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DBE/MBE/WBE Recent Legal Cases and Challenges

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Recent Cases and Challenges to the Federal DBE Program and Its Implementation By State and Local Governments

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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] Dunnet Bay Construction Company v. Illinois DOT (2015), cert. denied, (2016)[5] Midwest Fence Corp. v. United States DOT, Illinois DOT, et al (2016), cert. denied, (2017)[6]			Northern Contracting, 2004 WL 422704 (N.D. Ill. 2004)[4] Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.[6]
Minnesota	Sherbrooke Turf, Inc. v. Minnesota Department of Transportation (2003)[7] Geyer Signal, Inc. v. Minnesota DOT, U.S. DOT, Federal Highway Administration, et al. (2014)[8]			Sherbrooke Turf (8th Circuit) [7] Geyer Signal (D. Minn.)[8]
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]			
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Washington	(Orion Insurance Group v. Washington OMWBE, U.S. DOT, et al. 2018), *cert. denied (June 2019)* [15]	Western States Paving Co., v. Washington State DOT (2005)[14]		Western States Paving (9th Circuit)[14] Orion Ins (9th Cir. 2018) [15]

Citations of Recent Cases on Chart (page 3)

1. ***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).**
2. ***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).**
7. ***Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041.**
8. ***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).**
10. ***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).**
11. ***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).**
13. ***U.S. v. Taylor*, 232 F. Supp. 3d 741 (W.D. Penn. 2017). Final judgment and termination of case on March 13, 2018.**
14. ***Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).**
15. ***Orion Insurance Group v. Washington OMWBE, U.S. DOT*, 2018 WL 6695345 (9th Cir. 2018), *cert. denied,* June 24, 2019.**

Summary of Recent Cases for MBE/WBE Programs and Implementing the Federal DBE Program

- **A race- and ethnicity-based program implemented by a state or local government, including as a recipient of U.S. DOT funds implementing the Federal DBE Program, is subject to the "strict scrutiny" constitutional analysis. The strict scrutiny analysis is comprised of two prongs**:

  1) The first prong of the strict scrutiny analysis requires a governmental entity to have a "compelling governmental interest" in remedying past identified discrimination.

     - In implementing the Federal DBE Program, local or state governments do not need to independently satisfy this prong; Congress has satisfied the compelling interest test.

     - Local and state governments must establish they have a firm basis in evidence of past identified discrimination in their marketplace and the need to remedy that discrimination.

  2) The second prong requires a local or state government's MBE/WBE program or implementation of the Federal DBE Program be "narrowly tailored" to remedy identified discrimination in that local or state government's marketplace or recipient's transportation contracting market.

- **Courts apply intermediate scrutiny to gender-conscious programs.**

  3) Restrictions subject to intermediate scrutiny are permissible so long as they are substantially related to serve an important governmental interest.

Summary of Recent Cases for MBE/WBE Programs and Implementing the Federal DBE Program

- **To satisfy the narrowly tailored prong of the strict scrutiny analysis the following factors are pertinent to MBE/WBE Programs or implementation of the Federal DBE Program:**

1) Evidence of specific identified discrimination in the local/state government marketplace or transportation contracting industry;
   - Quantitative (statistical) and qualitative (anecdotal) evidence.
2) Serious consideration of workable race-ethnic and gender-neutral remedies;
   - For implementing the Federal DBE Program: application of 49 CFR Section 26.51 measures.
   - Are neutral measures effective to remedy identified 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 MBE/WBE/DBE goals to the relevant market;
   - Rational relationship of contract goals based on availability of qualified MBE/WBE/DBEs (ready, willing and able) (for Federal DBE Program, follow USDOT regulations and guidance).

Summary of Recent Cases for MBE/WBE Programs and Implementing the Federal DBE Program

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 government marketplace, or for the Federal DBE Program, 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).

Summary of Recent Cases for Implementing Federal DBE Program

- **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.

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.
- 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.

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 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 in-camera inspection.
- Court in September 2020, issued an Order denying the Motion to Dismiss, ordering MTA to file its answer and defenses to Palm Beach County
- Court denied motion by AGC to be elevated to party status and to conduct discovery.
- At this time, parties are in discovery.
- Court on November 17, 2020 issued an order finding that certain documents generated by MTA are exempt from the public records requests as trade secrets under Florida's Uniform Trade Secrets Act.
- The ruling may lead to suit on the County MBE/WBE program by the AGC.
- The ruling has a potential 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.

- 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, l983, 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.

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.

- 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 the discovery stage would be premature.
- 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.
- The claims for money damages against *Individual Defendants* in their individual capacity were not dismissed.
- 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.

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.

- Federal Court in California issued an Order granting a Motion to Compel against MTA for failing to comply with a subpoena to produce documents, which MTA appealed to the Ninth Circuit Court of Appeals.
- Ninth Circuit dismissed the appeal by MTA.
- Plaintiffs filed with the Court in Tennessee a Motion to Exclude Proof from MTA, the disparity study consultant to the County, because MTA refused to produce documents relating to the study.
- Court in Tennessee issued an Order denying *without prejudice* the Motion to Exclude Proof based on lack of authority to limit the County's ability to present proof at tri.al due to the non-party MTA's failure to meet its discovery obligations.
- Court in Tennessee held: "Now that the Ninth Circuit has dismissed MTA's appeal, Plaintiff is free to again ask the California … court to compel MTA (or sanction it for failing) to produce any documents which it is obligated to disclose."
- The parties filed in September 2020 with the court in Tennessee a Notice of Pending Settlement, subject to the final approval of the Shelby County Commission.
- County Commission voted in November, 2020 and approved Settlement of the case with the County paying Plaintiffs $331,950.
- Minority-owned business program appears will be changing from its current form.
- Stipulation of Dismissal with Prejudice filed by the parties on January 4, 2021.
- Judgment entered by the Court on January 4, 2021.

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 in November 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.
- 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.

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 in November 2019).

- 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 claims 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.
- Plaintiffs filed in February 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.
- Court issued a Memorandum and Order, dated July 27, 2020, which provides the Motion for Preliminary Injunction is denied as withdrawn by the Plaintiff.
- Both parties filed cross-Motions for Summary Judgment in August 2020.
- Court in September 2020 issued an order over the opposition of the parties referring the case to mediation “immediately,” with mediation to be concluded by January 11, 2021.
- Court also held that the pending cross-motions for summary judgment will be denied without prejudice to being refiled only upon conclusion of mediation if the case has not settled.

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.
- 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.

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 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*.
- 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).

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 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.
- 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 arrests 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).

Circle City Broadcasting I, LLC ("Circle City") and National Association of Black Owned Broadcasters ("NABOB") (Plaintiffs) v. DISH Network, LLC ("DISH" or "Defendant"), U.S. District Court, Southern District of Indiana, Indianapolis Division, Case NO. 1:20-cv-00750-TWP-TAB.

- This case involves allegations of racial discrimination in contracting by DISH against Plaintiff Circle City.
- Plaintiffs allege DISH refuses to contract in a nondiscriminatory manner with Circle City in violation of 42 U.S.C. § 1981.
- Circle City is a small, minority-owned and historically disadvantaged business providing local television broadcasting with television stations.
- Plaintiffs allege NABOB is a trade association representing the interests of the African American owned commercial radio and television stations across the country.
- Plaintiffs claim that DISH discriminates against minority-owned broadcasters and disadvantaged business by paying the non-minority broadcasters significant fees to rebroadcast their stations and channels while offering practically no fees to the historically disadvantaged broadcaster or programmer for the same or superior programming.
- Plaintiffs assert that DISH's policies discount the contribution minorities can make in a market by refusing to contract with them on a fair and equal basis, and this policy highlights discrimination against minority businesses.
- Plaintiffs allege that DISH refuses to negotiate a television retransmission contract in good faith with a minority owned business, Circle City.
- Circle City sues for retransmission fees, actual and punitive damages, interest, attorneys' fees and costs resulting from allegations of intentional misconduct by DISH in its alleged disingenuous "negotiations" with Circle City.
- NABOB also seeks injunctive relief to enjoin the alleged unlawful acts.
- Court sets pretrial conference in February 2022.
- The case is pending.

Etienne Hardre, and SDG Murray, LTD et al v. Colorado Minority Business Office, Governor of Colorado et al., U.S. District Court for District, District of Colorado, Case 1:20-cv-03594. Complaint filed in December 2020.

- Complaint concerns Senate Bill 20B-001 (“SB1”) signed into law by the Governor of Colorado on December 7, 2020.
- Complaint claims unconstitutional race-based classifications in SB1, including those in Section 8 providing economic relief and stimulus only to minority-owned businesses; provisions will be codified at Colo. Rev. Stat. § 24-49.5-106.
- SB1 appropriates $4 million for COVID-19 relief payments for “minority-owned businesses.”
- Plaintiffs allege Caucasian businesses are excluded from participating in these relief payments based on the racial identities of the business owners.
- The appropriation of $4 million for use by the Colorado Minority Business Office is to provide “relief payments, grants and loans to minority-owned businesses.”
- SB1 directs the Colorado Minority Business Office to use a portion of the funds “to provide technical assistance and consulting support to minority-owned businesses across the state.”
- SB1 provides three primary forms of economic relief exclusively to minority-owned businesses: direct relief payments, grants and loans for startup capital, and funds to provide minority-owned business leaders with professional development and networking opportunities.
- SBE directs Director of CMBO to establish a process for minority-owned businesses to apply for economic stimulus benefits, with a threshold requirement to applying is that the business be “minority owned” as defined by SB1.
- Plaintiffs allege SB1’s provision limiting certain economic stimulus payments to minority-owned businesses violates the Equal Protection Clause of the Fourteenth Amendment by unconstitutionally making facial racial classifications.

Etienne Hardre, and SDG Murray, LTD, et al v. Colorado Minority Business Office, Governor of Colorado et al., U.S. District Court for District, District of Colorado, Case 1:20-cv-03594.

- Plaintiffs allege Section 8 of SB1 is subject to strict scrutiny because it classifies individuals based on their race.
- Plaintiffs allege Defendants do not have a compelling interest in limiting the COVID-19 economic stimulus in Section 8 of the bill to members of the defined racial minority groups.
- Plaintiffs allege Colorado has not identified with specificity in SB1 the racial discrimination to be remedied by making facial racial classifications, and that Section 8 of SB1 is facially unconstitutional.
- Plaintiffs allege Colorado does not have a strong basis in evidence upon which to conclude that remedial action is necessary with regard to any supposed racial discrimination that SB1 was intended to remedy.
- Plaintiffs allege Colorado cannot prove SB1 is narrowly tailored even if there is a compelling government interest.
- Colorado could adopt race-neutral remedies, such as stimulus payments based on geographic areas or sectors of the economy most impacted by the COVID-19 pandemic.
- .Plaintiffs alternatively make an as-applied challenge to the minority-business provisions in SB1.
- Plaintiffs allege its business has been impacted by the COVID-19 pandemic and would be qualified and a candidate for relief for the economic benefits in Section 8 of SB1 if Plaintiff Hardre or his business were permitted to apply.
- Plaintiffs seek the court declare the minority-business stimulus provisions in Section 8 of SB1 unconstitutional under the Equal Protection Clause.
- Plaintiffs seek to enjoin Defendants from enforcing the race-based qualifications, distributing relief payments, loans, grants, or other support or the economic stimulus provided in SB1 due to race-based classifications, and award damages.

Infinity Consulting Group, LLC, et al. V. United States Department of the Treasury, et al., Case No.: Gjh-20-981, In The United States District Court For The District Of Maryland, Southern Division. Complaint filed in April 2020

- This case involved a complaint filed in response to the distribution of PPP funds that "resulted in a disproportionate number of minority-owned and female-owned business owners unfairly left without relief."
- Plaintiffs, two owners of Maryland small businesses, sued Defendants U.S. Department of the Treasury, the U.S. Small Business Administration ("SBA") regarding the guidelines governing the first round of funding for the Paycheck Protection Program ("PPP") in April 2020.
- Plaintiffs alleged Defendants knowingly and intentionally discriminated against MBE/WBEs by prohibiting businesses without employees from applying for funding until a week after businesses with employees could apply, leaving only a short period before the funds were depleted.
- In anticipation of legislation authorizing a second round of funding for the PPP, Plaintiffs moved for a temporary restraining order and preliminary injunction halting the entire PPP from proceeding until Defendants took steps to guarantee more equitable distribution of PPP funds before they were exhausted a second time.
- Plaintiffs' asserted claims under the Fifth Amendment of the U.S. Constitution and the Administrative Procedure Act, 5 U.S.C. § 706(2).
- Court on April 26, 2020 held Plaintiffs' Emergency Motion for a Temporary Restraining Order and Preliminary Injunction was denied.

Infinity Consulting Group, LLC, et al. v. United States Department of the Tresury, et al., Case No.: Gjh-20-981, In The United States District Court For The District Of Maryland, Southern Division

- Court found Plaintiffs did not demonstrate a likelihood of success on their claims or that their remedy would be in the overall interest of the greater public.
- Court held Plaintiffs did not show Defendants' knowingly and intentionally discriminated against MBE/WBEs with no employees, and thus did not prove violation of the equal protection component of the Fifth Amendment's Due Process Clause.
- Plaintiffs did not show that an "invidious discriminatory purpose was a motivating factor" behind the Defendants' decision making in administering the PPP.
- Court pointed out that while "a showing of disparate impact on a protected group and the foreseeability of this impact is relevant to prove that the decision maker acted with a forbidden purpose, 'impact alone is not determinative, and the Court must look to other evidence."
- After the denial of the Temporary Restraining Order and Preliminary Injunction, Motions to Dismiss were filed by Defendants mainly asserting lack of jurisdiction and failure to state a claim.
- Plaintiffs and Defendants subsequently entered into a Stipulation of Dismissal with prejudice on October 27, 2020.

Blueprint Captial Advisors, LLC, v. Governor of the State of New Jersey, Department of the Treasury, Division of Investment, Blackrock, Inc., et. al., U.S. District Court for the District of New Jersey, Civ. No. 2:220-cv-07663-KM-ESK

- Plaintiff Blueprint Capital Advisors, LLC (“BCA”)) sued the State of New Jersey and Blackrock alleging discrimination and racist abuse.
- Plaintiff alleges the New Jersey Division of Investment (“DOI”) fraudulently misappropriated a proprietary investment program BCA developed and use it to launch the same program with BlackRock.
- Plaintiff alleges officials at the State of New Jersey’s Division of Investment (DOI)(which manages investment of the state’s pension funds), perpetrate discrimination by shunning Black firms and professionals.
- Plaintiff alleges New Jersey’s DOI cast aside Black-owned Blueprint in favor of BlackRock, and the DOI and its vendor Cliffwater handed Blueprint’s proprietary business plans and information to BlackRock so they could unlawfully coopt Blueprint’s specialized program and business opportunity.
- Plaintiff alleges DOI officials stated that the agency had an aversion to minority- and female-owned businesses, and that BlackRock was setting up with New Jersey the same program as Blueprint had proposed.
- Plaintiff alleges New Jersey’s DOI retaliated against Blueprint and worked in concert with Cliffwater and Blackrock to steal the materials and concepts behind the FAIR program, a proprietary business idea that Blueprint created.
- Plaintiff alleges under the guise of performing “due diligence” into Blueprint, the DOI, and its hand-selected consultant Cliffwater, demanded that Blueprint open its books and share hundreds of pages of research, financial models, vendor lists and investment strategies that comprised the FAIR program.

Blueprint Capital Advisors, LLC, v. Governor of the State of New Jersey, Department of the Treasury, Division of Investment, Blackrock, Inc., et. al., U.S. District Court for the District of New Jersey, Civ. No. 2:220-cv-07663-KM-ESK

- Plaintiff alleges unbeknownst to Blueprint, while promising the Company that DOI intended to invest hundreds of millions of dollars of capital into the FAIR program, the DOI and Cliffwater were secretly working with BlackRock to exploit Blueprint, a Black-owned company.
- Plaintiff alleges DOI and Cliffwater sent Blueprint's confidential information about the FAIR program to BlackRock in order to allow BlackRock to create its own FAIR program.
- Plaintiff alleges New Jersey failed to take remedial action in response to Blueprint's concerns, and retaliated against Blueprint by rejecting Blueprint's investment ideas, making it impossible for the Company to grow and generate crucial revenue from its investment concepts and strategies.
- Plaintiff alleges systemic racial discrimination and abuse at the DOI.
- This action seeks declaratory, injunctive and equitable relief, as well as monetary damages, to redress Defendants' violations of 42 U.S.C. § 1981, 42 U.S.C. §1983, New Jersey Civil Rights Act, breaches of contract, breaches of the implied covenant of good faith and fair dealing, breaches of fiduciary duty, breaches of duty of confidentiality, civil RICO, as well as for unjust enrichment, unfair competition, and use of idea.
- Motions to Dismiss have been filed by Defendants and are pending.

US DOT Final Rule, published in Vol. 85 Federal Register 80646 (December 14, 2020): Disadvantaged Business Enterprise Program; Inflationary Adjustment

- **US DOT Final Rule, published December 14, 2020; effective date January 13, 2021 (85 Federal Register 80646, December 14, 2020)): Disadvantaged Business Enterprise Program; Inflationary Adjustment**

- Amends the small business size limit under its Disadvantaged Business Enterprise (DBE) program, also known as the gross receipts cap, to ensure that small businesses may continue to participate in the Department's DBE program after taking inflation into account.
- This final rule provides an inflation adjustment to the size limit on small businesses participating in the DBE program and implements a statutory change to the size standard pursuant to the Federal Aviation Administration (FAA) Authorization Act of 2018.
- This rule is effective January 13, 2021.
- This rule adjusts the gross receipts cap for inflation by increasing the gross receipts cap applicable to firms for purposes of FHWA and FTA assisted work to $26,290,000.
- If a firm's gross receipts averaged over the firm's previous three fiscal years exceeds $26,290,000, it exceeds the small business size limit for participation in FHWA and FTA assisted work under the Department's DBE program.
- The FAA removed the gross receipts cap for purposes of eligibility for FAA-assisted work. This rule reflects that the cap does not apply for purposes of determining a firm's eligibility for FAA-assisted work.
- This rule amends 49 CFR § 26.65 by revising the average annual gross receipts cap to $26.29 million; that USDOT will adjust this amount for inflation on annual basis, and the adjusted amount will be published on the USDOT's website in subsequent years.

H.R. 8337 – Continuing Appropriations Act, 2021 and Other Extensions Act: Extending the FAST Act

"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:
- Congress passed a Continuing Resolution on October 1, 2020 that extended the FAST Act for another year.
- Continuing Resolution is known as H.R.8337 - Continuing Appropriations Act, 2021 and Other Extensions Act.
- The Continuing Appropriations Act, 2021 and Other Extensions Act" is found at Pub. Law 116-159, 116th Congress, 134 STAT. 709, October 1, 2020.

H.R. 2 -116th Congress (2019-2020): Moving Forward Act

- This Act may be cited as the “The Moving Forward Act.”
- This legislation was introduced in the House and passed in July 2020.
- It was received in the Senate on July 20, 2020.
- No substantive further action was taken in the Senate.

- **SEC. 1101. AUTHORIZATION OF APPROPRIATIONS.**

- (c) DISADVANTAGED BUSINESS ENTERPRISES

- (1) FINDINGS.—Congress finds that—
- (A) while significant progress has occurred due to the establishment of the disadvantaged business enterprise program, discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States;

H.R. 2 -116th Congress (2019-2020): Moving Forward Act

- (B) the continuing barriers described in subparagraph (A) merit the continuation of the disadvantaged business enterprise program;

- (C) Congress has received and reviewed testimony and documentation of race and gender discrimination from numerous sources, including congressional hearings and roundtables, scientific reports, reports issued by public and private agencies, news stories, reports of discrimination by organizations and individuals, and discrimination lawsuits, which show that race- and gender-neutral efforts alone are insufficient to address the problem;

- (D) the testimony and documentation described in subparagraph (C) demonstrate that discrimination across the United States poses a barrier to full and fair participation in surface transportation-related businesses of women business owners and minority business owners and has impacted firm development and many aspects of surface transportation-related business in the public and private markets; and

- (E) the testimony and documentation described in subparagraph (C) provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business

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- (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 or group of concerns controlled by the same socially and economically disadvantaged individual or individuals that have average annual gross receipts during the preceding 3 fiscal years in excess of $26,290,000, as adjusted annually by the Secretary of Transportation for inflation.
- (B) SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS.—The term “socially and economically disadvantaged individuals” has the meaning given the term in section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations issued pursuant to that Act, except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.

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- (3) AMOUNTS FOR SMALL BUSINESS CONCERNS.—Except to the extent that the Secretary of Transportation determines otherwise, not less than 10 percent of the amounts made available for any program under titles I, II, V, and VII of this division and section 403 of title 23, United States Code, shall be expended through small business concerns owned and controlled by socially and economically disadvantaged individuals.
- (4) ANNUAL LISTING OF DISADVANTAGED BUSINESS ENTERPRISES.—Each State shall annually—
- (A) survey and compile a list of the small business concerns referred to in paragraph (3) in the State, including the location of the small business concerns in the State; and
- (B) notify the Secretary, in writing, of the percentage of the small business concerns that are controlled by—
- (i) women;
- (ii) socially and economically disadvantaged individuals (other than women); and
- (iii) individuals who are women and are otherwise socially and economically disadvantaged individuals
- (5) UNIFORM CERTIFICATION.—
- (A) IN GENERAL.—The Secretary of Transportation shall establish minimum uniform criteria for use by State governments in certifying whether a concern qualifies as a small business concern for the purpose of this subsection.

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- (B) INCLUSIONS.—The minimum uniform criteria established under subparagraph (A) shall include, with respect to a potential small business concern—
- (i) on-site visits;
- (ii) personal interviews with personnel;
- (iii) issuance or inspection of licenses;
- (iv) analyses of stock ownership;
- (v) listings of equipment;
- (vi) analyses of bonding capacity;
- (vii) listings of work completed;
- (viii) examination of the resumes of principal owners;
- (ix) analyses of financial capacity; and
- (x) analyses of the type of work preferred.

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- (6) REPORTING.—The Secretary of Transportation shall establish minimum requirements for use by State governments in reporting to the Secretary—
- (A) information concerning disadvantaged business enterprise awards, commitments, and achievements; and
- (B) such other information as the Secretary determines to be appropriate for the proper monitoring of the disadvantaged business enterprise program.
- (7) COMPLIANCE WITH COURT ORDERS.—Nothing in this subsection limits the eligibility of an individual or entity to receive funds made available under titles I, II, V, and VII of this division and section 403 of title 23, United States Code, if the entity or person is prevented, in whole or in part, from complying with paragraph (3) because a Federal court issues a final order in which the court finds that a requirement or the implementation of paragraph (3) is unconstitutional.
- (8) SENSE OF CONGRESS ON PROMPT PAYMENT OF DBE SUBCONTRACTORS.—It is the sense of Congress that—
- (A) the Secretary of Transportation should take additional steps to ensure that recipients comply with section 26.29 of title 49, Code of Federal Regulations (the disadvantaged business enterprises prompt payment rule), or any corresponding regulation, in awarding federally funded transportation contracts under laws and regulations administered by the Secretary; and
- (B) such additional steps should include increasing the Department of Transportation's ability to track and keep records of complaints and to make that information publicly available.

DBE and ACDBE Certification for Non-Transportation Industry Businesses (09/1/2020): US DOT Q&A

DBE and ACDBE Certification for Non-Transportation Industry Businesses (09/1/2020): US DOT Q&A

- Question: When reviewing DBE and ACDBE applications, may recipients provide additional program information and advice to ACDBE and DBE applicants whose work activities appear unlikely to have any use for any DOT-assisted contracts or airport concession and concession supplier opportunities? (Sections 23.37(b), 26.1).
- Answer: Yes. Certification for purposes of the DBE and ACDBE programs should be limited to eligible DBEs and ACDBEs that intend to bid on work as prime or subcontractors on DOT-assisted contracts or airport concessions contracts (including suppliers to concessionaries), respectively.
- This includes both construction and non-construction work in the transportation industry at large.
- DOT funding recipients may emphasize this information to applicant firms and State and local agencies, and may make inquiries into the nature of the firm's work and what the firm seeks to achieve with certification.
- Recipients may recommend that a firm not pursue certification if the firm expresses that it has no intention of participating in or bidding on DOT-assisted contracts or airport concessions contracts.
- If a firm withdraws its application before you have issued a decision, the firm may resubmit an application at any time.

Changes to the Gross Receipts Calculation in the SBA Program Regulation Applicable to DBEs

- October 19, 2020 Memorandum from Departmental Office of Civil Rights (DOCR) regarding changes to the gross receipts calculation in the SBA Program regulation applicable to DBEs (Small Business Runway Act of 2018 amended Section 3 of Small Business Act).
- Explains how recipients of FAA, FHWA, and FTA funds should apply changes to 13 CFR Part 121 (the SBA program regulation) when assessing a small business's eligibility as a DBE.
- To remain classified as a small business under the DBE program, a business's gross receipts must satisfy two size standards:
  - First, SBA sets a size limit for each NAICS code that represents the highest amount of receipts a firm can have to be considered small.
    a. The DBE program follows this method and applies the applicable NAICS code size standards to each eligible DBE and applicant firm. 49 CFR § 26.71(n).
  - Second, the DBE program applies a size standard known as the statutory gross receipts cap found at 49 CFR §26.65(b).
    a. To qualify as a DBE, a firm cannot exceed the size cap prescribed by this regulation. Both the NAICS code standard and the statutory gross receipts cap are measured in average annual gross receipts.

Changes to the Gross Receipts Calculation in the SBA Program Regulation Applicable to DBEs

- Three-Year Measurement is Changed for the NAICS Code Size Calculations.
  - An SBA final rule (84 FR 66561, effective January 6, 2020) amended the SBA regulation to modify the method which establishes business size standards by changing the time period for calculating average annual gross receipts under 13 CFR Part 121 from 3 years to 5 years.
  - It provides firms with the option to use either the 3-year or the 5-year calculation until the 5-year period becomes mandatory on January 6, 2022.
- The Measurement for the Statutory Gross Receipts Cap Remains the Same.
  - For the statutory DOT size cap found at 49 CFR § 26.65(b), DBE firms are still subject to the 3-year averaging period because this 3-year period is specifically prescribed by the Fixing America's Surface Transportation (FAST) Act.

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.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. was referred to 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 –

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

“(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

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

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.

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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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