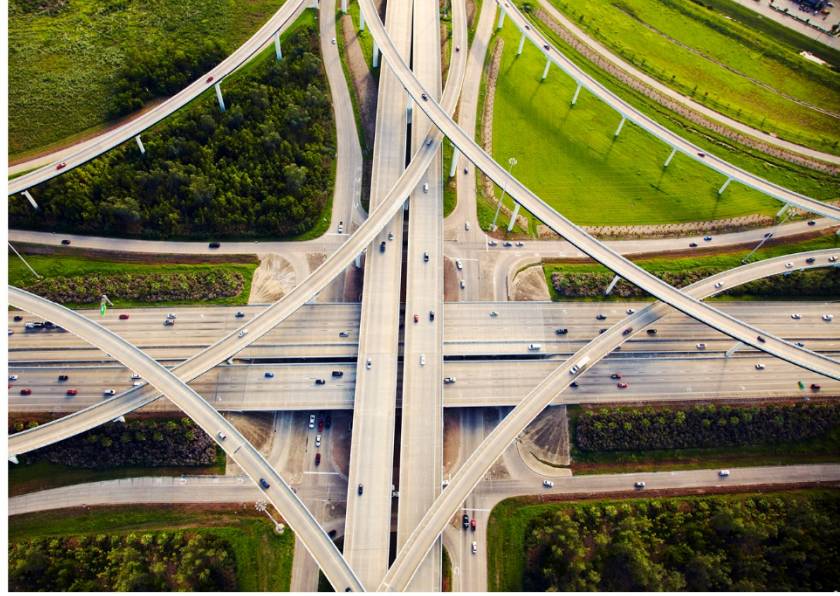

TRB
TRANSPORTATION RESEARCH BOARD
OF THE NATIONAL ACADEMIES

DBE/MBE/WBE/SOCIAL AND ECONOMIC DISADVANTAGED BUSINESS PROGRAMS - Recent Legal Cases and Challenges

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Summary of Recent Cases for MBE/WBE/DBE Programs, Social and Economic Disadvantaged Business Programs, and Implementing the Federal DBE Program

- **A race- and ethnicity-based program implemented by the federal government or 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 the relevant industry/marketplace and the need to remedy that discrimination.

  2) The second prong requires the federal, local or state government's MBE/WBE/DBE/Social Economic Disadvantaged Business program or implementation of the Federal DBE Program be "narrowly tailored" to remedy identified discrimination in that local or state government's relevant industry/marketplace or Federal DBE Program 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/DBE Programs, Social and Economic Disadvantaged Business 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/DBE/Social and Economic Disadvantaged Business Programs or implementation of the Federal DBE Program:**

1) Evidence of specific identified discrimination in the federal/local/state government relevant industry/marketplace or for the Federal DBE Program in the state/local 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/DBE Programs, Social and Economic Disadvantaged Business 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 federal/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.

Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA, 2021 WL 2172181 (6th Cir. May 27, 2021).

- In 2020, the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") created the Paycheck Protection Program ("PPP"), a $659 billion federally guaranteed loan program for businesses distressed by the pandemic.
- Congressional investigation revealed that minority-owned and women-owned businesses had more difficulty accessing PPP funds relative to other kinds of business.
- In March 2021, the President signed the American Rescue Plan Act of 2021 (the "ARPA"). As part of ARPA, Congress appropriated $29 billion to a "Restaurant Revitalization Fund" ("RRF").
- In April 2021, under ARPA the SBA announced that "[f]or the first 21 days that the program is open, the SBA will prioritize funding applications from businesses owned and controlled by women, veterans, and socially and economically disadvantaged individuals."
- Antonio Vitolo is a white male who owns Jake's Bar and Grill, LLC in Harriman, Tennessee.
- Vitolo applied for a grant from the RRF in May 2021, on the first day of the application period. The SBA notified him that "[a]pplicants who have submitted a non-priority application will find their application remain in a Review status while priority applications are processed during the first 21 days."
- Vitolo initiated the suit against Defendant Guzman, the Administrator of the SBA. Vitolo asserted that ARPA's twenty-one-day priority period violates the U.S. Constitution's equal protection clause and due process clause because it impermissibly grants benefits and priority consideration based on race and gender classifications.

Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA, 2021 WL 2172181 (6th Cir. May 27, 2021).

- Vitolo requested the Court enter: (1) a temporary restraining order; (2) a temporary injunction requiring the Small Business Administration to process applications and pay grants in the order received regardless of race or gender; (3) a declaratory judgment that race-and gender-based classifications under ARPA are unconstitutional; and (4) an order permanently enjoining the SBA from applying race- and gender-based classifications in determining eligibility and priority for grants under ARPA.
- Strict Scrutiny. The parties agreed that this system is subject to strict scrutiny. The district court found that whether Plaintiffs are likely to succeed on the merits turns on whether Defendant has a compelling government interest in using a race-based classification, and whether that classification is narrowly tailored to that interest. .
- District Court findings and holdings (Rejected by Sixth Circuit). The district court found Congress gathered evidence suggesting that small businesses owned by minorities (including restaurants) have suffered more severely than other kinds of businesses during the COVID-19 pandemic, and that the Government's early attempts at general economic stimulus disproportionately failed to help those businesses because of historical discrimination patterns.
- The district court found that the Government has a compelling interest in remediating past racial discrimination against minority-owned restaurants and in ensuring public relief funds are not perpetuating the legacy of that discrimination. Congress had evidence before it suggesting that its initial COVID-relief program, the PPP, disproportionately failed to reach minority-owned businesses due (at least in part) to historical lack of relationships between banks and minority-owned businesses, itself a symptom of historical lending discrimination.

Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA, 2021 WL 2172181 (6th Cir. May 27, 2021).

- The district court said: “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” only “serious, good faith consideration of workable race-neutral alternatives. The Government received evidence that the race-neutral PPP was tainted by lingering effects of past discrimination and current racial bias.
- The district court found the Government considered and actually used race-neutral alternatives during prior COVID-19 relief attempts, which failed to reach all small businesses equitably that motivated the priority period.
- Further, according to the district court, the priority period is not overinclusive. Prior to enacting the priority period, the Government considered evidence relative to minority-business owners generally as well as data pertaining to specific groups. The court stated that the RRF is a national relief program. As such, the court found it is distinguishable from other regional programs that the Supreme Court found to be overinclusive.
- The inclusion in the presumption of certain groups is logical for a program that offers relief funds to restaurants throughout the US.
- The district court found that Congress had evidence showing that woman-owned businesses suffered historical discrimination that exposed them to greater risks from an economic shock like COVID-19, and that they received less benefit from earlier federal COVID-19 relief programs. The court held Defendant identified an important governmental interest in protecting women-owned businesses from disproportionately adverse effects of the pandemic and failure of relief programs.
- The court found its denial of Plaintiffs’ Motion for a TRO addresses the same factors that control the preliminary-injunction analysis.

Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA, 2021 WL 2172181 (6th Cir. May 27, 2021).

- Appeal by Plaintiff to Sixth Circuit Court of Appeals. The Plaintiffs appealed the district court's decision to the Sixth Circuit Court of Appeals.
- The Sixth Circuit stated this case is about whether the government can allocate limited coronavirus relief funds based on the race and sex of the applicants, held that it cannot, and thus enjoined the government from using "these unconstitutional criteria when processing" Vitolio's application.
- Court applies Strict Scrutiny to the Motion for Preliminary Injunction.
- Compelling Interest rejected by Sixth Circuit. The Court states that government has a compelling interest in remedying past discrimination only when three criteria are met:
  - First, the policy must target a specific episode of past discrimination. It cannot rest on a "generalized assertion that there has been past discrimination in an entire industry."
  - Second, there must be evidence of intentional discrimination in the past.
  - Third, the government must have had a hand in the past discrimination it now seeks to remedy.
- The government's asserted compelling interest, the Court found, meets none of these requirements.
- The Court said that if the government "show[s] that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of [a] local ... industry," then the government can act to undo the discrimination.
- First, the government points generally to societal discrimination against minority business owners, but it does not identify specific incidents of past discrimination. The Court said, since "an effort to alleviate the effects of societal discrimination is not a compelling interest," the government's policy is not permissible.

Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA, 2021 WL 2172181 (6th Cir. May 27, 2021).

- Second, the government offers little evidence of past intentional discrimination against the many groups to whom it grants preferences. The schedule of racial preferences in the government's regulation—preferences for Pakistanis but not Afghans; Japanese but not Iraqis; Hispanics but not Middle Easterners—is not supported by any evidence at all.
- When the government promulgates race-based policies, “it must operate with a scalpel.” And its cuts must be informed by data that suggest intentional discrimination. The broad statistical disparities cited by the government are not enough, and as to general social disparities, there are too many variables to support inferences of intentional discrimination.
- Third, the Court found the government has not shown that it participated in the discrimination it seeks to remedy. The government identified statements by members of Congress that race- and sex-based grant funding would remedy past discrimination.
- But, the Court stated Congress only identified a “theme” that MBE/WBEs needed targeted relief from the pandemic because Congress's “prior relief programs had failed to reach” them. A vague reference to a “theme” of governmental discrimination, the Court said is not enough.
- To satisfy equal protection, the Court said, government must identify “prior discrimination by the governmental unit involved” or “passive participa[tion] in a system of racial exclusion.” An observation that prior, race-neutral relief efforts failed to reach minorities, the Court pointed out, is no evidence that the government administered those policies in a discriminatory way.
- The Court concluded the government lacks a compelling interest in awarding RRF based on the race of the applicants, and thus the policy's use of race violates equal protection.

Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA, 2021 WL 2172181 (6th Cir. May 27, 2021).

- Narrow Tailoring rejected by Sixth Circuit. The Court found discriminatory disbursement of RRF is not narrowly tailored.
- The government must engage in a genuine effort to determine whether alternative policies could address the alleged harm. A court must not uphold a race-conscious policy unless it is "satisfied that no workable race-neutral alternative" would achieve the compelling interest. A policy is not narrowly tailored if it is either overbroad or underinclusive in its use of racial classifications.
- The Court found the government could have used alternative, nondiscriminatory policies, but failed to do so. The Court noted the government contends that MBEs disproportionately struggled to obtain capital and credit during the pandemic, but a race-neutral alternative exists: The government could grant priority consideration to all business owners who were unable to obtain needed capital or credit during the pandemic.
- The Court also rejected the government's argument that earlier coronavirus relief programs "disproportionately failed to reach minority-owned businesses." The Court found a race-neutral alternative exists again: The government could grant priority consideration to all small business owners who have not yet received coronavirus relief funds.
- Because these race-neutral alternatives exist, the Court held the government's use of race is unconstitutional. In addition, the government's use of racial preferences is both overbroad and underinclusive, which is fatal to the policy.
- The government argues its program is not underinclusive because people of all colors can count as suffering "social disadvantage." But, the Court pointed out, there is a critical difference between the designated races and the non-designated races. The designated races get a presumption that others do not.

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- The government's policy, the Court found, is “plagued” with other forms of underinclusivity. The Court considered the requirement that a business must be at least 51% owned by women or minorities. How, “the Court asked, does that help remedy past discrimination?”
- Black investors may have small shares in lots of restaurants, none greater than 51%. But does that mean those owners did not suffer economic harms from racial discrimination? The Court noted the restaurant at issue is 50% owned by a Hispanic female, and the government failed to explain why that 1% difference cutoff relates to its remedial purpose.
- The dispositive presumption enjoyed by designated minorities, the Court found, bears strikingly little relation to the asserted problem the government is trying to fix. The Court pointed out the government attempts to defend its policy by citing a study showing it was harder for black business owners to obtain loans from Washington, D.C., banks.
- Rather than designating those owners as the harmed group, the Court noted, the government relied on the SBA’s 2016 regulation granting racial preferences to vast swaths of the population. The Court held this “scattershot approach” granting special treatment to certain groups does not conform to the narrow tailoring strict scrutiny requires.
- Women-Owned Businesses. Intermediate Scrutiny applied by Sixth Circuit. The plaintiffs also challenge the government's prioritization of women-owned restaurants.
- Government policies that discriminate based on sex cannot stand unless the government provides an “exceedingly persuasive justification.” To meet this burden, the government must prove that (1) a sex-based classification serves “important governmental objectives,” and (2) the classification is “substantially and directly related” to the government's objectives.

Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA, 2021 WL 2172181 (6th Cir. May 27, 2021).

- The government, the Court held, fails to satisfy either prong. The Court found it failed to show that prioritizing women-owned restaurants serves an important governmental interest.
- The government claims an interest in "assisting with the economic recovery of women-owned businesses, which were 'disproportionately affected' by the COVID-19 pandemic." The Court said while remedying specific instances of past sex discrimination can serve as a valid governmental objective, general claims of societal discrimination are not enough.
- Instead, the government first needs proof that discrimination occurred. The government must show that the sex being favored "actually suffer[ed] a disadvantage" as a result of discrimination in a specific industry or field. Without proof of intentional discrimination against women, a policy that discriminates on the basis of sex cannot serve a valid governmental objective.
- Additionally, the Court found, the government's prioritization system is not "substantially related to" its purported remedial objective. All women-owned restaurants are prioritized—even if they are not "economically disadvantaged." The Court noted, that whether a restaurant did better or worse than a male-owned restaurant is of no matter—as long as the restaurant is at least 51% women-owned, it receives priority status.
- Because the Court found the government made no effort to tailor its priority system, it cannot find that the sex-based distinction is "substantially related" to the objective of helping restaurants disproportionately affected by the pandemic.

Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA, 2021 WL 2172181 (6th Cir. May 27, 2021).

- Ruling by Sixth Circuit. The Plaintiffs are entitled to an injunction pending further appeal.
- The Court ordered the government to fund the Plaintiffs' grant application, if approved, before all later-filed applications, without regard to processing time or the applicants' race or sex. The government, however, may continue to give veteran-owned restaurants priority in accordance with the law. One of the three Judges filed a dissenting opinion.
- Subsequently on July 14, 2021, the Plaintiffs-Appellants filed a Motion to Dismiss the appeal voluntarily stating that Plaintiffs-Appellants have received their grant from Defendant-Appellee. The Court granted the Motion and dismissed the appeal terminating the case.
- Thus, after granting Plaintiffs' Emergency Motion for Injunction Pending Appeal and to Expedite Appeal on May 27, 2021, the Sixth Circuit within a week of the district court decision, reversed the district court's denial of an injunction, granted the Emergency Motion for Injunction, and ruled the government's priority for administering funds based on race and gender to minorities and women was unconstitutional as it did not satisfy the strict scrutiny test: no compelling government interest in awarding the funds based on the race of the applicants and the policy was not narrowly tailored.
- There was a dissenting opinion by one of the three Judge panel.

Greer's Ranch Café v. Guzman, Administration of the U.S. SBA, 2021 WL 2092995 (N.D. Tex. 5/18/21)

- Plaintiff Philip Greer ("Greer") owns Plaintiff Greer's Ranch Café restaurant. Greer sought relief under the $28.6-billion Restaurant Revitalization Fund ("RRF") created by the American Rescue Plan Act of 2021 ("ARPA") and administered by the Small Business Administration ("SBA").
- Greer is eligible for a grant from the RRF, but did not apply because he is barred from consideration altogether during the program's first twenty-one days from May 3 to May 24, 2021.
- During that window, ARPA directed SBA to "take such steps as necessary" to prioritize eligible restaurants "owned and controlled" by "women," by "veterans," and by those "socially and economically disadvantaged."
- SBA announced during the program's first twenty-one days, it "will accept applications from all eligible applicants, but only process and fund priority group applications."
- Plaintiffs sued Defendants SBA and Guzman, in her official capacity as administrator of SBA. Shortly thereafter, Plaintiffs moved for a TRO, enjoining the use of race and sex preferences in the distribution of the Fund.
- Plaintiffs challenged SBA's implementation of the "socially disadvantaged group" and "socially disadvantaged individual" race-based presumption and definition from SBA's Section 8(a) government-contract-procurement scheme into the RRF-distribution-priority scheme as violative of the Equal Protection Clause.
- The parties agreed strict scrutiny applies where government imposes racial classifications, like here where the RRF prioritization scheme incorporates explicit racial categories from Section 8(a).
- Defendants argued the race-based rules serve a compelling interest and are narrowly tailored, satisfying strict scrutiny.

Greer's Ranch Café v. Guzman, Administration of the U.S. SBA, 2021 WL 2092995 (N.D. Tex. 5/18/21)

- Defendants propose as the government's compelling interest "remedying the effects of past and present discrimination" by "supporting small businesses owned by socially and economically disadvantaged small business owners ... who have borne an outsized burden of economic harms of [the] COVID-19 pandemic."
- Defendants point to the factual findings supporting the implementation of Section 8(a) itself in removing obstacles to government contract procurement for minority-owned businesses, including House Reports in the 1970s and 1980s and a D.C. District Court case discussing barriers for minority business formation in the 1990s and 2000s.
- The court recognized the "well-established principle about the industry-specific inquiry required to effectuate Section 8(a)'s standards." Thus, the court looked to Defendants' industry specific evidence to determine whether the government has a "strong basis in evidence to support its conclusion that remedial action was necessary."
- According to Defendants, "Congress has heard a parade of evidence offering support for the priority period prescribed by ARPA."
- The Defendants evidence was summarized by the court as follows:
- A House Report specifically recognized that "underlying racial, wealth, social, and gender disparities are exacerbated by the pandemic," that "[w]omen –especially mothers and women of color – are exiting the workforce at alarming rates," and that "eight out of ten minority-owned businesses are on the brink of closure."
- Expert testimony describing how "[b]usinesses headed by people of color are less likely to have employees, have fewer employees when they do, and have less revenue compared to white-owned businesses" because of "structural inequities resulting from less wealth compared to whites …," and having fewer employees or lower revenue made COVID-related loans to those businesses less lucrative for lenders.

Greer's Ranch Café v. Guzman, Administration of the U.S. SBA, 2021 WL 2092995 (N.D. Tex. 5/18/21)

- Expert testimony explaining that "businesses with existing conventional lending relationships were more likely to access PPP funds quickly and efficiently," and that minorities are less likely to have such relationships with lenders due to "pre-existing disparities in access to capital."
- Evidence showing that "[t]he COVID-19 public health and economic crisis has disproportionally affected Black, Hispanic, and Asian-owned businesses, in addition to women-owned businesses" and that "minority-owned and women-owned businesses were particularly vulnerable to COVID-19, given their concentration in personal services firms, lower cash reserves, and less access to credit."
- Witness testimony: "[u]nderrepresentation by women and minorities in both funds and in small businesses accessing capital" and "[t]he amount of startup capital that a Black entrepreneur has versus a White entrepreneur is about 1/36th."
- Expert testimony that in many cases, minority-owned businesses struggled to access earlier COVID relief funding, such as PPP loans, "due to the heavy reliance on large banks, with whom they have had historically poor relationships."
- Evidence presented showing that minority and women-owned business lack access to capital and credit generally, and specifically suffered from inability to access earlier COVID-19 relief funds and also describing "long-standing structural racial disparities in small business ownership and performance."

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- A statement of the Center for Responsible Lending describing present-day "overtly discriminatory practices by lenders" and "facially neutral practices with disparate effects" that deprive minority-owned businesses of access to capital.
- Court findings. This evidence, the court found, falters because it "lacks the industry-specific inquiry needed to support a compelling interest for a government-imposed racial classification."
- The court, quoting the *Croson* decision, stated that while it is mindful of these statistical disparities and expert conclusions based on those disparities, "[d]efining these sorts of injuries as 'identified discrimination' would give ... governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor."
- Thus, the court concluded that the government failed to prove that it likely has a compelling interest in "remedying the effects of past and present discrimination" in the restaurant industry during the COVID-19 pandemic.
- For the same reason, the court found that Defendants have failed to show an "important governmental objective" or exceedingly persuasive justification necessary to support a sex-based classification.
- Conclusion. The court granted Plaintiffs' motion for temporary restraining order, and enjoins Defendants to process Plaintiffs' application for an RRF grant.
- Subsequently, the Plaintiffs filed a Notice of Dismissal without prejudice on May 19, 2021.

Faust v. Vilsack, Secretary of U.S. Dep't of Agriculture, 2021 WL 2409729, US District Court, E.D. Wisconsin (June, 10, 2021)

- This is a federal district court decision that on June 10, 2021 granted Plaintiffs' motion for a temporary restraining order holding the federal government's use of racial classifications in awarding funds under the loan-forgiveness program violated the Equal Protection Clause of the US Constitution.
- Background. Twelve white farmers, who reside in nine different states, brought this action against Secretary of Agriculture and Administrator of Farm Service Agency (FSA) seeking to enjoin U. S. Dep't of Agriculture (USDA) officials from implementing loan-forgiveness program for farmers and ranchers under the American Rescue Plan Act of 2021 (ARPA) by asserting eligibility to participate in program based solely on racial classifications violated equal protection.
- The USDA describes the loan-forgiveness plan: Eligible Direct Loan borrowers will receive debt relief letters from FSA, and "about three weeks after a signed letter is received, socially disadvantaged borrowers who qualify will have their eligible loan balances paid and receive a payment of 20% of their total qualified debt by direct deposit.
- Application of strict scrutiny standard. The court stated the government has a compelling interest in remedying past discrimination only when three criteria are met, and the Sixth Circuit summarized the three requirements as follows:
  - "First, the policy must target a specific episode of past discrimination. It cannot rest on a "generalized assertion that there has been past discrimination in an entire industry."
  - "Second, there must be evidence of intentional discrimination in the past. … Statistical disparities don't cut it, although they may be used as evidence to establish intentional discrimination...."
  - "Third, the government must have had a hand in the past discrimination it now seeks to remedy. So if the government "shows that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of a local industry," then the government can act to undo the discrimination.

Faust v. Vilsack, Secretary of U.S. Dep't of Agriculture, 2021 WL 2409729, US District Court, E.D. Wisconsin (June, 10, 2021)

- The court found that "Defendants have not established that the loan-forgiveness program targets a specific episode of past or present discrimination. Defendants point to statistical and anecdotal evidence of a history of discrimination within the agricultural industry…. But Defendants cannot rely on a 'generalized assertion that there has been past discrimination in an entire industry' to establish a compelling interest."
- The court said Defendants' evidence discrimination "includes assertions that the vast majority of funding from more recent agriculture subsidies and pandemic relief efforts did not reach minority farmers and statistical disparities."
- The court concluded: "Aside from a summary of statistical disparities, Defendants have no evidence of intentional discrimination by the USDA in the implementation of the recent agriculture subsidies and pandemic relief efforts."
- "An observation that prior, race-neutral relief efforts failed to reach minorities is no evidence at all that the government enacted or administered those policies in a discriminatory way."
- The court held "Defendants have failed to establish that it has a compelling interest in remedying the effects of past and present discrimination through the distribution of benefits on the basis of racial classifications."
- The court found "Defendants have not established that the remedy is narrowly tailored. To do so, the government must show "serious, good faith consideration of workable race-neutral alternatives."
- Defendants contend that Congress has unsuccessfully implemented race-neutral alternatives for decades, but the court concluded, "they have not shown that Congress engaged "in a genuine effort to determine whether alternative policies could address the alleged harm" here.

Faust v. Vilsack, Secretary of U.S. Dep't of Agriculture, 2021 WL 2409729, US District Court, E.D. Wisconsin (June, 10, 2021)

- The court stated: "The obvious response to a government agency that claims it continues to discriminate against farmers because of their race or national origin is to direct it to stop: it is not to direct it to intentionally discriminate against others on the basis of their race and national origin."
- The court found "Congress can implement race-neutral programs to help farmers and ranchers in need of financial assistance, such as requiring individual determinations of disadvantaged status or giving priority to loans of farmers and ranchers that were left out of the previous pandemic relief funding. It can also provide better outreach, education, and other resources. But it cannot discriminate on the basis of race."
- On this record, the court held, "Defendants have not established that the loan forgiveness program under Section 1005 is narrowly tailored and furthers compelling government interests."
- Conclusion. The court found a nationwide injunction is appropriate. "To ensure that Plaintiffs receive complete relief and that similarly-situated nonparties are protected, a universal temporary restraining order in this case is proper."
- This case is pending. The court on July 6, 2021, issued an Order that stayed the Plaintiffs' motion for a preliminary injunction, holding that the District Court in *Wynn v. Vilsack* (M.D. Fla. June 23, 2021), 2021 WL 2580678, granted the Plaintiffs a nationwide injunction, which thus rendered the need for an injunction in this case as not necessary. For the same reason, the court dissolved the temporary restraining order and stayed the motion for a preliminary injunction.
- Subsequently, the Defendants filed a Motion to Stay Proceedings, and the court granted the motion on August 20,2021, requiring the Defendants to file a status report every six months on the progress of the *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.) case, which is a pending class action.

Wynn v. Vilsack, Secretary of U.S. Dep't of Agriculture, Wynn v. Vilsack (M.D. Fla. June 23, 2021), 2021 WL 2580678, U.S. District Court, Middle District of Fla.,

- *Wynn* is a similar case as the *Faust v. Vilsack*, 2021 WL 2409729 (N.D. Wis. June 10, (2021) case pending in district court in Wisconsin.
- The court in *Wynn* granted the Plaintiff's Motion for Preliminary Injunction holding: Defendants Vilsack, U.S. Secretary of Agriculture, and the Administrator, Farm Service Agency, are enjoined from issuing any payments, loan assistance, or debt relief pursuant to the American Rescue Plan Act of 2021 until further order from the Court.
- Background. Plaintiff challenges Section 1005 of the American Rescue Plan Act of 2021 (ARPA), which provides debt relief to "socially disadvantaged farmers and ranchers" (SDFRs). Specifically, Section 1005(a)(2) authorizes the Secretary of Agriculture to pay up to 120% of the indebtedness of an SDFR's direct Farm Service Agency (FSA) loans and any farm loan guaranteed by the Secretary. Section 1005 uses the definition of an SDFR as "a farmer of rancher who is a member of a socially disadvantaged group."
- A "socially disadvantaged group" is defined as "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities." Racial or ethnic groups that categorically qualify as socially disadvantaged are "Black, American Indian/Alaskan Native, Hispanic, Asian, and Pacific Islander." White or Caucasian farmers and ranchers do not.
- Plaintiff is a white farmer in Florida who has qualifying farm loans but is ineligible for debt relief under Section 1005 because of his race. In his Complaint, Plaintiff alleges Section 1005 violates the equal protection component of the Fifth Amendment's Due Process Clause.

Wynn v. Vilsack, Secretary of U.S. Dep't of Agriculture, Wynn v. Vilsack (M.D. Fla. June 23, 2021), 2021 WL 2580678, U.S. District Court, Middle District of Fla.,

- Application of strict scrutiny test. Compelling Interest. The court, similar to the court in *Faust*, applied the strict scrutiny test and held that it had serious concerns over whether the Government will be able to establish a strong basis in evidence warranting the implementation of Section 1005's race-based remedial action.
- The statistical and anecdotal evidence presented, the court said, is insufficient.
- The Government states that its "compelling interest in relieving debt of [SDFRs] is two-fold: to remedy the well-documented history of discrimination against minority farmers in USDA loan (and other) programs and prevent public funds from being allocated in a way that perpetuates the effects of discrimination."
- To survive strict scrutiny, the Government must show a strong basis in evidence for its conclusion that past racial discrimination warrants a race-based remedy.
- Here, to establish the requisite evidence of discrimination, the court said the Government relies on substantial legislative history, testimony given by experts at various congressional committee meetings, reports prepared at Congress' request regarding discrimination in USDA programs, and floor statements made by supporters of Section 1005 in Congress.
- This evidence consists of evidence of historical discrimination that predates remedial efforts made by Congress, and evidence the Government contends shows continued discrimination that permeates USDA programs.
- The court decided it need not determine whether the Government ultimately will be able to establish a compelling interest for this "broad, race-based remedial legislation. This is because … Plaintiff has convincingly shown that the relief provided by Section 1005 is not narrowly tailored to serve that interest."

Wynn v. Vilsack, Secretary of U.S. Dep't of Agriculture, Wynn v. Vilsack (M.D. Fla. June 23, 2021), 2021 WL 2580678, U.S. District Court, Middle District of Fla.,

- Narrow Tailoring. Even if the Government establishes a compelling governmental interest to enact Section 1005, the court holds that Plaintiff has shown a substantial likelihood of success on his claim that the law violates his right to equal protection because it is not narrowly tailored to serve that interest.
- The narrow tailoring requirement ensures that "the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." "The essence of the 'narrowly tailored' inquiry is the notion that explicitly racial preferences ... must be only a 'last resort' option."
- In determining whether a race-conscious remedy is appropriate, the "Supreme Court instructs courts to examine several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties."
- The court found "Section 1005 is tailored to benefit only those SDFRs who succeeded in receiving qualifying farm loans from USDA, but the evidence of discrimination provided by the Government says little regarding how this particular group of SDFRs has been the subject of past or ongoing discrimination. … Thus, the necessity of debt relief to the group targeted by Section 1005, as opposed to a remedial program that more narrowly addresses the discrimination that has been documented by the Government, is anything but evident."
- The court stated "Section 1005's rigid, categorical, race-based qualification for relief is the antithesis of flexibility. The debt relief provision applies strictly on racial grounds irrespective of any other factor. Every person who identifies him or herself as falling within a socially disadvantaged group who has a qualifying farm loan with an outstanding balance as of January 1, 2021, receives up to 120% debt relief—and no one else receives any debt relief."

Wynn v. Vilsack, Secretary of U.S. Dep't of Agriculture, Wynn v. Vilsack (M.D. Fla. June 23, 2021), 2021 WL 2580678, U.S. District Court, Middle District of Fla.,

- Although the Government argues that Section 1005 is narrowly tailored to reach small farmers or farmers on the brink of foreclosure, the court finds it is not. "Race or ethnicity is the sole, inflexible factor that determines the availability of relief provided by the Government under Section 1005."
- The court found Section 1005 has an inflexible, automatic award of up to 120% debt relief only to SDFRs.
- The court noted other cases that involved a MBE program with a minority participation goal, the government "would grant a waiver if qualified minority businesses were uninterested, unavailable, or significantly more expensive than non-minority businesses." In this way the court in those cases observed the MBE program "had been carefully crafted to minimize the burden on innocent third parties."
- The court concluded the 120% debt relief program is untethered to an attempt to remedy any specific instance of past discrimination, and "is absolutely rigid in the relief it awards and the recipients of that relief and provides no waiver or exception by which an individual who is not a member of a socially disadvantaged group can qualify."
- The court found Section 1005 is overinclusive and underinclusive. "It appears to be overinclusive in that it will provide debt relief to SDFRs who may never have been discriminated against or faced any pandemic-related hardship." It also "appears to be underinclusive in that, … it fails to provide any relief to those who suffered the brunt of the discrimination identified by the Government. It provides no remedy … for an SDFR who was unable to obtain a farm loan due to discriminatory practices or who no longer has qualifying farm loans as a result of prior discrimination."

Wynn v. Vilsack, Secretary of U.S. Dep't of Agriculture, Wynn v. Vilsack (M.D. Fla. June 23, 2021), 2021 WL 2580678, U.S. District Court, Middle District of Fla.,

- The Court concluded there is little evidence that the Government gave serious consideration to, or tried, race-neutral alternatives to Section 1005, finding "almost all of the programs identified by the Government were not race-neutral programs; they were race-based programs that targeted things like SDFR outreach efforts, improving SDFR representation on local USDA committees, and providing class-wide relief to SDFRs who were victims of discrimination.
- The court held Plaintiff is likely to show Congress "failed to give serious good faith consideration to the use of race and ethnicity-neutral measures" to achieve the compelling interest supporting Section 1005, does not appear to have turned to the race-based remedy as a "last resort," and instead "appears to have chosen it as an expedient and overly simplistic, but not narrowly tailored, approach to addressing prior and ongoing discrimination at USDA."
- The court holds "it appears to create an inflexible, race-based discriminatory program that is not tailored to make the individuals who experienced discrimination whole, increase participation among SDFRs in USDA programs, or eradicate the evils of discrimination that remain following Congress' prior efforts to remedy the same."
- Therefore, the court holds that Plaintiff has established a strong likelihood of showing that Section 1005 violates his right to equal protection under the law because it is not narrowly tailored to remedy a compelling governmental interest.
- Conclusion. Defendants are enjoined from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of the American Rescue Plan Act of 2021 until further order from the Court.
- The case is pending in the district court. The court on *December* 7, 2021 issued an Order granting the federal Defendants' Motion to Stay Proceedings Pending Resolution of Related Class Action of the class action claims of which Wynn is a member in *Miller v. Vilsack*, Case No. 4:21-cv-595 (N.D. Tex.).

Miller v. Vilsack Case No. 4:21-cv-595 (N.D. Tex.) Class Action Litigation

- Background. Same basic facts as in *Faust* and *Wynn*.
- Plaintiffs are Texas farmers and ranchers seeking to enjoin the U.S. Department of Agriculture from administering the loan-forgiveness program under section 1005 of the American Rescue Plan Act of 2021 (ARPA).
- ARPA appropriated funds to the USDA and required the Secretary to "provide a payment in an amount up to 120 percent of the outstanding indebtedness of each socially disadvantaged farmer or rancher as of January 1, 2021," to pay off qualifying Farm Service Agency (FSA) loans.
- To be eligible, an applicant must be a "socially disadvantaged farmer or rancher." A "'socially disadvantaged farmer or rancher' means a farmer or rancher who is a member of a socially disadvantaged group." It defines "socially disadvantaged group" as "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities."
- Plaintiffs held qualifying FSA loans on January 1, 2021 but are white, making them ineligible for the funds under the Act.
- On April 26, 2021, Plaintiffs filed a class action to enjoin the program as a violation of equal protection under the United States Constitution and a violation of Title VI of the Civil Rights Act of 1964.
- Plaintiffs filed their Motion for Class Certification and Motion for Preliminary Injunction on June 2, 2021.
- The court on July 1, 2021 granted both of Plaintiffs' Motions for Class Certification and for Preliminary Injunction.
- Application of Strict Scrutiny. The Government concedes its prioritization scheme is race based but maintains that it is allowed to use racial classification to remedy the lingering effects of past racial discrimination against minority groups—a "well-established" compelling government interest.

Miller v. Vilsack Case No. 4:21-cv-595 (N.D. Tex.) Class Action Litigation

- The Government also submits that Congress narrowly tailored the law to achieve that compelling interest, considering the history of discrimination against minority farmers and specific gaps in pandemic-related funding for those racial groups. The Court disagrees.
- As other courts to consider this issue already have, the Court concludes that Plaintiffs are likely to succeed on the merits of their claim that the Government's use of race- and ethnicity based preferences in the administration of the loan-forgiveness program violates equal protection under the Constitution. *See Faust v. Vilsack*, 2021 WL 2409729 (E.D. Wis. June 10, 2021); *Wynn v. Vilsack*, 2021 WL 2580678 (M.D. Fla. June 23, 2021).
- Government's burden to establish that its race-based distribution of taxpayer money is narrowly tailored to achieve a compelling interest.
- All of the Government's evidence shows disparate impact, but requires an inference of intentional discrimination by the USDA or its agencies.
- Government puts forward no evidence of intentional discrimination by the USDA in at least the past decade.
- In sum, the Government's evidence falls short of demonstrating a compelling interest, as any past discrimination is too attenuated from any present-day lingering effects to justify race-based remedial action by Congress.
- Even if the evidence clearly established historical governmental discrimination to give rise to a compelling interest, the Government must then show that its proposed remedy in the race[1]exclusionary program is narrowly tailored. See *Id*. In the racial classifications context, narrowly tailored means explicit use of even narrowly drawn racial classifications can be used only as a last resort.

Miller v. Vilsack Case No. 4:21-cv-595 (N.D. Tex.) Class Action Litigation

- This requires "serious, good faith consideration of workable race-neutral alternatives."
- The Government's claim that new race-based discrimination is needed to remedy past race-based discrimination is unavailing. Namely, it is founded on a faulty premise equating equal protection with equal results.
- Government's evidence does not support the conclusion that these disparities are the result of systemic discrimination justifying the use of race classifications here.
- The loan-forgiveness program is simultaneously overinclusive and underinclusive: overinclusive in that the program provides debt relief to individuals who may never have experienced discrimination or pandemic-related hardship, and underinclusive in that it fails to provide any relief to those who have suffered such discrimination but do not hold a qualifying FSA loan.
- In short, the court finds the "statute's check-the-box approach to the classification of applicants by race and ethnicity is far different than the "highly individualized, holistic review" of individuals in a classification system permitted as narrowly tailored" as in the Supreme Court's decisions in the University Admissions cases.
- Government has not demonstrated a compelling interest or a narrowly tailored remedy under strict scrutiny.
- Holding. Court enjoins USDA from discriminating of account of race or ethnicity in administering section 1005 of the ARPA, which prohibits considering or using an applicant's race or ethnicity as a criterion in determining loan assistance, forgiveness or payments.
- Class Action pending. The class action litigation is ongoing with the parties engaging in discovery, including depositions and expert witness reports to be concluded in February 2022.

Additional recent cases similar to *Faust* and *Wynn* pending resolution of class action challenge to Section 1005 of ARPA of 2021 in *Miller v. Vilsack* Class Action Litigation

- There are other very recent pending cases similar to *Faust v. Vilsack*, 21-cv.-548 (E.D. Wis.) and *Wynn v. Vilsack*, 3:21-cv-514 (M.D. Fla.) discussed above, including a class action filed in *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.), and separate lawsuits seeking to enjoin United States Department of Agriculture (USDA) officials from implementing loan-forgiveness program for farmers and ranchers under Section 1005 of the American Rescue Plan Act of 2021 (ARPA) by asserting eligibility to participate in program based solely on racial classifications violated equal protection.
- For example: *Carpenter v. Vilsack*, 21-cv-103-F (D. Wyo.); *Holman v. Vilsack*, 1:21-cv-1085 (W.D. Tenn.); *Kent v. Vilsack*, 3:21-cv-540 (S.D. Ill.); *McKinney v. Vilsack*, 2:21-cv-212 (E.D. Tex.); *Joyner v. Vilsack*, 1:21-cv-1089 (W.D. Tenn.); *Dunlap v. Vilsack*, 2:21-cv-942 (D. Or.); *Rogers v. Vilsack*, 1:21-cv-1779 (D. Colo.); *Tiegs v. Vilsack*, 3:21-cv-147 (D.N.D.); *Nuest v. Vilsack*, 21-cv-1572 (D. Minn.)
- In most of these cases, the federal district courts recently have granted the federal Defendants' Motion to Stay pending resolution of the class challenge to Section 1005 of ARPA in the *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.) class action litigation.
- *Miller* court issued an injunction and certified a nationwide class action on the claims challenging the constitutionality of section 1005. (N.D. Tex. entered July 1, 2021).
- Thus, the decision in *Miller v. Vilsack* class action pending in federal court in Texas (which is in the Fifth Circuit) is a key case to watch in 2022.

UPDATE: 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.
- Palm Beach sued MTA for breach of contract and seeks specific performance of the contract requiring MTA to transfer all public records.
- The AGC requested 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.
- Court in September 2020, issued an Order denying the MTA's Motion to Dismiss.
- In February 2021, the court issued a final order finding that the records of MTA sought by the County fell within the trade secret exemption of the Florida Public Records Act. The court held the County's Complaint were dismissed as moot.
- The ruling has a potential effect on the disclosure requirement as to documents and records kept by a disparity study or goal methodology consultant.

UPDATE: 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.
- 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, denied the Motion to Dismiss the official capacity claims seeking *injunctive relief* under federal against *Individual Defendants*.
- The court held dismissal of claims on the basis of qualified immunity at the discovery stage would be premature.
- Local legislators enjoy absolute immunity from suits based on legitimate legislative activity. The court found, at the discovery stage, Turner is not entitled to legislative immunity.
- The claims for money damages against *Individual Defendants* in their individual capacity were not dismissed.
- Court held Plaintiffs may not seek monetary damages against *Individual Defendants* based on an *official* capacity claim, but may seek injunctive relief.

UPDATE: 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's appeal to the Ninth Circuit Court of Appeals was dismissed.
- Plaintiffs filed with the court in Tennessee a Motion to Exclude Proof from MTA, because MTA refused to produce documents relating to the study.
- The parties filed with the court in Tennessee a Notice of Pending Settlement, subject to the final approval of the Shelby County Commission.
- County Commission approved Settlement of the case with the County paying Plaintiffs $331,950. MBE program changed based on Settlement.
- Stipulation of Dismissal with Prejudice filed by the parties and Judgment entered by the Court in January 2021.

UPDATE: 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.

UPDATE: 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.
- 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 also seek injunctive relief requiring the City to strike its definition of a Minority Group Member and reinstate their MBE certification.
- The court in April 2021 issued an Order dismissing this case based on a settlement and consent judgment. The City adopted new rules pertaining to MBE/WBE certification. The City agreed for this case only to a rebuttable presumption that the plaintiffs are members of a tribe that are Native Americans and socially and economically disadvantaged subject to the City reserving the right to rebut the presumption.
- The City agreed to pay plaintiffs $15000 in attorney's fees. The City also agreed that it will use best efforts to process Plaintiffs' certification applications and will provide a decision on each application by August 2021.

UPDATE: 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.
- R.C. §3796.09(C) is subject to strict scrutiny.
- Court held post-enactment evidence may not be used to demonstrate the government's interest in remedying prior discrimination was compelling.
- 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.

UPDATE: 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 statute is not flexible because it is a strict percentage unrelated to the 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.
- Statistics do not demonstrate racial disparities pertaining to marijuana 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.
- 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).
- In March 2021 the parties dismissed the appeal, filed a Joint Motion to Dismiss the case, and the Court of Common Pleas Ordered the dismissal of the case.

UPDATE: 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.
- Circle City and NABOB and DISH on July 29, 2021 filed a Stipulation of Facts and Dismissal of NABOB dismissing with prejudice the claims made by NABOB against DISH.
- Court sets pretrial conference in February 2022. The case is pending.

UPDATE: 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 and requires a preference for “minority-owned businesses.”
- SB1 was modified by SB 21-001 (“SB21”) in January 2021. SB21 provides relief to “disproportionately impacted business[es].”
- To qualify as a disproportionately impacted business, the business must have “been disproportionately impacted by the COVID-19 pandemic” and meet one of seven criteria. One criteria is to be a minority-owned business. A preference is given to minority-owned businesses who also meet one of the other six criteria.
- Plaintiffs filed an Amended Complaint and allege SB21 violates Equal Protection Clause because it gives a preference to minority owned businesses in receiving funds and permits them to automatically qualify as disproportionately impacted.
- Plaintiffs filed a Motion for Preliminary Injunction to prevent defendants from implementing either the preference or minority-owned business portions of SB21.
- Defendants filed a Motion to Dismiss.

UPDATE: 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.

- Colorado Office of Economic Development and International Trade ("OEDIT") is tasked with administering funds, "establish[ing] a process" for applying for the funds, determining the "information and documentation required" to "demonstrate eligibility," and for "establish[ing] policies setting forth the parameters and eligibility for the program."

- The court issued an Order on April 19, 2021 that held:

(1) *at this time* Plaintiffs cannot show they are eligible to receive a benefit under SB21, and thus do not have standing, because it is not known how key provisions of SB21 will be implemented by OEDIT;

(2) these unknowns concerning implementation implicate the ripeness doctrine, and *at this juncture* it is impossible to determine if plaintiffs have standing, thus the claims are constitutionally unripe;

(3) even if plaintiffs could establish standing and ripeness, court finds it is inappropriate to exercise jurisdiction under the doctrine of prudential ripeness concluding the issues and claims are *not fit for review at this time*.

- The court thus Denied the plaintiffs' Motion for Preliminary Injunction; Granted the defendants' Motion to Dismiss; Ordered that plaintiffs' claim for relief is dismissed *without* prejudice; and that Judgment be entered for defendants and against plaintiffs on all claims, and that the case is closed.
- The court then entered Final Judgment on April 20, 2021 for the defendants and closed the case.

H.R. 3684 -117th Congress (2021): Infrastructure Investment and Jobs Act

- This Act may be cited as the “The Infrastructure Investment and Jobs Act.”
- This legislation passed Congress and was signed by the President on November 15, 2021.
- Public Law No. 117-58.

- **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. 3684 -117th Congress (2021): Infrastructure Investment and Jobs 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.

H.R. 3684 -117th Congress (2021): Infrastructure Investment and Jobs Act

- (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.

H.R. 3684 -117th Congress (2021): Infrastructure Investment and Jobs Act

- (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.

H.R. 3684 -117th Congress (2021): Infrastructure Investment and Jobs Act

TITLE IX--GENERAL PROVISIONS--THIS DIVISION

DIVISION K--MINORITY BUSINESS DEVELOPMENT

SECTION 100001: “Minority Business Development Act of 2021"

TITLE I-- EXISTING INITIATIVES

- Subtitle A--Market Development, Research, and Information
- Subtitle B--Minority Business Development Agency Business Center Program

TITLE II--	NEW INITIATIVES TO PROMOTE ECONOMIC RESILIENCY FOR MINORITY BUSINESSES
TITLE III--	RURAL MINORITY BUSINESS CENTER PROGRAM
TITLE IV--	MINORITY BUSINESS DEVELOPMENT GRANTS
TITLE V--	MINORITY BUSINESS ENTERPRISE ADVISORY COUNCIL
TITLE VI--	FEDERAL COORDINATION OF MINORITY BUSINESS PROGRAMS
TITLE VII--	ADMINISTRATIVE POWERS OF THE AGENCY; MISCELLANEOUS PROVISIONS

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

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] 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]			
Pennsylvania	U.S. v. Taylor (2018)[13]			*U.S. v. Taylor* (W.D. Penn. 2018)[13]
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.**

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