representative of a chamber of commerce commented, "Pairing women- and minority-owned businesses with "coaches" who can help them to forge relationships with lenders [and other resource providers] is key." [#TO-01]

Quality work. Many reported keys to business success as maintaining quality work, reputation and good customer service. [e.g., #I-20] Comments include:

- An African American owner of a DBE-certified professional services firm indicated that providing good customer service and a timely response are key ingredients to business success. [#I-03]

- The white woman owner of a specialty services firm commented that "the bottom line" is an important measure of success. She added, "Success is also measured by the feeling that I have when people walk out the door and they're very satisfied with not only the product that I sell them but the service … I serve a lot of women …. A lot of them feel like they've been taken advantage of by other places. I'm very honest. I always let them know upfront … what they're buying." [#I-08]

- An African American owner of a professional services firm reported that offering a good return on investment is important to his firm's success. [#I-15]

- The Hispanic woman owner of a construction-related firm remarked, "We're trustworthy … transparent and honorable. What we tell them we're going to do, we do it. We return a phone call no matter what time it is …. I don't care if it is during storm season or if it's a regular day …. We're always going to respond." [I-11c]

  The same business owner remarked, "Speak up and tell the truth … let your work prove who you are and just keep going." [#I-11c]

- "Yes, this company has been successful …. We make sure that our employees that are on the job site do a job quickly and efficiently, professionally. We make sure that our customers are left with a project that they can be proud of and those customers, in turn, tell other people about us and those people come to us," commented a white woman representative of a construction-related firm. [#I-10]

- "Dedication to doing a really good job," reported a white partner of a professional services firm. He added that because most of his firm's projects are derived from repeat clients, it is a necessity that quality of work and dedication remain paramount. [#I-05]

- A white owner of a construction-related firm reported that, as a family-owned business, it is essential to deliver a quality product, maintain profitability, and build a firm that will be a "legacy" he can pass on to his kids. He added that his firm has been successful because the firm is led by "good … guys" who are honest and provide quality products and services. [#I-07]

Employees. Many business owners and representatives reported or indicated that qualified staff contributed significantly to business success.

Business owners and representatives reported the importance of both recruiting qualified workers and maintaining them. Many of these interviewees indicated that recruiting and sustaining employees was a challenge as once trained they leave for larger firms or other higher paying industries. [e.g., #I-04, #I-11c, #TO-02, #AS-13, #AS-14, #AS-27, #AS-28, #AS-29, #AS-30] Examples follow:

- One African American owner of a professional services firm reported that hiring the wrong people can be a barrier to success. An African American part owner of a construction-related firm indicated that limited manpower is a barrier. [#I-15, #I-01]

- "[Hiring] has been a problem in the area …. Sometimes it's hard to find a good pool … to get good employees … and when you do [hire a good employee] you try everything you can to hold onto them," commented the African American woman owner of a professional services firm. [#I-18]

- A white woman representative of a construction-related firm commented, "It affects a lot … If you don't hire the right people, you can't have the right people on the job. If you don't have the right people on the job, that looks bad on your business." [#I-10]

- One representative of a chamber of commerce reported good "pay" as a way to sustain a stable and desirable workforce, explaining, "Firms that do not pay as much for a similar job as another firm will ultimately drive potential employees away to that business." [#TO-01]

- "We like to think we keep our employees really happy. Between giving them a retirement, a five-year education … if they are serious about working here, they have to take this education … we give them all good benefits and plenty of time off," remarked a white owner of a professional services firm. He added, "We have a good reputation given to us solely based off our employees." [#I-09]

- When interviewed, the white owner of a specialty services firm reported that when his firm began expanding from offering a small number of services to a greater number of services, his need for qualified personnel expanded. [#I-12]

- Several availability survey respondents in professional and specialty services industries reported difficulty finding qualified staff. Comments included: "[I am] unable to hire experienced people," "the labor pool is kind of shallow," and "the limited availability of staff [makes it] very difficult to hire skilled employees … find good help." [#AS-03, #AS-24, #AS-06]

- "Having a qualified workforce is the key to success for any business. You must be able to prove that you have a qualified workforce, which ultimately circles back to education," commented a representative of a chamber of commerce. [#TO-01]

Financing, capital and bonding. Many business owners and representatives reported that access to capital, financing and bonding are keys to business success. They commented that business financing affects all aspects of their businesses. [e.g., #I-04, #I-11c] For example:

- "[Financing and capital are] very important for a young business starting out, to be able to have access to that …. In the beginning, 'yes,' having access to capital does help to kind of get you over that hump," commented the African American woman owner of a professional services firm. [#I-18]

- The African American owner of a professional services firm reported that access to capital is very important, as is building an established relationship with a bank. [#I-15]

- When interviewed, the African American part owner of a construction-related firm remarked that barriers to success include limited access to capital. He explained that he defines success as "a well-capitalized business." [#I-01]

- When asked about barriers to obtaining work with the City, the white owner of a small construction-related firm indicated that bonding capacity was a primary issue for his firm. He explained that his firm cannot secure bonds on projects worth over $1 million, and therefore does not bid on City of Alexandria projects. [#I-07]

- The representative of a chamber of commerce commented, "Female entrepreneurs often have a harder time [than men] accessing capital and gathering loans from a bank." [#TO-01]

Insurance. Having the ability to secure proper insurance was key for some businesses but cost can be a barrier. [e.g., #I-04, #I-10, #I-12, #I-20] For example:

- When surveyed, the white owner of a construction-related firm stated that "workers' comp insurance" is a barrier to firm success. [#AS-01]

- Regarding insurance, an African American owner of a professional services firm indicated that insurance requirements are "too strict" and reduce his chances for making a profit. [#I-15]

  This same business owner added that although he is a proponent of workers' comp coverage, he noted that the fees are too high. [#I-15]

- A focus group participant commented that the "fear of insurance" discourages many businesses from bidding on City of Alexandria procurements. He added that if a business can get past the insurance requirements, they will "be in the clear." [#FG-02]

- The white owner of a construction-related firm reported that insurance is an issue. He added that his firm pays "close to $100,000 per year" for business-related insurance. [#I-07]

Fair pricing and credit. Several business owners and representatives indicated that access to favorable pricing and credit for materials and products is a key to their firm's success. [e.g., #I-07, #I-11c]

Equipment. Access to good and affordable equipment is a key to success for some business owners. [e.g., #I-04, #I-10, #I-11c, #I-12, #I-16, #I-20]

Profit. Several business owners considered paying the bills, keeping staff happy and employed and "turning a profit" as their measure of success. Comments include:

- "A successful business must be able to support their own operation and generate a profit; the goal is to export products and import cash," commented a white woman representative of a chamber of commerce. [#TO-01]

  She added, "If a business has shut down and is trying to return, cash flow may not be present. If a business has been lucky enough to have cash reserves, then it can still stay afloat." [#TO-01]

- "Get projects that are profitable … and know when to say 'no,'" remarked the representative of a trade association when asked to define business success. [#TO-05]

Other keys to business success. Some business owners and representatives reported what gives one firm in the industry an advantage over another. Some reported that larger firms have an advantage over smaller firms. Others mentioned competitive pricing, proper licensing, "one-stop shopping," owning equipment, and having the capacity to low bid as advantages. For example:

- "Size of the business and the offerings … often potential clients go to the [larger] companies with state contracts," remarked the African American owner of a DBE-certified professional services business. [#I-03]

- Being licensed gives a firm a leg up over the competition in his field of work, reported one African American owner of a professional services firm. He reported knowing of some unlicensed business owners in the local market performing work "under the table." He noted, however, that there has been a recent increase in African American business owners getting properly licensed. [#I-15]

  This same owner of a professional services firm indicated that one of the reasons he became a licensed in his field was because he attempted to work unlicensed until a City employee came to his job site to inform him that he must be licensed to continue work on projects above a certain dollar amount. [#I-15]

- The African American woman owner of a professional services firm remarked that it is advantageous to be a "one-stop shop" that is able to provide products from various companies. [#I-18]

- A white woman representative of a construction-related firm reported, "In this field, I think one advantage … is that we only have to sub out those specialty areas …. Everything else we do ourselves." She added, "That allows us to give more competitive pricing to our customers and we also own all of our equipment. Those companies that don't own their equipment, they have to rent it out which adds to their cost as well." [#I-10]

- When interviewed, the representative of a trade association indicated that price and availability give one firm an advantage over another. [#TO-04]

- When discussing advantages, the white owner of a construction-related firm indicated that the "low bidder" almost always wins public contracts, despite the possibility of the firm producing lower quality work. [#I-07]

D. Prime-Subcontractor Relationships

The study team asked business owners and representatives to comment on prime-subcontractor relationships in the marketplace, and whether primes engage minority- and woman-owned businesses as subcontractors/subconsultants. Topics include:

- How prime-sub relationships are established; and
- Efforts to include minority- and woman-owned businesses in public sector contracts.

How prime-sub relationships are established. Many business owners and representatives discussed how prime-sub relationships are built. Although one interviewee reported using resources such as the Louisiana Unified Certification Program (LA UCP) Directory, most relied on "word-of-mouth" or previously established prime-sub relationships. Examples follow:

- The African American part owner of a construction-related firm reported that he finds primes and subs through the Louisiana Unified Certification Program (LA UCP) directory (UCP Directory). He added that he also looks to "word-of-mouth" sources for local work. [#I-01]

- An African American owner of a DBE professional services firm reported that both primes and subs usually find out about work through "word of mouth." He added, "They really need to build relationships ahead of time. Sometimes, if the sub finds out about a project, [they] will call the prime and submit a quote." [#I-03]

- Regarding how primes find subcontractors, a representative of a trade association reported, "They [potential subs] really need to build relationships ahead of time. Sometimes, if the sub finds out about a project, [they] will call the prime and submit a quote." [#TO-05]

- Regarding how he generally perceives contractor-sub relationships, the representative of a trade association remarked, "The primes know who they are going to call. All goes back to building relationships." [#TO-05]

- A white woman representative of a construction-related firm commented, "We generally have certain subcontractors that we work with time after time. These are people that we have built a relationship with." [#I-10]

- Regarding how primes and subs go about finding work, the representative of a trade association indicated that primes that bid on projects already know who they will call for estimates. He added, "Many SDBEs do not know work is out there and that is a problem. They do not do the legwork in the beginning …. Primes want to work with companies they know." [#TO-05]

Efforts to include minority- and woman- owned businesses in public sector contracts. Some business owners made efforts to include all disadvantaged businesses, while others focused on including only businesses holding specific certifications. For example:

Some firms reported that they attempt to enlist the help of small businesses, and minority- and women-owned businesses. [e.g., #I-01]

- A white partner at a professional services firm indicated that his firm regularly hires subconsultants. He added that most of the firm's projects include professional services subconsultants to make up for the firm's lack of in-house expertise in some fields. [#I-05]

- The Hispanic woman owner of a construction-related firm reported that the firm does make efforts to include minority- and woman-owned businesses reporting that her company recently partnered with a woman-owned firm. [#I-11c]

- "I … try to work with small and disadvantaged businesses," commented the African American owner of a DBE professional services firm. To identify potential subconsultants, he added that he uses DBE lists available for the area. [#I-03]

- When interviewed, the Hispanic woman owner of a construction-related firm commented that her firm "absolutely" engages minority- and woman-owned businesses as subcontractors on projects. [#I-17a]

- A white owner of a construction-related firm reported that his firm often includes minority- and woman-owned specialty services subcontractors on projects. He added that it is easy for the firm to meet contracting goals for MBE, WBE or DBE inclusion. [#I-07]

Some business owners and trade organization representatives reported whether primes make attempt to include minority and woman-owned companies, as well as any associated challenges. [e.g., #] Comments include:

- "Yes, because they are afraid if they refuse, they will not get the project. So now many public projects will require or highly desire participation of SDBE," remarked a representative of a trade association. [#TO-05]

- "It depends on the contractor in question. From what I have seen, sometimes a prime contractor will be selected, and they choose to work with a diverse business … in order to expand the scheme of their projects," commented the representative of a chamber of commerce. She added that when this happens, it "… can provide possible opportunities for subcontractors." [#TO-01]

- Regarding challenges when partnering with small, minority- or woman-owned businesses, a representative of a chamber of commerce reported, "It is possible that there is a lack of representation [of minority- and woman-owned firms among the pool of potential subs]. Since Alexandria is a smaller area, it is difficult to identify minority- and woman-owned businesses; sometimes [a prime] needs to go outside of the region in order to find these companies." [#TO-01]

- "Over time, the requirement and desire to achieve SDBE goals is a challenge to companies because they will subcontract the work out where before they would self-perform the work," commented the representative of a trade association. [#TO-05]

- A number of business owners agreed that without concerted efforts by the City and others to specifically engage minority- and woman-owned businesses, many disadvantaged businesses could not secure the opportunities needed to achieve success. [e.g., #I-17b, #I-03, #I-17a]

E. Working on Projects with the City of Alexandria

Business owners and representatives were asked about their experiences regarding opportunities for contracts with the City of Alexandria. Some reported the experiences they had when conducting work with the City of Alexandria. Topics included:

- Seeking opportunities with City of Alexandria;
- Barriers to conducting work for the City; and
- Challenges specific to minority- and woman-owned businesses when pursuing or performing work for the City of Alexandria.

Seeking opportunities with City of Alexandria. Business owners and representatives discussed their experience trying to get work with the City of Alexandria. The study team interviewed firms that had conducted work for the City of Alexandria [e.g., #I-03, #TO-05, #I-07, #I-12], as well as businesses that had not yet had the opportunity to secure work with the City. [e.g., #I-15, #I-20]

A few business owners and representatives discussed how businesses find out about opportunities with the City of Alexandria, and any associated barriers. Comments include:

- The white owner of a specialty services firm remarked that firms must be persistent in searching for work with the City as it does not contact vendors directly about upcoming opportunities. [#I-12]

- "The website is the primary source for new opportunities, but the City does not often use that process," commented an African American owner of a DBE professional services firm. [#I-03]

- "All work is public bid and … must be advertised. All public bids are governed by state law … projects are advertised in the local paper …. Associated General Contractors (AGC) sends out regular newsletter-type communication that will have big announcements," commented the representative of a trade association. He added, "It is a matter of the firms looking for the work and responding to them." [#TO-05]

  The same representative indicated that the City has not had many projects in the last few years. [#TO-05]

Some interviewees reported lack of transparency and limited outreach as a barrier to pursuing work with the City of Alexandria. [e.g., #I-06] For example:

- "If [the City] were reaching out, I'm sure I would respond. But just not hearing about it … how can you respond if you don't hear about something?" commented an African American owner of a specialty services firm. [#I-06]

- The African American woman co-owner of an MBE specialty services firm commented that the City does "not have the money allocated for us any longer." She added that she had never been given "a fully realized answer" as to why a contract was pulled by the City. [#I-04a]

- An African American woman owner of a professional services firm commented that in the past her firm was discussing a potential consulting role with the City but then communication "just stopped." She added, "I find it very difficult … I'm sure … a lot of other people [are] probably trying to do the same thing … If [the City wants] us to compete [for contracts] then let's compete … Tell us what we need to do [to be part of a competitive process]." [#I-18]

- When discussing whether the City of Alexandria's bidding and notification processes are transparent, the white partner of a professional services firm answered, "Oh, heavens no." While the City does have a dedicated website that advertises jobs, he stated that he did not "believe that all the advertisements make it to that site." He reported that, instead, the City gives jobs to firms selected by the City Council. [#I-05]

- While discussing recommendations, the representative of a trade association indicated that there must be a "a fair and transparent process." He added, "Publish job news and network opportunities." [#TO-05]

- A white owner of a specialty services firm commented that vendors receive notifications for regular and reoccurring bid opportunities but noted that "not all opportunities are shared in this system." He added that the City should improve the notification system to ensure that vendors are not missing opportunities. [#I-12]

- The African American part owner of a construction-related firm suggested that the City could provide contract forecasting where sectors can advertise future opportunities and their dollar values "to give people foresight of what is coming down the pipeline." He remarked, "Other agencies are doing these things, so why not Alexandria?" [#I-01

Barriers to conducting work for the City. Some reported being discouraged by their attempts to conduct work for the City, or that the City relies too heavily on low-bid awards and restrictive bidding requirements. For example, a representative of a chamber of commerce indicated that getting work with the City by bidding is a very "big process." [#TO-01] Other comments include:

- The white owner of a specialty services firm remarked that, although licensing is necessary, the City has overly restrictive licensing requirements that create barriers when pursuing work with the City of Alexandria. [#I-12]

- An African American woman owner of a professional services firm remarked, "I find it harder to work in government because there's just more politics involved …." [#I-18]

- "Minority- and woman-owned small businesses … get discouraged and they leave. They don't want to be in this area," commented the Hispanic woman owner of a construction-related firm. [#I-17a]

- Currently discouraged from pursuing work with the City, a Hispanic woman owner of a construction-related firm stated, "We tried last year. A new administration came in and we knew things were going to change … for the better as it has been slowly." [#I-11c]

  However, she added, "As soon as we started, the contracts started changing, our insurance wasn't good enough …. Other investor-owned utility companies that are a heck of a lot bigger than the City of Alexandria don't require what they are requiring." [#I-11c]

- An African American owner of a DBE professional services business said that he was disappointed that his City contract didn't lead to more business with the City. [#I-03]

- A white owner of a specialty services firm reported that his experiences working with the City have been professional and positive but reported frustration that finding work with the City is often difficult. He explained that the City focuses "too heavily on the lowest bid, regardless of the bidders' qualifications." [#I-12]

- A white representative of a construction-related firm reported that a named decision maker at the City has made it difficult for the firm to get contracts. He commented, "We bid [several winning] contracts this year … every bid was rejected after he went through the bids and found some kind of excuse. Either the money was not in the budget, which we knew the money was in the budget, or [for] insurance purposes, or we forgot to dot an 'i' on the contract or anything like that." [#I-11a]

- The white manager of a construction-related firm reported that one City employee will "manipulate" a contract and "add all these addenda … so the person he wants to get [the contract] will get it." [#I-17b]

  This same business representative concluded, "I'll never work for [the City of Alexandria] again until [named staff person] is gone." [#I-17b]

- Requirements for firms to have a "licensed plumber, electrician, etc. on payroll could be cost prohibitive and it takes a long time to get this certification," remarked the representative of a trade association. [#TO-05]

- One white representative of a construction-related business reported that one department at the City functions as a "kingdom." Another white business representative of the same firm commented that the City might "strategically move and find talent in other places and start cross training people" to make that department more business friendly. [#I-11b, #I-11a]

Challenges specific to minority- and woman-owned businesses when pursuing or performing work for the City of Alexandria. Business owners and representatives discussed many barriers related to working with the City of Alexandria.

Some interviewees reported unfavorable experiences while working for the City. For example:

- An African American woman owner of a minority-owned specialty services firm reported that there have been instances of discrimination within the City. She remarked, "We are the only Black-owned … company in [our field in] Louisiana and, for some reason, the City [revoked] all of our contracts …. There is some serious discrimination." [#I-04a]

  The same business owner remarked that the City has questioned "invoices and dollar amounts." She added, "[No other] vendor is being questioned like us. And they can, and have, questioned everything except our quality service. They have no reason to be putting us in question like this." [#I-04a]

- The African American woman owner of a professional services firm reported having met with the City many times to gather the information needed to come up with a "product" that would meet the City's needs. However, the City opted to direct purchase from another source. She concluded, "I feel like a lot of that has to do with being a minority business." [#I-18]

  She added that even a former City official once said to her, "'I don't know why anybody wants to do business with the City [of Alexandria] because they make it so complicated to do business with [them].'" [#I-18]

For some, firm size and capacity disadvantage small firms seeking work with the City of Alexandria. Comments follow:

- "[I have been] working with the City [for many years], but it is difficult to expand the contracts because the City seems to prefer a larger [non-local] company," commented the African American owner of a DBE professional services firm. He later added that "[the City] often prefers larger companies" that makes it difficult to get work. [#I-03]

- An African American owner of a DBE professional services firm reported that the City seemed "to favor or be more comfortable with a larger company from [outside the City]." [#I-03]

- Regarding capacity to take on work with the City, an African American owner of a specialty services firm commented, "Being so small, it makes you limited …." [#I-06]

- The African American woman owner of a professional services firm reported that she knows of an engineering firm that was not awarded a contract by the City. She remarked, "[The City] didn't give them the contract because they figured … that the firm wasn't large enough to handle the project …. a lot of times, [the City looks] at your [company] size … and [decides] what they think you 'can and can't do' before giving you an opportunity …." [#I-18]

  She added that if a firm has reviewed the scope of work "and said, 'Yes, we can do it,' then give [them] an opportunity to do it … really large companies are not the only ones [that can do the work]." [#I-18]

Suggestions for the City of Alexandria or to improve procurement practices. Some business owners and representatives discussed ways that the City of Alexandria could improve procurement practices. Some made specific recommendations for how public sector procurements could strengthen utilization of disadvantaged businesses.

Some reported the need for a disadvantaged business goals program, as well as enforcement protocols that penalize primes not in compliance with contract goals and other requirements. Comments include:

- An African American part owner of a construction-related firm suggested that to increase utilization of minority- and woman-owned firms, the City could implement a "Fair Share" or disadvantaged business program. He added, "Put policies in place to enforce the participation in those programs." [#I-01]

- "If they had 'set asides' specifically for small business, but they do not. Also, to be able to beat or match costs of the larger firm," remarked the African American owner of a DBE professional services firm. [#I-03]

- "I don't know if [the City] can do any more than [what they have] because they have to follow state law," remarked a white public entity representative. [#I-19]

A few business owners were suspicious of programs designed to level the playing field for disadvantaged businesses. These interviewees included:

- A white man and owner of a construction-related firm commented that he appreciated that the City does not conduct procurement through job "set-asides." He added that set-asides can be biased in favor of certain firms. He remarked that opening all jobs to all contractors is a good way to level the playing field. [#I-07]

- A city staff member and focus group participant reported that the City awards some contracts to small firms with "gumption." He explained that the City can test out small businesses while also helping them build capacity but he remarked, "We have to be careful with how much we help them." [#FG-01]

- A white owner of a specialty services firm reported that participation among minority-owned businesses is very low and could precipitate the need for a program designed to give disadvantaged firms a leg up. [#I-12]

  However, he said that "awarding contracts to minorities regardless of their qualifications" is a waste of taxpayer money. He concluded that minorities "should have to work as aggressively as other businesses" to win work with the City. [#I-12]

Other opportunities for strengthening procurement practices and making City purchasing more accessible to minority- and woman-owned businesses. For instance:

- "Implementing a workshop to educate businesses on what they need to know in order to bid on a contract would greatly improve procurement practices," commented a representative of a chamber of commerce. [#TO-01]

- The African American woman owner of a professional services firm recommended, "Let people know a way that we can know what's happening with [City procurement]." [#I-18]

  She added that the City should create a committee to make sure that information is adequately "filtered out to the public" so that firms can compete for contracts, rather than holding contracts back for their friends. She remarked, "If your friend [can perform a contract] then let your friend compete [for it]. [#I-18]

- When interviewed, an African American part owner of a construction-related firm indicated that the City could unbundle large contracts to increase access for small businesses. [#I-01]

- The white partner of a professional services firm recommended that the City of Alexandria use a qualifications-based selection process for future contracts that is free of "political opinions," not "swayed" by political donations. [#I-05]

F. Whether There is a Level Playing Field in the City of Alexandria Marketplace

An unlevel playing field in the City of Alexandria marketplace puts minority- and woman-owned businesses at a disadvantage many said. Topics include:

- Evidence of a playing field that disadvantages minority- and woman-owned businesses;
- Stereotyping and double standards;
- "Good ol' boy" networks or other closed networks;
- Issues with prompt payment;
- Denial of opportunity to bid or unfair rejection of bid;
- Submitting bids or proposals and not getting feedback;
- Bid shopping and bid manipulation; and
- "Fronts" or false reporting of good faith efforts.

Evidence of a playing field that disadvantages minority- and woman-owned businesses. Although a few business owners perceived the playing field as fair, most interviewees reported that there is not a "level playing field" for minority- and woman-owned businesses in the Alexandria area marketplace.

Some business owners and representatives reported instances of an unlevel playing field or unfair treatment of minority- or woman-owned businesses when pursuing opportunities with or performing work for the City of Alexandria or other public sector agencies in the marketplace. [e.g., #I-01, #I-11, #TO-02, #I-07] Comments include:

- A white man and owner of a professional services firm remarked, "… I try to focus just on my [business], but I'm not going to say [discrimination] isn't out there." [#I-09]

- When asked about public sector work, the African American woman owner of a professional services firm stated, "The 'local area' … [is] far more accepting [than public sector agencies] … I have [clients of various races and ethnicities] with great relationships," explaining that the playing field in public sector-focused professional services needs leveling. [#I-18]

- An African American owner of a specialty services firm reported a unlevel playing field for minority business owners. He stated that the same issues of racial discrimination that affect the United States nationally "trickle down" to the marketplace within the City of Alexandria. [#I-06]

  This business owner declared, "It's like being a 'Black man is a plague' … If I come on the scene … and a white guy come[s] on the scene, and if I'm more qualified … he'll still probably get the job quicker than I would." [#I-06]

- One white woman owner of a specialty services firm remarked that she is often told that she is "not typical" in her "male-dominated" industry. [#I-08]

- An African American owner of a professional services firm indicated that he has personally witnessed unfair treatment in the marketplace. He commented that minority- and woman-owned businesses and other small firms must overcome unfair treatment through "determination and development of a good relationship with a bank." [#I-15]

  The same business owner went on to explain that many small business owners lack the determination and business readiness needed to succeed. [#I-15]

- "By law, there is a level playing field and certain protections in place, however, they still face challenges. Having access to capital is harder, and if they do not have relationships with top-level business or industry leaders then it can be more challenging," commented a representative of a chamber of commerce. [#TO-01]

- When asked if she has experienced any unfair treatment or disadvantages, the Hispanic woman owner of a construction-related firm remarked, "Absolutely … I have had issues at the City of Alexandria, with the old administration." She added, "If they [continue to] treat other companies the way they treated me, they would put them out of business, because that is what they were trying to do with me." [#I-11c]

  She went on to report, as explanation, a conflict of interest in a public entity in Alexandria where a public sector employee was on the payroll of one of her firm's competitors. She commented, "That is a complete conflict of interest! You now have the numbers to all of the competitors … now you can hand over [privileged information] and you get paid under the table." She added, "Since I wasn't playing that game, 'he made me pay.' He was trying to make me lose my company …. I know for a fact that if I was treated like that, others are being treated like that. Everybody else is scared to speak [up]." [#I-11c]

- The Hispanic woman owner of a construction-related firm reported that while conducting work for the City of Alexandria, she got out of her truck at the jobsite to meet with a man from another firm. She went on to explain that the man she was meeting with looked up from a map and then looked back down, "shaking his head." She explained, "[He] didn't like the fact that [I] was a woman when he expected … a man …. [He behaved] like he was being punished … [like his] company 'put him in a predicament' to deal with me [a woman] …." [#I-17a]

  The same owner commented that the firm had "the most horrible experience" working for the City of Alexandria. She added that the City is "crooked [and] prejudiced [and made] us do things that were unethical … and the more I would [speak out about it] then the worse it got." [#I-17a]

  The same business owner elaborated, "They would steal [our] equipment on and off city time for their own personal gains, and their friends' property … clearing property with our equipment and at the same time telling us that we needed new equipment … they were exploiting [our] company … [It was] mind-blowing." [#I-17a]

- "In the field that I am in, if we were to hire subcontractors and a woman showed up here that is a subcontractor that is a plumbing business and says … 'I am looking for some work' … Personally, I would say, 'sure, send me your insurance information and the next time I have a job to quote I will send it to you," commented the white woman representative of a construction-related firm. She added, "My boss, however, would feel completely different and he makes the final determination …." [#I-10]

- An African American owner of a professional services firm stated there is not a level playing field for minority- or women-owned firms but added that some small business owners bear some responsibility for the unlevel playing field. He added that the City would hire more minority- and women-owned businesses if more of them were qualified to perform work. [#I-15]

Some reported an undercurrent of covert discrimination in the marketplace. Some interviewees indicated that covert discrimination prevails. Comments include:

- An African American owner of a certified professional services firm experienced covert discrimination in the marketplace describing it as "nothing 'overt' … more of a 'perception' than specific instances." [#I-03]

- A white focus group participant commented that everyone is "hyperaware" of current issues "unless you have been living under a rock the last five years" stating that "overt" racism or discrimination against minorities and women is rare. He explained that although many contractors have gotten better about not making insensitive remarks, there are still some "Neanderthals." [#FG-01]

- When interviewed, the African American part owner of a construction-related firm reported that there is "systematic unfairness" for minority-owned businesses in the marketplace. [#I-01]

Stereotyping and double standards. Some interviewees reported that minority- and women-owned firms experience challenges not faced by majority-owned businesses. [e.g., #I-01, #I-12]

Many business owners and representatives described double standards and unfavorable treatment that was race- or gender-based. Stereotyping of persons of color and women is common in the marketplace, some indicated. Based on race and gender, some interviewees described being unfairly scrutinized or targeted, "not taken seriously" or considered not as able as white men. For example:

- "[Minority- and women-owned firms] face greater challenges than other companies," commented the African American part owner of a construction-related firm. [#I-01]

- The African American owner of a DBE professional services firm remarked that there are "assumptions" made about minority- and woman-owned businesses. An African American co-owner of a specialty services firm commented that although "white women are treated better than Black men," both suffer from disparities. [#I-03, #I-04b]

- "[Minorities and women] have to fight much harder and make more noise than other businesses that try to acquire [work]. [We] have to 'do better' and 'be better' than some of the others," remarked an African American woman owner of a professional services firm. [#I-18]

  She added, "If [my company] can provide better products, a better service, lower rates … then why not make a change? I find that they won't give the minority- or women-owned businesses that opportunity like they would do with other businesses." [#I-18]

- When interviewed, the representative of a chamber of commerce commented, "An example of a challenge faced by an acquaintance includes a qualified Hispanic woman who created a clearing business (in a traditionally male-dominated industry). When she went to other companies to gain a project, she had trouble with the owners of those businesses not 'taking her seriously.'" [#TO-01]

  She commented, "These acquaintances felt like they needed to have everything more detailed and complete than their male counterparts." [#TO-01]

- Several business owners who are persons of color reported to have had trouble getting work they performed approved for invoice or being treated "differently" than business owners of majority firms. [e.g., #I-01, #I-11]

- Regarding unfair treatment and double standards, the Hispanic woman owner of a construction-related firm commented, "We only touched the tip of the iceberg, but 'yes.' All of those things did happen when I was on the job." [#I-11c]

- "It's a problem in Alexandria," remarked the African American co-owner of a specialty services firm. He added that his firm's contracts were "targeted" while majority firms have not faced any scrutiny. [#I-04b]

  When asked if his firm has been treated unfairly in the marketplace, the same business owner reported that, as the only firm providing their service in the region, they should be included on vendor lists of local agencies, but his firm is not always included and is skipped over for opportunities to bid. [#I-04b]

  He added that this unfair treatment was due to a lack of accountability among government officials concluding, "If they cannot be held accountable to it, they don't worry about doing it." [#I-04b]

- An African American co-owner of a specialty services firm reported that he had a great relationship with the City until the 2010s when "prejudice-minded" individuals entered the procurement office and began to target their firm. He added that individuals with the City began questioning why they were receiving constant work with the City, as opposed to utilizing different firms, even though their firm has never received any complaints from the City about the quality of their work. [#I-04b]

Some business owners and representatives reported unfair treatment or disadvantages for small businesses in the City marketplace. [#I-11] Comments include:

- One business owner reported that some of these barriers are experienced by small businesses as well. This partner of a professional services firm reported that "client perception" can be a barrier. He explained that some clients have the perception that smaller firms cannot produce high quality work on large projects. [#I-05]

- When discussing unfair treatment or disadvantages specific to minority- or women-owned firms, an African American owner of a certified professional services firm remarked, "There is a distinct disadvantage because I cannot qualify as a state contractor. To do this, you must be approved by the manufacturer." [#I-03]

  The same business owner added, "Small companies have a very difficult time getting these approvals, which hinders them qualifying as a state contractor." [#I-03]

A few reported being unaware of any unfair treatment of or double standards for minority-owned and women-owned firms when performing work. [e.g., #TO-02, #TO-05] For example, when asked if he has ever witnessed double standards for minority- and women-owned businesses, a public entity representative commented, "The only time I have seen evidence of that is 'when it was warranted.'" [#I-19]

One interviewee commented that minority- and woman-owned businesses have advantages over majority firms. This white specialty services business owner accused the City of "reverse racism." He said that the City unfairly awards contracts to "unqualified firms to redress past disparities." He added that "the City is 'giving away' contracts to minority-owned businesses." [#I-12]

"Good ol' boy" networks or other closed networks. Many business owners and representatives commented on whether closed networks in the marketplace disadvantaged minority- and woman-owned firms. [e.g., #I-01].

Many interviewees reported the existence and negative effects of "good ol' boy" networks and other closed networks. [#I-06, #I-18] Examples follow:

- "Yes … If you know that the firm that you are bidding with is in the "good ol' boy" network and you are not, then there is no reason to bid on it, or you could waste time and money bidding on that project, and it would be given to someone in the "good ol' boy" network," remarked a white woman representative of a construction-related firm. [#I-10]

  She added businesses in the network "may be given 'insider information' like a budget price that they are looking for." [#I-10]

- When interviewed, the Hispanic woman owner of a construction-related firm indicated that there are "generations of friendships" in the Alexandria area and that "they like to keep everything in that 'circle.'" [#I-17a]

- An African American man and co-owner of a specialty services firm reported on the existence of closed networks in the City of Alexandria. He remarked, "[There are firms that] have been around 'longer' … they're part of the "good ol' boy" network and they're 'automatically included.' They're treated different." He added that firms on 'the list' are automatically awarded jobs without going through the bidding process. [#I-04b]

  The same business owner reported that connected firms are "treated better" regarding paperwork and contract renewal. [#I-04b]

- A Hispanic woman owner of a construction-related firm indicated that there are "good ol' boy" networks within the City that negatively impact minority- and women-owned firms. She commented, "[Typically] once people get to know you, and they see how transparent you are, and you are not going to play the game, and you do what you say you are going to do, then they begin to have that trust relationship with you, and you can get past that barrier." [#I-11c]

  However, she added, "In the City of Alexandria, we have not been able to get past that barrier because the 'snake' is still there." [#I-11c]

  "There were all sorts of … challenges due to … me not being from here, and Louisiana is very tight-knit. It's always, 'Who's your mama, who's your daddy?' … Everybody knows everybody," remarked the same business owner. She added, "The fact of being a female coming into the industry … it was hard 'to get through.' It was a lot of hard work for people to get to know us." [#I-11c]

- A white city staff member and focus group participant stated that it is "human nature" to not want to hire new contractors if "regulars are no drama" and have a track record of doing quality work for a low price. [#FG-01]

  When asked about closed networks, the same staff member reported, "There certainly used to be. Some [used to be] almost outright about it. Not so much anymore … they have more transparency. Sometimes it is just personal." He added that for the review process, "sometimes [you need to rely on] your gut." [#FG-01]

Several interviewees reported that the City of Alexandria and others bear responsibility to expose and not perpetuate "good ol' boy" networks and "back-room deals" that disadvantage less connected businesses. Examples follow:

- When asked how to overcome the barrier of a "good ol' boy" network in local government contracting, the African American owner of a specialty services firm reported that bids should be awarded based on qualifications rather than personal relationships. He added that doing so would level the playing field and "spread the love a little bit." [#I-06]

- The white owner of a specialty services firm indicated that "personal relationships" lead to contracts. He added that this is the way business with the City works and that some contracts for the Mayor's office probably do not go out to bid. [#I-12]

- A white focus group participant commented that the City "needs to be careful" to ensure it does not "have favorites." [#TO-05, #FG-01]

However, many city staff participating in focus groups for the disparity study reported being unaware of any "good ol' boy" networks operating in the marketplace. [e.g., #FG-04, #FG-05, #FG-06, #FG-07, #FG-08, #FG-09] For example, one white focus group participant commented that he has not seen any "good ol' boy" networks. He added that that when there is a goal on a contract, closed networks "open" as primes are required to meet the contract goals. [#I-19]

Issues with prompt payment. Many business owners and representatives expressed challenges with prompt payment on contracts. [e.g., #I-07, #I-11] Comments follow:

- An African American owner of a professional services firm remarked that customers want work, but they don't want to pay. He explained that he often deals with clients who are late to pay for services rendered. [#I-15]

- When interviewed, the African American part owner of a construction-related firm commented that firms often experience unfair payment terms. He added that "paid when paid" payment terms can prevent smaller contractors from building and sustaining the cash flow needed to carry them over an extended period of time. [#I-01]

- An African American co-owner of a specialty services firm reported "issues with prompt payment" when asked if minority- and woman-owned businesses suffer from any barriers in the marketplace. He added that "prompt payment" is one of the key factors contributing to the low number of lasting minority- and woman-owned businesses in the marketplace. [#I-04b]

- A representative of a trade organization reported that although he has not heard of any issues with prompt payment from the City of Alexandria, he is aware of other cities and public agencies that go well past 30 days when paying primes. He remarked, "This trickles-down to subs not being paid timely." [#TO-05]

- A white owner of a construction-related firm reported that timely payment by public agencies is a barrier for small businesses, especially when working on larger projects. He added, for example, that the invoicing process at the City is lengthy and payment can extend up to 45 days. He explained that late payments are a burden for small businesses with limited cash reserves. [#I-07]

  The same business owner indicated that he relies on his relationships and good reputation with suppliers to manage the effects of late payments. However, he added that many other small businesses without established standing with suppliers may incur damages when payment from the City is not prompt. [#I-07]

- One white owner of a construction-related firm remarked, "Follow what the State of Louisiana uses … they have two systems, a credit card system … [and] an online pay system." He viewed these two methods as ways for the City to ensure prompt payment. [#I-07]

Many city staff participating in disparity study focus groups reported no awareness of prompt payment issues directly caused by the City. Some of these indicated that the City generally pays promptly. [e.g., #FG-01, #FG-02, #FG-03, FG-04, #FG-05, #FG-06, #FG-07, #FG-08, #FG-09]

Denial of opportunity to bid or unfair rejection of bid. Some business owners and representatives indicated that unfair denial of bid or bid rejections are barriers to success.

Some interviewees reported incidences of denial of opportunity to bid or unfair rejection of a bid. For example:

- When interviewed, the African American part owner of a construction-related firm commented that businesses are not given enough time to prepare for a bid, which limits a firm's opportunities to bid. Others, including a city staff member and a small business owner commented that the City takes too much time to "put together a bid" or has other logistical processes that preclude small firms from bidding. [#I-01, #FG-01, #I-11]

- The Hispanic woman owner of a construction-related firm reported experiencing an unfair rejection of her bid by a [specified] department within the City of Alexandria. She remarked, "Everywhere else, they're on the up and up. When you get your paperwork, and you get your bid package … we have to fight to get a bid package … it is challenging." She added, "Everywhere else … it's done fairly. However, this department in Alexandria is a major issue and … if I have that issue, so does everybody else." [#I-11c]

- A white city staff participant of a disparity study focus group reported just following "marching orders [regarding awarding contracts]." He added that firms with "no drama" that have a "good relationship with the City" typically win. [#FG-01]

- The African American woman owner of a professional services firm reported a situation where her rates were the lowest, but she lost a public sector job to a firm outside the region. She remarked, "[It was] one of those situations where the person that's making the decision has a relationship with the person … in another state … but even though we're saving you money, and even though we are local … they chose to stay with the company [outside Louisiana]." [#I-18]

- A white business partner of a small professional services firm indicated that the previous City administration for purely political reasons had established a directive to prohibit his firm from bid consideration by excluding the firm from the pre-approved list. He added that these actions prevented the firm from participating at the outset of any bid. Because of the inability to gain pre-approval, his firm no longer pursues projects with the City. [#I-05]

One, however, reported that firms "disqualify themselves." This focus group participant commented, "We give everyone a fair opportunity to bid. They just need to read through the bid." He stated, "I wish I was treated back then how we treat contractors now. The paperwork is burdensome for those who don't take the time to read through the, not very complex, bid book." He added that, more times than not, firms will "disqualify themselves" by not completing the requirements outlined in the bid book. [#I-19]

Submitting bids or proposals and not getting feedback. Several business owners and representatives reported that submitting bids or proposals and not getting feedback is a significant barrier for small businesses wanting to improve their submittals and learn from their experiences. [e.g., #I-03, #I-11, #TO-05]

On the other hand, a white owner of a specialty services firm indicated that feedback in his line of work is "unnecessary." He added that contracts in his industry are awarded based solely on price and those that lose a bid should know why they lost without needing feedback. [#I-12]

Bid shopping and bid manipulation. Although some city staff reported not knowing of any bid shopping or bid manipulation [e.g., #FG-10, #FG-11, #FG-12, #FG-13], a number of business owners and representatives indicated that bid shopping and bid manipulation are pervasive in the marketplace. [e.g., #I-04, #I-11] For example:

- Issues related to bid shopping were reported by an African American owner of a certified professional services firm. [#I-03]

- The white woman representative of a construction-related firm reported that she has experienced bid shopping. She added, "We've been in business long enough to know who those are that do the bid shopping and we won't give them a price." [#I-10]

- Regarding the causes of bid shopping specifically, a representative of a trade association commented, "Public bid law dictates award goes to lowest bidder; this would make bid shopping more common." [#TO-05]

- An African American part owner of a construction-related firm indicated that small minority- and women-owned firms are often solicited for opportunities two days prior to a bid opening because prime contractors must demonstrate that they solicited opportunities. He added that small firms don't have enough time to prepare for the bid. [#I-01]

- The African American owner of a professional services firm commented that bid shopping is common and that many potential clients request quotes for insurance purposes. He added that his firm experiences "sunken costs" due to the labor involved in preparing quotes for people who were never serious about the work to begin with. [#I-15]

- A white owner of a professional services firm indicated that bid shopping is a problem in the Alexandria marketplace and is the reason he no longer pursues contracts with the City. He added, "Of course the lowest bid will get it, but it's the way they get it that just rubs me the wrong way. Ask anyone, they'll tell you the City does bid shopping." [#I-09]

- The white manager of a construction firm reported to be aware of one City of Alexandria employee who also works for a private company and uses his inside knowledge to "steal" information. He remarked, "Every time we put a bid in, he simply takes the numbers [in our bid] and uses [them] against us [to bid on projects with other municipalities] … [not] just us, [he does this to] every contractor. 'That's why we can't bid [on City contracts] anymore … it's the security breach we've got here.'" [#I-17b]

  A Hispanic woman owner of a construction-related firm explained, "[The same City employee] collects all those numbers [from other firms' bids], he goes to another municipality [and] uses everybody else's numbers to create bids for … the company he works for to bid against you." [#I-17a]

- Some wanted more accountability from the City. Regarding the decision-making process, one focus group participant remarked, "They never explain their rationale … they think the rest of us should just get it." He indicated that he would like to see more accountability on [the City's] end. [#FG-03]

- A Hispanic woman owner of a construction firm remarked, "If you're a civil servant or an elected official, you have to carry yourself in a certain manner. Be respectful, transparent and ethical. If it's illegal, immoral or unethical, you should not be doing it." [#I-17a]

"Fronts," or false reporting of good faith efforts. Business owners were asked about their knowledge of "fronts" or issues with false reporting of good faith efforts. A few who commented reported no direct knowledge of "fronts," or false reporting of good faith efforts. [e.g., #I-01, #I-03, #TO-02, #TO-05]

On the other hand, a white woman representative of a construction-related firm reported, "There is one contractor … he is a minority [business owner] …. [but] he doesn't do any of the work himself. He … subs everything out and puts a number on it … and submits [a bid through his firm]." She added, "There are some [City of Alexandria] projects that we have both bid on … we have beat his number and he still gets it because he is a minority-owned business." [#I-10]

G. Insights Regarding Contract Goals, Business Assistance Programs and Certification

The study team asked business owners and representatives for any insights regarding contract goals, business assistance programs and certification. Topics include:

- Contract goals or other preference programs;
- Business assistance programs; and
- Certification.

Contract goals or other preference programs. Business owners and representatives were asked to provide insights regarding contract goals or other preference programs. Some were familiar with both contract goals and preference programs. [e.g., #I-01, #I-15, #I-18]

A number of interviewees recommended the need for mandated contract goals that would give small and disadvantaged businesses a leg up. [#FG-08, #FG-09] For example:

- "Create an accurate [small and disadvantaged business] registry [and] create an effective 'fair share' program," remarked the African American part owner of a construction-related firm. He added that, within the program, contractors should be "mandated, not just encouraged," to do business with small and disadvantaged businesses on city-led projects. [#I-01]

- When asked if the City might consider implementing a contract goals program, a focus group participant reported that it would be a "good idea" to give a percentage to disadvantaged businesses so they "can at least participate and build capacity." [#FG-10]

- When prompted about a contract goals program, two focus group participants reported that "it would also benefit the City" with more business owners learning about the bidding process. [#FG-04, #FG-05]

- The African American part owner of a construction-related firm indicated that the City needed to develop mechanisms for the enforcement of minority participation on large contracts. He added that the City has no mechanism to force large firms to do business with smaller firms. [#I-01]

- A white business owner wanted to see goals for veteran-owned businesses. This owner of a construction-related firm stated, "As a veteran, I don't qualify for a lot of … disadvantaged business [programs]." [#I-07]

- One white representative of a trade association, however, cautioned that the pressure to meet goals puts a lot of work in front of small and disadvantaged firms, but those firms can become "overextended, especially in human resources, [and unable] to do the job." [#TO-05]

A few interviewees and focus group participants had strong aversions to contract goals equating them with "handouts" and "freebies." Related comments include:

- "I am neither a minority- nor woman-owned …. If you are doing research for the City, tell them to get their heads out of their asses and work 'for the City instead of against it,'" remarked a white man and owner of a construction-related firm. [#I-02]

  He added, "If a minority- or woman-owned business is to survive in this day in time, they need to 'work harder, smarter' and not expect to have your 'handout' for 'freebies,' as you get lazy spending other people's money." [#I-02]

- A white public agency representative remarked, "The way I see it, I see people who want to work and those who don't want to participate and expect work." He added, "I had a woman come into my office demanding work and I told her once the bid comes out, she is welcome to try, and she looked at me like I was the crazy one … So, what I see is a lack of trying, not a [disparity]." [#I-19]

Business assistance programs. Many business owners reported taking advantage of some type of business assistance program.

Some reported on business assistance programs they knew about or participated in at one time. Examples follow:

- "State and federal programs do exist, for example, small business development centers provide coaching [state-wide]. The Business Acceleration System is funded by a grant, which provides business coaches that are highly qualified," commented the representative of a chamber of commerce. [#TO-01]

- An African American part owner of a construction-related firm indicated that his firm utilizes the Business Acceleration System. He added that other business assistance programs are needed in the marketplace. [#I-01]

- One white owner of a construction-related firm indicated that he has taken advantage of a program with the Louisiana Procurement Technical Assistance Center, as well as the City of Alexandria's Business Acceleration System program run through the Chamber of Commerce. He added, "They do a great job." [#I-07]

- The Hispanic woman owner of a construction-related firm reported that the firm received assistance from a business incubator in the early 2010's that was set up by the City. [#I-11c]

- A white woman owner of a specialty services firm indicated that her perception of the small business incubator was that there might not have been funds to adequately promote it. She commented, "Talking to young professionals, they weren't sure what the business incubator [offered]." She added, "I was very fortunate that I had the opportunity to have an office in the incubator for a short period of time … that was very enlightening." She added, "[They] taught me a lot and introduced me to a lot of people." [#I-08]

- One focus group participant reported that the City used to have a small business incubator — a brick and mortar building — to provide training, support and space to emerging businesses. He added that since the onset of COVID-19, there is "no need for office space [so the incubator model is antiquated]." [#FG-01]

- When interviewed, the African American owner of a certified professional services firm indicated that he has received training from Central Louisiana Economic Development Alliance but is unaware of other programs available through the City. [#I-03]

- A white woman representative of a construction-related firm reported that the firm applied for and received a small business loan at the beginning of the COVID-19 pandemic. [#I-10]

Some interviewees recommended neutral remedies for addressing barriers for minority- and woman-owned businesses. Recommendations follow:

- One representative of a trade association wanted to see more networking opportunities for small businesses. Regarding suggestions to address barriers, a white woman representative of a chamber commented, "Making connections for those businesses is vital, as well as making sure that their business and marketing plan is sufficient. Helping them to connect with local investors will make a large difference." The African American part owner of a construction-related firm indicated that education is a barrier that could be addressed through new initiatives. [#I-01, #TO-01]

- Another trade association representative suggested a bonding assistance program or removing bonding requirements all together. Regarding other suggestions to address barriers, the white representative of a trade organization reported a lack of bonding assistance. He recommended municipality- or agency-owned and sponsored insurance to make bonding easier for small business. The same trade organization representative commented, "Or to forego the bonding requirement altogether since it causes more issues than being beneficial. [minority- and woman-owned firms] also need assistance with funding." [#TO-05]

- Some business owners and representatives reported the need for more training programs and mentoring such as a mentor-protégé program. For example, the African

American part owner of a construction-related firm indicated that his firm could use more access to training. He added that the City can improve its efforts through partnerships with chambers and other business services providers to develop training programs and educational events. [#I-01]

- Although the African American woman co-owner of a specialty services firm indicated that she was not unaware of any business assistance programs offered by the City of Alexandria, she recommended that such programs should not be for a "select" group of business, but rather for all small businesses owners who are interested. She added that there should be proper advertising of these programs to ensure all business owners are aware that they are available through the City. [#I-04a]

  The co-owner of the firm commented that the City should offer programs for small and disadvantaged businesses to help them locate financial and educational resources. He added that if a business owner lacks capital, the City should help the owner find new sources of capital, or if a business lacks certain qualifications or certifications, the City should help the business obtain them. [#I-04b]

- One business owner suggested looking to models and initiatives set by other leaders in the marketplace. "Louisiana Economic Development helps with … financing, accounting … different things that you need to make your business successful," commented the Hispanic woman owner of a construction-related firm. [#I-17a]

- "They should do round tables …. They should do more educating … on how to get certified. They need to do little programs showing them where to find jobs that are coming up that have certain goals …. they need to open that a little more," commented the Hispanic woman owner of a construction-related firm. She added that these initiatives would address one of the biggest issues for small firms: "Knowing where to find work opportunities in the first place." [#I-11c]

- The African American woman owner of a professional services firm recommended that the City start a "bidders list" that the City can use to reach out to businesses directly when they have work. She commented, "I just think the City needs to reach out more to people that are in their area … [and] be more inclusive in trying to reach out to especially … small [and] minority businesses." [#I-18]

Certification. Business owners and representatives were asked if they were aware of any certification programs available to small or disadvantaged businesses in Louisiana.

Only a few interviewees reported being aware of certification programs; one reported that a certification program could close the gap for small and disadvantaged businesses seeking work in the marketplace. Comments include:

- A white woman owner of a specialty services firm reported that her business has multiple certifications. [#I-08]

- An African American part owner of a construction-related firm indicated that certifications give small and disadvantaged businesses access and opportunities to contracts, but certified firms are often taken advantage of by primes/others. [#I-01]

- "When I first [certified], it was, just like every other government website, horrific. It's not easy that you just click here, and it just happens," remarked the Hispanic woman owner of a construction-related firm. She added, "… because I wasn't educated in getting certified, it took me a little longer … but once I got past that … I started calling someone there and they would talk me through certain processes …. There needs to be more education on how to get certified." [#I-11c]

- "It is important [for the City] to get a … certification [initiative in place] to help minority- and women-owned businesses close the gap when it comes to being at a disadvantage," remarked a white woman representative of a chamber of commerce. [#TO-01]

A few interviewees reported specifically choosing not to pursue certification, limited awareness of certification programs or barriers to becoming certified. For example:

- Regarding certifications, a representative of a local chapter of a national trade association indicated that he is unfamiliar with the Federal DBE Program or any other certification programs. A white woman representative of a trade association was also unfamiliar with the Federal DBE Program as well as the process for certifying. [#TO-03, #TO-02]

- "I am certified by the Southern Region Minority Supplier Development Council, but not with the LA UCP because the process is too cumbersome and difficult," commented the African American owner of a DBE professional services firm. [#I-03]

- Regarding barriers surrounding the DBE certification process, a representative of a trade association remarked, "The certification process is unwieldly." [#TO-05]

- An African American part owner of a construction-related firm indicated that certified firms, if not careful, can be taken advantage of by primes/others. [#I-01]

H. Any Other Insights and Recommendations for the City of Alexandria

The study team asked business owners and representatives what the City is doing well and to provide insights or recommendations for improvements. Some reported that the disparity study is a positive first step to leveling the playing field.

- The Hispanic woman owner of a construction-related firm reported that the new administration is making good efforts to improve conditions and "clean up" the City. She remarked, "The new Mayor is doing a fantastic job …. He landed into a hot, nasty mess there and it takes time, it takes strategy." [#I-11c]

- A white owner of a construction-related firm reported that the City of Alexandria, and the Chamber of Commerce, "does a good job encouraging small businesses." He remarked that he wished more funding was available so that the Chamber could help more local businesses. [#I-07]

- Another business owner commented that the disparity study is a positive effort made by the City of Alexandria. "I am glad that the City is doing the disparity study," remarked the African American owner of a DBE-certified professional services firm. He added that he "hopes things come to light." [#I-03]

- A focus group participant reported that the City needs to have money "set aside for an emergency" and used the recent hurricanes as an example. He stated that small, local businesses typically do not benefit from emergency spending; instead, contracts go to firms outside the region. [#FG-02]

- Regarding suggestions on how the City of Alexandria can improve, a white woman representative of a chamber of commerce commented, "We have a long way to go for people who work for companies in terms of securing the same opportunities. It is not just a problem in the acquisition of small businesses …." [#TO-01]

  The same representative remarked, "There needs to be more effort in ensuring that there is no racial disparity in the education system [by] addressing that resources are not the same for everyone …. There should be more of a concern for the gender wage gap, and the disparity among African American females is even less. Transparency … about pay can take care of this problem." [#TO-01]

  She added, "Childcare for women in the workforce is a huge issue for women who are trying to break through the glass ceiling." [#TO-01]

- Regarding recommendations for the City, the white woman owner of a specialty services firm commented that the City should continue outreach at the high school level to reach students interested in starting their own business and highlight business assistance programs. She added this would give students "something to look forward to, something that they can utilize [to help grow] their businesses until they're large enough that they can go out on their own and survive." [#I-08]

- An African American co-owner of a specialty services firm recommended that the City of Alexandria provide training programs for youth and minorities interested in trade careers. He remarked, "Invest in their futures as entrepreneurs and business owners." [#I-04b]

  The same business owner indicated that the City should keep processes transparent to minimize market disparities and inform every member of procurement issues. To do so, he added, the City must commit to transparency publicly and provide funding, training and for initiatives that keep the City transparent. [#I-04b]

  He later recommended that the City regularly evaluate business program processes and that doing so will hold the City accountable and keep things fair. [#I-04b]

APPENDIX K.
Business Assistance Programs

Local and state agencies, not-for-profit organizations and other groups operate a broad range of assistance programs available to businesses in the Alexandria metropolitan area. Although the list of programs may not be exhaustive, it describes many programs that businesses in the Alexandria area could access. Examples include:

A. Federal government and other national programs; and

B. State and local government, not-for-profit and private sector initiatives.

A. Federal Government and other National Program Examples

A summary of federal program examples follows.

Federal ACDBE Program. Commercial airports receiving FAA funds are required to implement the Federal Airport Concessions Disadvantaged Business Enterprise (ACDBE) Program related to certain airport concessions activities. Socially and economically disadvantaged firms can be certified as ACDBEs. Airports sometimes set goals for participation of ACDBEs in individual airport concessions agreements.

The ACDBE Program applies to commercial service airports with 10,000 or more annual enplanements. Non-primary airports, non-commercial service airports, general aviation airports, reliever airports, or any other airport that does not have scheduled commercial service are not required to have an ACDBE program.[1]

England Economic Development and Industrial District (England Authority) owns and operates the Alexandria International Airport. To be eligible, firms must be certified as an ACDBE by the Louisiana Unified Certification Program.[2]

Federal DBE Program. The U.S. Department of Transportation requires state and local governments that receive funds from the Federal Highway Administration, Federal Transit Administration and Federal Aviation Administration to implement the Federal DBE Program. The Federal DBE Program applies to contracts funded by the U.S. Department of Transportation.[3]

- The Federal DBE Program applies to FHWA-funded contracts the City awards (using money received through the Louisiana Department of Transportation).

[1] 49 CFR Section 23.21.

[2] See https://www.englandairpark.org/ and https://flyaex.org/community/dbe-program/

[3] See https://www.fhwa.dot.gov/civilrights/programs/dbess/

- The City applies the Federal DBE Program to FTA-funded contracts it awards related to transit services (except for transit vehicle purchases, which fall under another USDOT program).

- The England Economic and Industrial Development Board applies the DBE Program to FAA-funded contracts at the Alexandria International Airport and other federally funded capital projects awarded by the Authority.[4]

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.[5]

Under the Federal DBE Program, a public agency can set an DBE goal on a contract. Prime contractors must either include a level of DBE participation in their bid that meets the goal for the contract or show good faith efforts to do so.

The State of Louisiana is the primary certification agency for a potential DBE in Alexandria (see Louisiana Unified Certification Program or LAUCP).

Internal Revenue Service (IRS) Small Business and Self-Employed Tax Center. This program provides resources for taxpayers filing as self-employers or small businesses with assets under $10 million. The Center serves as an assistance provider for small businesses or self-employed entrepreneurs. It includes information on independent contractors; preparing and filing taxes; online learning workshops; and the stages of owning a business.[6]

Minority Business Development Agency (MBDA). Part of the U.S. Department of Commerce, MBDA provides technical assistance and resources related to business financing, access to capital, contract opportunities and new opportunities for minority-owned businesses in the United States.[7]

National Minority Supplier Development Council (NMSDC). NMSDC is a corporate member organization focused on increasing business opportunities for certified minority-owned businesses. It operates the Business Consortium Fund, a nonprofit business development program, which offers financing programs and business advisory services for its members.[8]

Operation Hope Small-Business Empowerment Program. The Operation Hope program assists aspiring entrepreneurs in low-wealth neighborhoods. The program combines business training and

[4] See https://www.englandairpark.org/ and https://flyaex.org/community/dbe-program/

[5] See https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/definition-disadvantaged-business-enterprise

[6] See https://www.irs.gov/businesses/small-businesses-self-employed

[7] See https://www.mbda.gov/

[8] See https://www.nmsdc.org/

financial counseling with access to small business financing options. Participants complete a 12-week training program, plus workshops on business financing, credit and money management.[9]

Small Business Development Centers (SBDCs). U.S. Small Business Administration financially supports SBDCs throughout the country to provide small business training and business counseling to small business owners and prospective entrepreneurs. There are 10 full-time centers located throughout the State of Louisiana including 1 in the City of Alexandria.[10]

Small Business Innovation Research (SBIR). SBIR program solicitations are issued by eleven Federal agencies, including the Department of Agriculture, Department of Commerce, Department of Defense, Department of Education, Department of Energy, Department of Health and Human Services, Department of Homeland Security, Department of Transportation, Environmental Protection Agency, National Aeronautics and Space Administration, and the National Science Foundation.[11]

Small Business Technology Transfer (STTR). STTR is designed to stimulate technological innovation and provide opportunities for small businesses in the field of research and development in partnership with federal agencies. Small businesses have the opportunity to collaborate with agencies such as the Department of Defense, the Department of Energy, the Department of Health and Human Services, the National Aeronautics and Space Administration and the National Science Foundation in joint-venture opportunities throughout the nation.[12]

U.S. Chamber Small Business Division. The Small Business Division offers free tools such as the Small Business Office Playbook and helps with selecting offices, cost control and choosing suppliers.[13]

United States Department of Housing and Urban Development (HUD). HUD is the federal department that administers Community Development Block Grants (CDBG funds), certain federal housing programs and related programs. State and local governments that receive money from HUD must comply with HUD requirements regarding minority- and women-owned business participation in HUD-funded contracts, as well as participation of project-area residents in those contracts.

U.S. Department of Transportation (USDOT) Office of Small and Disadvantaged Business Utilization (OSDBU). The OSDBU offers a range of programs and resources to assist small and disadvantaged businesses. Programs include a mentor-protégé program, a bonding assistance program, the Women and Girls in Transportation Initiative and a short-term lending program.

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[9] See https://operationhope.org/small-business-development/

[10] See https://bizcenter.org/centers/

[11] See https://www.sbir.gov/

[12] See https://www.sbir.gov/about/about-sttr

[13] See https://www.uschamber.com/members/small-business

OSDBU partners with The Surety and Fidelity Association of America (SFAA) to help small businesses become bond ready. Becoming bondable is a challenge for many targeted businesses and this program aims to help businesses grow and build bonding capacity.[14]

U.S. Economic Development Administration (EDA). U.S. EDA works directly with local communities and regions to advance economic development initiatives based on local requirements. The U.S. EDA provides grants to businesses for planning, technical assistance and infrastructure construction.[15]

United States Environmental Protection Agency (EPA) Disadvantaged Business Enterprise (DBE) Program. The EPA is the federal agency that administers regulations and programs regarding environmental protection. The EPA has certain requirements for the EPA Disadvantaged Business Enterprise (DBE) Program regarding participation of minority- and women-owned businesses, small businesses and other targeted businesses in EPA-funded contracts for construction, equipment, services and supplies.[16]

U.S. Small Business Administration (SBA) 7(a) Loan Program. The SBA 7(a) Program provides small businesses access to up to $5 million in loans to fund startup costs, buy equipment, purchase new land, repair existing capital and expand an existing business. To be considered eligible for the SBA 7(a) Loan Program, businesses must meet SBA's size standards which are dependent on a businesses' annual receipts and number of employees.[17]

U.S. Small Business Administration (SBA) 8(a) Business Development Program. The SBA 8(a) Business Development Program is a business assistance program for small disadvantaged businesses. It offers a broad scope of assistance to firms certified under the program (companies that are owned and controlled at least 51 percent by socially and economically disadvantaged individuals).[18] Program participants can compete for set-aside and sole-source federal contracts.

Woman-Owned Small Business/Economically Disadvantaged Woman-Owned Small Business (WOSB/EDWOSB) Federal Contracting Program. The WOSB/EDWOSB program administered by the U.S. SBA assists small businesses owned and controlled by one or more economically disadvantaged women to participate in federal procurement process within industries where women-owned small businesses are under-represented. To be a WOSB, a woman-owned small business in selected industries[19] must be at least 51 percent owned and controlled by women who are U.S. citizens and be a small business as defined by the U.S. SBA.

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[14] See https://www.transportation.gov/content/office-small-and-disadvantaged-business-utilization

[15] See https://www.eda.gov/

[16] See https://www.epa.gov/sites/production/files/2015-09/documents/tues_atlanta_5_1015_henderson.pdf

[17] See https://www.sba.gov/partners/lenders/7a-loan-program/types-7a-loans

[18] See https://www.sba.gov/category/business-groups/minority-owned

[19] See https://www.sba.gov/document/support--qualifying-naics-women-owned-small-business-federal-contracting-program

To be eligible as an EDWOSB, the business must meet the criteria of the WOSB program and each owner must have less than $750,000 in personal net worth, $350,000 or less in adjusted gross income averaged over the previous years, and $6 million or less in personal assets.[20]

B. State and Local Government, Statewide Membership Organization, Not-for-Profit and Private Sector Initiatives

Examples of programs available locally and throughout Louisiana follow.

American Council of Engineering Companies (ACEC) of Louisiana. ACEC of Louisiana is the state chapter of ACEC that provides advocacy, education and training to Louisiana engineering firms.[21]

American Institute of Architects (AIA) Central Louisiana. The AIA Central Louisiana is the local chapter of the national organization that provides architects and designers with training and education, networking opportunities, and advocacy at all policy levels. The AIA Central Louisiana chapter is located in Alexandria.[22]

Business Acceleration Systems (BAS). The Business Acceleration System is administered by the Central Louisiana Economic Development Alliance (CLEDA) to help entrepreneurs with business coaching, education, technical assistance and networking opportunities to address similar business needs and challenges. It is funded in part by CLEDA, The Rapides Foundation and USDA.[23]

Central Louisiana Business Incubator. The Central Louisiana Business Incubator provides management, financial, marketing and administrative consulting support to start-ups.[24]

Central Louisiana Regional Chamber of Commerce. Central Louisiana Regional Chamber of Commerce provides workforce development, professional development, and business advisory service to its more than 1,200 businesses and industry members in central Louisiana.[25]

Greater Alexandria Economic Development Authority (GAEDA). GAEDA was created through legislation to provide economic development opportunities within the City and Rapides Parish. It provides access to resources such as grants, contract opportunities, Louisiana tax credits and incentive programs.[26]

Hudson Initiative SE. Hudson Initiative SE certification helps small businesses gain access to purchasing and contracting opportunities available at the state level.[27]

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[20] See https://www.certify.sba.gov/am-i-eligible

[21] See https://www.acec.org/acec-of-louisiana/

[22] See https://aiala.com/local-chapters/

[23] See https://cenla.org/bas/

[24] See https://www.clbi.org/

[25] See https://www.clbi.org/

[26] See https://www.gaeda.org/

[27] See https://www.opportunitylouisiana.com

Louisiana Associated General Contractors (LAGC). LAGC provides members access to construction seminars, networking opportunities and information on current construction projects in Louisiana.[28]

Louisiana Contractors Accreditation Institute. The Institute offers seminars and courses to small and emerging construction businesses in a partnership between Louisiana Economic Development, Louisiana Community & Technical College System and the Louisiana State Licensing Board for Contractors.[29]

Louisiana Economic Development (LED). Louisiana Economic Development assists small business owners in Louisiana regarding access to capital, growing a business and bonding and offers access to a mentor-protégé program. It also provides information on how to conduct business with the government and as well as resources for MBE/WBE/DBE and veteran-owned businesses.[30]

Louisiana Economic Development's (LED) Bonding Assistance Program. LED's Bonding Assistance Program offers bond guarantees of 25 percent of contract price up to $100,000 for certified Small and Emerging Development (SEBD) Program businesses. The bond guarantee helps the business owner obtain bonding by mitigating some of the risk to the surety company.[31]

Louisiana Economic Development's (LED) Mentor-Protégé Recognition Program. The Mentor-Protégé Recognition Program connects certified small and emerging Louisiana businesses with mentor companies for technical and developmental assistance.[32]

Louisiana Federation of Business and Professional Women. Louisiana Federation of Business and Professional Women provides resources for leadership, networking, personal development, professional development and advocacy to help members who range from entrepreneurs to small business owners to large corporations.[33]

Louisiana Small Business Development Center Northwest & Central Region (LSBDC NWCR). LSBDC NWCR provides one-on-one business consulting to entrepreneurs through a network of centers to support the growth and success of small businesses.

Louisiana Unified Certification Program (LAUCP). LAUCP was developed by the State of Louisiana to certify businesses as DBEs. LAUCP follows all certification procedures and standards under the Federal DBE Program.[34]

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[28] See http://www.lagc.org/

[29] See https://www.opportunitylouisiana.com/small-business/special-programs-for-small-business/louisiana-contractors-accreditation-institute

[30] See https://www.opportunitylouisiana.com/

[31] See https://www.opportunitylouisiana.com/small-business/special-programs-for-small-business/bonding-assistance-program

[32] See https://www.opportunitylouisiana.com/small-business/special-programs-for-small-business/mentor-protege-recognition-program

[33] See http://lafbpw.wildapricot.org/

[34] See http://www8.dotd.la.gov/UCP/LADOTD_UCP_Agreement.pdf

Louisiana Veteran Entrepreneurship Program (LVEP). The Louisiana Department of Economic Development's Veteran Entrepreneurship Program (LVEP) is designed to boost business opportunities for Louisiana veterans (active duty, Reservists and veterans) by providing the tools necessary to develop their business.

Louisiana's Veteran Initiative (LAVETBIZ). The Louisiana Department of Economic Development's Veteran Initiative (LAVETBIZ) provides certification to Louisiana small businesses that are at least 51 percent veteran-owned or service-connected disabled-veteran-owned in order to increase access to purchasing and contracting opportunities available at the state government level.

Maker Mornings. Maker Mornings is a quarterly speaker series sponsored by the Central Louisiana Economic Development Alliance (CLEDA). These events are designed to connect and encourage inventors, builders, manufacturers, fabricators and suppliers from across Central Louisiana.[35]

Small Business Loan and Guaranty Program. The Small Business Loan and Guaranty Program is administered by Louisiana Economic Development through the Louisiana Economic Development Corporation (LEDC). The Small Business Loan and Guaranty program helps small businesses by providing loan guarantees to banks and other small business lenders in association with the federal State Small Business Credit Initiative (SSBCI).[36]

Small and Emerging Business Development Program (SEBD). SEBD is designed to increase the managerial and technical skills of business owners.[37]

[35] See http://cenla.org/innovation/makermornings

[36] See https://www.opportunitylouisiana.com/business-incentives/small-business-loan-and-guaranty-program

[37] See https://batonrougearea.score.org/

APPENDIX L.
Analysis of Central Louisiana Construction Projects

Keen Independent analyzed the utilization of minority- and women-owned construction firms as contractors and design firms on commercial, public building and other public works projects in the Central Louisiana marketplace that were not awarded by the City of Alexandria. The analysis is for prime contractors and prime consultants, as subcontract data were not available for these projects.

As described in Chapter 3, Central Louisiana includes Avoyelles, Catahoula, Concordia, Grant, La Salle, Rapides, Vernon and Winn parishes. It is the primary area from which the City of Alexandria draws contractors and design firms for its construction and A&E contracts.

Appendix L presents results for:

- MBE/WBE utilization on Central Louisiana construction projects; and
- Disparity analysis for Central Louisiana construction projects.

A. Compilation of Data for Similar Construction Projects in the Central Louisiana Marketplace

Keen Independent purchased data on local marketplace construction projects from Dodge Data & Analytics. The study team examined projects in the Dodge Reports for 2017 through 2019. These data contain information regarding commercial, public building and other public works projects and identify the general contractor or construction manager for each project. Types of projects were:

- Office and bank buildings;
- Warehouses;
- Parking garages and automotive services;
- Schools, libraries and laboratories (no manufacturing);
- Hospitals and other health treatment;
- Government service buildings;
- Amusement, social and recreational buildings;
- Streets and highways;
- Bridges;
- Dams, reservoirs, river development;
- Sewerage and waste disposal systems;
- Water supply systems; and
- Power plants, gas and communications.

For some projects, the Dodge Reports data also identify the design firm. Because the Dodge Reports data do not provide dollars for the design work, Keen Independent analyzed the number of design contracts rather than dollars of design work.

Keen Independent obtained data on 127 non-City public and commercial construction projects for which the study team was able to compile general contractor ownership information, 35 of which contained information about the project's designer. The Dodge Reports data included 10 additional design projects, bringing the total number of projects examined to 172.

B. MBE/WBE Utilization on Central Louisiana Construction Projects

Keen Independent determined ownership of firms in the Dodge Reports data following the steps described for analyzing ownership for City contracts (see Appendix C).

Utilization of general contractors. Keen Independent examined 127 non-City public and commercial construction projects from 2017 through 2019 based on Dodge Reports data.

Minority-owned firms were identified as the general contractor for 16 out of the 127 projects. About 9 percent of project dollars went to MBEs. There were two contracts that Keen Independent identified as going to white women-owned companies. WBEs utilization accounted for than 1 percent of project dollars.

Figure L-1.
Number of non-City public and commercial construction projects within the Central Louisiana marketplace, 2017–2019

	Number of projects	$1,000s	Percent of dollars
African American-owned	4	$ 3,903	2.00 %
Asian American-owned	1	3,798	1.94
Hispanic American-owned	11	9,631	4.93
Native American-owned	0	0	0.00
Total MBE	16	$ 17,332	8.86 %
WBE (white women-owned)	2	424	0.22
Total MBE/WBE	**18**	**$ 17,756**	**9.08 %**
Majority-owned	109	177,797	90.92
Total	**127**	**$ 195,553**	**100.00 %**

Note: Does not include City of Alexandria projects.

Source: Keen Independent from 2020 availability survey and analysis of Dodge Data & Analytics Dodge Reports data for 2017–2019.

Utilization of design firms. None of the 45 contracts for design work went to firms that Keen Independent identified as minority- or women-owned.

C. Disparity Analysis for Central Louisiana Construction Projects

Keen Independent used the approach described in Appendix D to estimate the availability of MBE/WBEs and majority-owned construction businesses for each of the construction contracts in the Dodge Reports data.

This analysis provided benchmarks for the percentage of Dodge Reports contracts one might expect to go to MBE/WBEs given the current availability of firms to perform specific types and sizes of those contracts. The availability analysis considered bid capacity of firms, only counting a company as available for sizes of contracts it had been awarded or had bid on in the local marketplace in the previous five years.

Figure L-2 compares the percentage of construction projects going to MBEs and WBEs with corresponding availability benchmarks.

As shown, the utilization of white women-owned businesses as construction firms (0.22%) was substantially below what might be anticipated from the availability analysis (15.16%), with a disparity index of 1.

There was no disparity between utilization and availability of MBEs as general contractors on these projects.

Figure L-2.
Disparity analysis for prime contracts on non-City public and commercial construction projects within the Central Louisiana marketplace, 2017–2019

	Utilization	Availability	Disparity index
MBE (minority-owned)	8.86 %	0.19 %	200+
WBE (white women-owned)	0.22	15.16	1
Total MBE/WBE	**9.08 %**	**15.35 %**	59

Note: Does not include City of Alexandria projects.

Source: Keen Independent from 2020 availability survey and analysis of Dodge Data & Analytics Dodge Reports data for 2017–2019.

Dollar-weighted availability results for design firms performing non-City projects.
MBE/WBEs accounted for 12.5 percent of the A&E firms in the Central Louisiana marketplace. As MBE/WBE utilization was 0 percent for the 45 design contracts examined, there was a large disparity between the utilization and availability of design firms for these projects.