





DBE/MBE/WBE Recent Legal Cases and Challenges

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Recent Legal Cases and Challenges to the Federal DBE Program and Implementation of the Federal DBE Program

State	Successfully defended implementation of Federal DBE Program	Unsuccessfully defended implementation of Federal DBE Program	Pending litigation at time of presentation	Upheld Constitutionality of the Federal DBE Program
California	Associated General Contractors of America, San Diego Chapter v. California DOT (2013) ¹			
Colorado				Adarand Constructors, Inc. v. Slater, (10th Cir. 2000) ²
Florida	South Florida Chapter of the Associated General Contractors v. Broward County, Florida (2008) ³			
Illinois	Northern Contracting, Inc. v. Illinois DOT (2007) ⁴			Northern Contracting, 2004 WL 422704 (N.D. III. 2004) ⁴
	Dunnet Bay Construction Company v. Illinois DOT (2015), cert. denied, (2016) ⁵			Midwest Fence Corp. v. United States DOT, Illinois DOT, et al. ⁶
	Midwest Fence Corp. v. United States DOT, Illinois DOT, et al (2016), cert. denied, (2017) ⁶			
Minnesota	Sherbrooke Turf, Inc. v. Minnesota Department of Transportation (2003) ⁷			Sherbrooke Turf (8 th Circuit) ⁷ Geyer Signal (D. Minn.) ⁸
	Geyer Signal, Inc. v. Minnesota DOT, U.S. DOT, Federal Highway Administration, et al. (2014) ⁸			Geyer Signal (D. Militt.)
Montana	M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al. (2013) ⁹	Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al. (2018) ¹⁰		
Nebraska	Gross Seed Company v. Nebraska Department of Roads (2003) ¹¹			Gross Seed (8th Circuit)11
New Jersey	Geod Corporation v. New Jersey Transit Corporation, et. al. (2010) ¹²			
Pennsylvania	U.S. v. Taylor (2018) ¹³			<i>U.S. v. Taylor</i> (W.D. Penn. 2018) ¹³
Washington	(Orion Insurance Group v. Washington OMWBE, U.S. DOT, et al. 2018), <i>cert</i> .	Western States Paving Co., v. Washington State DOT		Western States Paving (9 th Circuit) ¹⁴
admington	denied (June 2019) 15	(2005) ¹⁴		Orion Ins (9th Cir. 2018) 15

Citations of Recent Cases on Chart (page 3)

- 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. 2013).
- 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).
- 3. South Florida Chapter of the Associated General Contractors v. Broward County, Florida, 544 F. Supp.2d 1336 (S.D. Fla. 2008).
- 4. Northern Contracting, Inc. v. Illinois, 473 F.3d 715 (7th Cir. 2007).
- 5. 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 et al., 2016 WL 193809 (2016).
- 6. Midwest Fence Corp. v. United States DOT, Illinois DOT, et al., 840 F.3d 932, 2016 WL 65414 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017).
- Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041.
- *Geyer Signal, Inc., et al. v. Minnesota DOT, U.S. DOT, Federal Highway Administration, et al.,* 2014 WL 1309092 (D. Minn. 2014).
- 9. M.K. Weeden Construction v. State of Montana, Montana Dept. of Transportation, et al., 2013 WL 4774517 (D. Mont.) (2013).
- 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), dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014). 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 voluntarily dismissed by stipulation of parties (March 14, 2018).
- Gross Seed Company v. Nebraska Department of Roads, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041.
- 12. Geod Corporation v. New Jersey Transit Corporation, et. al., 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. 2010).
- 3. U.S. v. Taylor, 232 F. Supp. 3d 741 (W.D. Penn. 2017). Final judgment and termination of case on March 13, 2018.
- Western States Paving Co. v. Washington State DOT, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).
- orion Insurance Group v. Washington OMWBE, U.S. DOT, 2018 WL 6695345 (9th Cir. 2018), cert. denied, June 24, 2019.

- » If a recipient of U.S. DOT funds implementing the Federal DBE Program determines it is necessary to utilize race- and ethnic-conscious measures, it is subject to the "strict scrutiny" analysis applied by the courts.
 - 1) The first prong of the strict scrutiny analysis requires a governmental entity to have a "compelling governmental interest" in remedying past identified discrimination;
 - Courts hold in implementing the Federal DBE Program, recipients do not need to independently satisfy this prong; Congress has satisfied the compelling interest test.
 - 2) The second prong requires a recipient's implementation of the Federal DBE Program be "narrowly tailored" to remedy identified discrimination in that recipient's transportation contracting market.

- » To satisfy the narrowly tailored prong of the strict scrutiny analysis the following factors are pertinent to implementation of the Federal DBE Program:
 - Evidence of specific identified discrimination in the local/state transportation contracting industry;
 - Quantitative (statistical) and qualitative (anecdotal) evidence.
 - 2) Serious consideration of workable race-ethnic and gender-neutral remedies;
 - Application of 49 CFR Section 26.51 measures.
 - Are neutral measures effective to remedy discrimination.
 - Not required to exhaust all neutral measures.
 - 3) Flexibility and duration of a race-ethnic-gender conscious remedy;
 - Front-end waivers; good faith efforts; sunset and re-evaluation provisions.
 - 4) Relationship of numerical DBE goals to the relevant market;
 - Rational relationship of goals based on availability of qualified DBEs (ready, willing and able)
 (follow USDOT regulations and guidance).

- 5) Impact of a race-ethnic-gender conscious remedy on third parties;
 - Cannot be unduly burdensome.
 - Overconcentration (see 49 CFR Section 26.33(a)).
- 6) Application of the program only to those minority groups who have suffered discrimination;
 - Evidence of discrimination as to a particular race, gender or ethnic group in the local/state transportation contracting industry.
- 7) Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et. al.
 - Seventh Circuit upheld Federal DBE Program and its implementation by Illinois DOT, but found "troubling" certain issues, including: (a) burden on non-DBEs; (b) overconcentration; (c) analysis of capacity of MBE/MBE/DBEs; and (d) mismatch argument (overall goals based on all funds to be spent, but contracts eligible for goals must have subcontracting possibilities).

- The narrow tailoring requirement: split in Courts of Appeal.
 - 1) The Ninth Circuit in AGC, San Diego Chapter v. California DOT and Western States Paving Co. v. Washington DOT followed by Mountain West Holdings Co. v. Montana DOT and M.K. Weeden v. Montana DOT, held:
 - State must have evidence of discrimination within its transportation contracting marketplace to determine whether there is the need for race- or ethnic- conscious remedial action.
 - Mere compliance with the Federal DBE Program does not satisfy strict scrutiny.
 - A narrowly tailored program must apply only to those minority groups who have actually suffered discrimination.
 - 2) In Northern Contracting and recent Midwest Fence and Dunnet Bay decisions, Seventh Circuit held:
 - A state DOT or recipient of federal funds implementing the Federal DBE Program "is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority."
 - 3) Seventh Circuit distinguished the Ninth Circuit in *Western States Paving* and Eighth Circuit in *Sherbrooke Turf*, holding a challenge to a state DOT's DBE program is limited to whether the state exceeded its grant of federal authority under the Federal DBE Program.

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), cert. denied, June 24, 2019, affirming, 2017 WL 3387344 (W.D. Wash. 2017)

Orion Insurance Group; Ralph G. Taylor, Plaintiffs v. Washington State Office of Minority & Women's Business Enterprises, United States DOT, et. al., 2018 WL 6695345 (9th Cir. December 19, 2018), cert. 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.
- » Plaintiff Taylor received results from a genetic ancestry test that estimated he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African.
- » Plaintiffs were certified by Washington State Office of Minority & Women's Business Enterprises ("OMWBE"), as a MBE under Washington State law.
- » Plaintiffs submitted to OMWBE Orion's application for DBE certification under federal law. Taylor identified himself as Black American and Native American.
- » 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.

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., (cont.)

- » OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.
- 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 insufficient evidence he was either Black or Native American.

Claims for violation of equal protection.

- » District court dismissed claim that the Federal DBE Program or its implementation violates the Equal Protection Clause.
- » District court found no evidence application of the federal regulations was done with intent to discriminate or create a disparate impact against mixed-race individuals.

Void for vagueness claim.

» District court dismissed' claims that definitions of "Black American" and "Native American" in the DBE regulations are impermissibly void for vagueness.

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., (cont.)

Claims for violations of 42 U.S.C. § 2000d (Title VI) against the State.

- » Plaintiffs' claims dismissed against the State Defendants for violation of Title VI.
- » DBE regulations' requirement a State consider race held constitutional.

On Appeal Ninth Circuit in Affirming the District Court Held:

- Taylor's claims dismissed against Acting Director of the USDOT's Office of Civil Rights, in her individual capacity.
- Taylor's claims for damages dismissed because the U.S. has not waived its sovereign immunity.
- » District court correctly dismissed Taylor's claims under 42 U.S.C. § 2000d (Title VI) because the Federal DBE Program does not qualify as a "program or activity" under the statute.
- » District court correctly granted summary judgment to 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.

Petition for Writ of Certiorari Denied in 2019

» Plaintiffs' Petition for Writ of Certiorari denied by Supreme Court in June 2019.

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 Circuit of the 15th Judicial Circuit in and for Palm Beach County, Florida; pending.

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 Circuit of the 15th Judicial Circuit in and for Palm Beach County, Florida; pending.

- The county sued Mason Tillman Associates (MTA) to turn over background documents from disparity studies it conducted.
- Those documents include the names of MWBE women and minority business owners who were interviewed by MTA, promised anonymity, and described discrimination trying to get county contracts.
- The documents sought initially by Associated General Contractors of America (AGC).
- The County filed suit after its unsuccessful efforts to get MTA to provide documents needed to satisfy a public records request from AGC.
- » Florida AGC requested information regarding disparity study by MTA.

Palm Beach County Board of County Commissioners v. Mason Tillman Associates, Ltd; Florida East Coast Chapter of the AGC of America, Inc. (cont)

- » MTA refused to provide the County the public records in their possession.
- » Palm Beach sued MTA for breach of contract and seeks specific performance of the contract requiring MTA to transfer all public records.
- The AGC requests documents from the County and MTA related to its study and its findings and conclusions, including the availability database, underlying data, and anecdotal interview identities.
- » MTA filed a Motion to Dismiss.
- » Court issued order to defer Motion to Dismiss and directing MTA to deliver the records to the court for incamera inspection.
- Court has denied motion by AGC to be elevated to party status and to conduct discovery.
- » At this time, parties are in discovery.
- The ruling may lead to suit on the County MBE/WBE program by the AGC.
- The ruling may have an effect on the disclosure requirement as to documents and records kept by a disparity study or goal methodology consultant.

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; pending.

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; pending.

- » Plaintiffs sued Shelby County for damages and to enjoin the County from the use of race-based preferences in awarding government construction contracts.
- » Plaintiffs claim violations of the 14th Amendment to the Constitution, 42 U.S.C. Sections 1981, I983, and 2000(d), and Tenn. Code § 5-14-108 requiring competitive bidding.
- The Plaintiffs claim the County MWBE Program is unconstitutional for prime and subcontractors.
- » Plaintiffs ask the Court to enjoin the County from implementing the Program with respect to awarding government construction contracts.
- » Motion to Dismiss brought by Individual Defendants Watkins and Turner. Watkins is the Administrator of the Shelby County Office of Equal Opportunity Compliance. Turner is an elected member of the Board of Commissioners.

- Watkins and Turner argue Plaintiffs' claims should be dismissed based on: (1) claims against them in their official capacity are duplicative of the claims against Shelby County; (2) they are entitled to qualified immunity; and (3) Turner is entitled to legislative immunity.
- Court granted the Motion to Dismiss the official-capacity damages claims against Individual Defendants as redundant with claims against County.
- » Court denied the Motion to Dismiss the official capacity claims seeking *injunctive relief* under federal law—the claims under §§ 1981, 1983 and 2000(d)—against *Individual Defendants*.
- The Court denied the Motion, finding dismissal of Plaintiffs' claims on the basis of qualified immunity at this discovery stage would be premature.
- » Qualified immunity shields federal and state officials from suits seeking money damages unless a plaintiff pleads sufficient facts showing:
 - (1) that the official violated a statutory or constitutional right, and
 - (2) that the right was 'clearly established' at the time of the challenged conduct (a reasonable officer would have known that his conduct violated that right").

- » Legislative Immunity. Local legislators enjoy absolute immunity from suits based on legitimate legislative activity. The Court found, at this stage, Turner is not entitled to legislative immunity.
- Turner's actions constituted administrative or executive functions, rather than legislative ones. Awarding contracts after a competitive bid process is not necessarily a legislative function.
- » Conclusion. The Motions to Dismiss on the basis that Plaintiffs' suit against *Individual Defendants* in their *official* capacities is improper are granted in part and denied in part.
- » Plaintiffs may not seek monetary damages against *Individual Defendants* based on an *official* capacity claim, but may seek injunctive relief. The Motions to Dismiss on the other bases—that *Individual Defendants* are entitled to qualified immunity and that Turner is entitled to legislative immunity—are denied.
- Therefore, the claims for money damages against Individual Defendants in their individual capacity are not dismissed.
- » At the time of this report, the parties are engaged in discovery.
- » Trial is scheduled for December 14, 2020.

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).

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 Defendant's MWBE Program Certification and Compliance Rules require Native Americans show at least one-quarter descent from a tribe recognized by the Federal Bureau of Indian Affairs (FBIA).
- » 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.
- » Plaintiffs allege violations of Title VI of the Civil Rights Act of 1964, and the denial of equal protection under the Fourteenth Amendment based on these definitions.
- » Plaintiffs who are MBE certified allege they are Minority Group Members because their owners are members of the Indian tribe known as Northern Cherokee Nation.
- » Plaintiffs allege the City defines Minority Group Members differently depending on one's racial classification.

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 claim to meet the definition of a Minority Group Member Native Americans are restricted to those persons who have cultural identification and can demonstrate membership in a tribe recognized by the FBIA.
- » In 2019 Plaintiffs sought to renew their MBE certification with the City, which was denied, and allege the City decided to decertify the MBE status.
- Their membership in the Northern Cherokee Nation ("NCN") disqualifies each company from Minority Group Membership because the NCN is not a federally recognized tribe.
- » Plaintiffs allege the City's policy treats Native Americans differently than African Americans, Hispanic Americans and Asian Americans on the basis of race.
- » Native Americans are not allowed to qualify in the same way.
- » Plaintiffs allege a violation of their rights by the use of a different standard to determine whether they should qualify as a Minority Group Member.
- » Plaintiffs damages for business losses, loss of standing in their community, and damage to their reputation, and punitive damages.
- » Plaintiffs also seek injunctive relief requiring the City to strike its definition of a Minority Group Member and reinstate their MBE certification.
- » Amended Complaint filed on November 17, 2019.

Pharmacann Ohio, LLC, et al. 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

Pharmacann Ohio, LLC, et al. 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

- » Ohio legislature codified R.C. Chapter 3796, legalizing medical marijuana.
- » Legislature instructed Defendant Ohio Department of Commerce to issue certain licenses to medical marijuana cultivators, processors, and testing laboratories.
- Department instructed to award 15% of licenses to economically disadvantaged groups ("EDG"), African Americans and American Indians.
- » Plaintiff Greenleaf Gardens received a score that would have qualified it to receive one of the twelve provisional licenses, but it was denied a license.
- Defendants Harvest Grows and Parma Wellness Center were awarded licenses due to the fact they were EDGs.
- » In 2018, Plaintiff Pharmacann filed its intervening complaint.
- » R.C. §3796.09(C) is subject to strict scrutiny.
- » Defendants assert the State had a compelling government interest in redressing past and present effects of racial discrimination within its jurisdiction.

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

- » Evidence included prior discrimination in bidding for Ohio government contracts, other states' marijuana licensing programs, and marijuana related arrests.
- » Some of the evidence not considered by the legislature prior to adopting R.C. §3796.09.
- » Court held post-enactment evidence may not be used to demonstrate the government's interest in remedying prior discrimination was compelling.
- » Evidence of racial disparities regarding arrest rates for marijuana do not support a set aside for EDGs who are not referenced in the arrest rates.
- » Increased arrest rates do not establish discrimination within the medical marijuana industry.
- » The legislators considered the history of R.C. §125.081, Ohio's MBE program.
- 2001 studies referenced pertain to government procurement contracts.
- These studies were not reviewed by the legislature for R.C. §3796.09(C).
- » Court held the law requires that evidence considered by the legislature must be directly related to discrimination in that particular industry.

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

- Court found fact medical marijuana industry is new, demonstrates there is no history of discrimination in this particular industry.
- » Court found there was not a strong basis in evidence supporting the conclusion that remedial action is necessary to correct discrimination within the medical marijuana industry; thus, there was no compelling government interest.
- » The court also found R.C. §3796.09(C) is not narrowly tailored.
- » Insufficient evidence alternative remedies were considered or proposed.
- » If the legislature sought to rectify elevated arrest rates, they should give preference to companies owned by former arrestees and convicts (not EDGs).
- » R.C. §3796.09(C) appears somewhat flexible as it has a waiver provision.
- » Court found the entire statute is not flexible, however, because it is a strict percentage, unrelated to the particular medical marijuana industry.
- » 15% is not an estimated goal, but a specific requirement.
- » R.C. §3796.09(C) does not include a proposed duration, and is not flexible.
- Defendants argued the numbers associated with the contracting market are applicable to the medical marijuana industry because of a Maryland study.

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

- 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.
- Statistics pertaining to arrest rates are not related to the statute, but are based on general rates throughout the U.S..
- Statistics do not demonstrate racial disparities pertaining to marijuana in Ohio.
- » 15% set aside is not based on the evidence demonstrating racial discrimination in marijuana related arrest in Ohio.
- » Court concluded the 15% value was selected at random, not based on evidence.
- » 15% set aside is an undue burden for a new industry with limited participants.
- Statute not require the legislature to evaluate the program on a reoccurring basis.
- » Court found failure of the legislature to evaluate or employ race-neutral alternative remedies; the inflexible and unlimited nature of the statute; the lack of relationship between the 15% and the relevant market; and the large impact on third parties, shows the legislature failed to narrowly-tailor R.C. §3796.09(C).
- Therefore, the Court finds R.C. §3796.09(C) is unconstitutional.
- The case at the time of this report is on appeal.

Pure Ohio Wellness, LLC v. Ohio Board of Pharmacy, In the Court of Common Pleas, Madison County, Ohio, Case No. CVH 20190197, November 4, 2019.

- » Appellant's Pure Ohio Wellness, LLC ("Pure Ohio"), appealed from the Order by State of Ohio Board of Pharmacy ("the Board"), in which Pure Ohio was denied a provisional medical marijuana dispensary license.
- » Pursuant to R.C. Chapter 3796, the Board was granted authority to implement and regulate the licensure of medical marijuana dispensaries in Ohio.
- » Board promulgated Ohio Administrative Code 3796:6-2-05(A) that provided the Board may issue up to 60 dispensary provisional licenses.
- » Board was required to issue not less than fifteen percent (15%) of retail dispensary licenses to entities that are owned and controlled by members of economically disadvantaged groups ("EDG").
- » Pure Ohio was the lowest scoring applicant in a specific district who would otherwise be awarded a provisional dispensary license.
- » Only reason Pure Ohio did not receive a provisional license was due to the requirement that the Board award 15% of all dispensaries to EDG applicants.
- » Pure Ohio alleges statute, established an unconstitutional race-based quota.

- » Board argues that R.C. 3796.10(C) was modeled on the Ohio Minority Business Enterprise ("MBE") program which has been upheld as constitutional.
- » Parties agree that R.C. 3796.10(C) is subject to strict scrutiny as the statute involves a raced-based quota.

A. Compelling government interest.

- » Evidence included prior discrimination in the bidding for Ohio government contracts, statistical and anecdotal studies, other jurisdiction's marijuana licensing programs, articles showing minorities are underrepresented in the medical marijuana industry.
- » Board references a 2001 anecdotal study that remedial action was necessary in the industry of government procurement contracts and led to the Encouraging Diversity Growth and Equity (EDGE Program) in 2003.
- » EDGE program establishes goals for state entities in awarding contracts procurement of supplies and services to minority-owned businesses.
- » Court found the evidence is not specific to the medical marijuana industry.
- » No evidence submitted that the General Assembly considered *prior* to the statute.
- » Court found the evidence pertains to *government procurement contracts*.

- » Evidence must be directly related to discrimination of *that particular industry*.
- » Board did not put forward any statistical evidence as to racial discrimination in the medical marijuana industry in Ohio.
- Multiple news articles that conclude minority groups are underrepresented in ownership of marijuana retail licenses were published after the statute, thus post-enactment evidence and should not be considered.
- » Courts are split, but Sixth Circuit precludes post-enactment evidence.
- Court held there is not a strong basis in evidence that remedial action is necessary to correct discrimination within the medical marijuana industry.

B. Narrowly tailored remedy

- » No evidence alternative remedies were proposed or analyzed by legislature.
- Court found that alternative remedies could have been available to the legislature.
- » R.C. 3796.01(C) somewhat flexible in that it includes a waiver provision.

- » But, the entire statute held not flexible because it has a strict percentage and no evidence established the quota is related to the medical marijuana industry.
- Statute does not include a proposed duration or how it is terminated.
- » Court found no relationship or correlation between the 15% quota and the relevant medical marijuana market.
- » Board did not provide any evidence or explanation as to why this percentage is related to the relevant labor market in the new medical marijuana industry.
- » A 15% "set aside" reserves licenses solely on the basis of race.
- Court found 15% set aside is not insignificant in its impact on third parties as it can bar qualified applicants participation in the market.
- Court held the burden is excessive for a new industry with limited participants.

Conclusion and Voluntary Dismissal

- » R.C. 3796.10(C) held unconstitutional R.C. 3796.10(C) not narrowly tailored.
- » Pure Ohio in December 2019 voluntarily dismissed the appeal.

SBA Final Rule, published in 64 Federal Register 66561 (December 5, 2019)

SBA Final Rule, published December 5, 2019; effective date January 6, 2020 (64 Federal Register 66561 (December 5, 2019)):

- Modifies method for calculating average annual receipts used to prescribe size standards for small businesses.
- From a 3-year averaging period to a 5-year averaging period.
- Two year transition period.

FAA Reauthorization Act of 2018 (October 5, 2018) (Pub. L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186)

Extends the FAA DBE and ACDBE programs for five years.

Sec. 150 Definition of Small Business Concern.

- A. Has the meaning given in section 3 of the Small Business Act (15 U.S.C. 632); but in the case of a concern in the construction industry, a concern shall be considered a small business concern if it meets the size standard for the NAICS Code 237310, as adjusted by the SBA.
 - Note: SBA Final Rule published 64 Federal Register 66561 (December 5, 2019). Rule modifies size standard definition of small business.

"Fixing America's Surface Transportation Act" or the "FAST Act" (December 4, 2015)

FAST ACT (December 4, 2015)

On December 3, 2015, the Fixing America's Surface Transportation Act" or the ``FAST Act" was passed by Congress, and it was signed by the President on December 4, 2015, as the new five year surface transportation authorization law. The FAST Act continues the Federal DBE Program and makes the following "Findings" in Section 1101 (b) of the Act:

SEC. 1101. AUTHORIZATION OF APPROPRIATIONS.

- (b) Disadvantaged Business Enterprises-
- (1) FINDINGS- Congress finds that—
- (A) while significant progress has occurred due to the establishment of the DBE Program, discrimination and related barriers continue to pose significant obstacles for MWBEs seeking to do business in federally assisted surface transportation markets across the U.S.;
- (B) the continuing barriers in (A) merit the continuation of the DBE Program;
- (C) Congress has received and reviewed testimony and documentation of race and gender discrimination from numerous sources, which show that race- and gender-neutral efforts alone are insufficient to address the problem;

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- (D) the testimony and documentation demonstrate that discrimination across the U.S. poses a barrier to full and fair participation in surface transportation-related businesses of MWBEs and has impacted firm development and surface transportation-related business in the public and private markets; and
- (E) the testimony and documentation provide a strong basis that there is a compelling need for the continuation of the DBE Program to address race and gender discrimination in surface transportation-related business.
- (2) DEFINITIONS- In this subsection, the following definitions apply:
- (A) SMALL BUSINESS CONCERN-
- (i) IN GENERAL- The term `small business concern' means a small business concern (as the term is used in section 3 of the Small Business Act (15 U.S.C. 632)).
- (ii) EXCLUSIONS- The term `small business concern' does not include any concern that have average annual gross receipts during the preceding **three** fiscal years in excess of \$23,980,000, as adjusted annually for inflation. Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

H.R.4593 - To amend the FAA Modernization and Reform Act of 2012 and title 49, United States Code, with respect to DBEs

- » H.R. introduced in the House of Representatives on October 1, 2019.
- » H.R. is currently in the House Committee of Transportation and Infrastructure; referred to the Subcommittee on Aviation.

SECTION 1. INSPECTOR GENERAL REPORT ON PARTICIPATION IN FAA PROGRAMS BY DISADVANTAGED SMALL BUSINESS CONCERNS.

- Section 140 of the FAA Modernization and Reform Act of 2012 is amended—
- (2) by adding at the end the following:
- "(d) ASSESSMENT OF EFFORTS.—The Inspector General shall assess the efforts of the FAA with respect to implementing recommendations suggested in reports and shall include in each semiannual report submitted to Congress a description of the results of such assessment."

SEC. 2. MINORITY AND DISADVANTAGED BUSINESS PARTICIPATION.

- » Section 47113 of title 49, U.S. Code, is amended by adding the following:
- (2) CONSISTENCY OF INFORMATION.—The Secretary shall develop and maintain a training program—

- "(A) for employees of the FAA who provide guidance and training to entities that certify whether a small business concern qualifies under this section (and for employees of other modal administrations of the DOT); and
- "(B) that ensures Federal officials provide consistent communications with respect to certification requirements.
- (3) LISTS OF CERTIFYING AUTHORITIES.—The Secretary shall ensure that each State maintains an accurate list of the certifying authorities in such State and that the list is—
- "(A) updated at least twice each year; and "(B) made available to the public."
- By adding at the end the following:
- (4) REPORTING.—The Secretary shall determine, for each fiscal year, the number of individuals who received training and shall make such number available to the public. If the Secretary determines, with respect to a fiscal year, that fewer individuals received training than in the previous fiscal year, the Secretary shall submit to Congress, and make available to the public, a report describing the reasons for the decrease.
- (5) ASSESSMENT.—Not later than 2 years after the date of enactment, and every 2 years thereafter, the Secretary shall assess the training program, including by soliciting feedback from stakeholders, and update the training program as appropriate; and

By adding at the end the following:

- (f) TREND ASSESSMENT.—
- (1) IN GENERAL.—Not later than 2 years after the date of enactment, and every 2 years thereafter, the Secretary shall study, using information reported by airports, trends in the participation of small business concerns.
- (2) CONTENTS.—The study under paragraph (1) shall include—
- (A) an analysis of whether the participation of small business concerns at airports increased or decreased during the period studied, including for such concerns that were first time participants;
- (B) an analysis of the factors relating to any significant increases or decreases in participation compared to prior years; and
- (C) development of a plan to respond to the results of the study, including recommendations for best practices for maintaining or boosting participation.
- (3) REPORTING.—For each study completed under paragraph (1), the Secretary shall submit to Congress, and make available to each airport a report describing the results of the study.

SEC. 3. PASSENGER FACILITY CHARGES.

Section 40117(c) of title 49, U.S. Code, is amended by adding the following:

(5) An airport project application shall include a description of good faith efforts to contract with DBEs and to ensure that all small businesses, including owned by veterans, fairly compete for work funded with passenger facility charges.

SEC. 4. ANNUAL TRACKING OF NEW DBE FIRMS AT AIRPORTS.

- (a) TRACKING REQUIRED.— The Administrator shall require each airport to report to the FAA on the number of new DBEs that were awarded a contract or concession during the previous fiscal year at the airport.
- (b) Training.—The Administrator shall train to airports to comply with (a).
- (c) REPORTING.—The Administrator shall update dbE—Connect (or any online reporting system) to include the number of new DBEs that were awarded a contract or concession during the previous fiscal year at airport.

SEC. 5. AUDITS.

The Inspector General of the U.S. DOT shall conduct periodic audits regarding the accuracy of the data on DBEs contained in the FAA's reporting database.

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