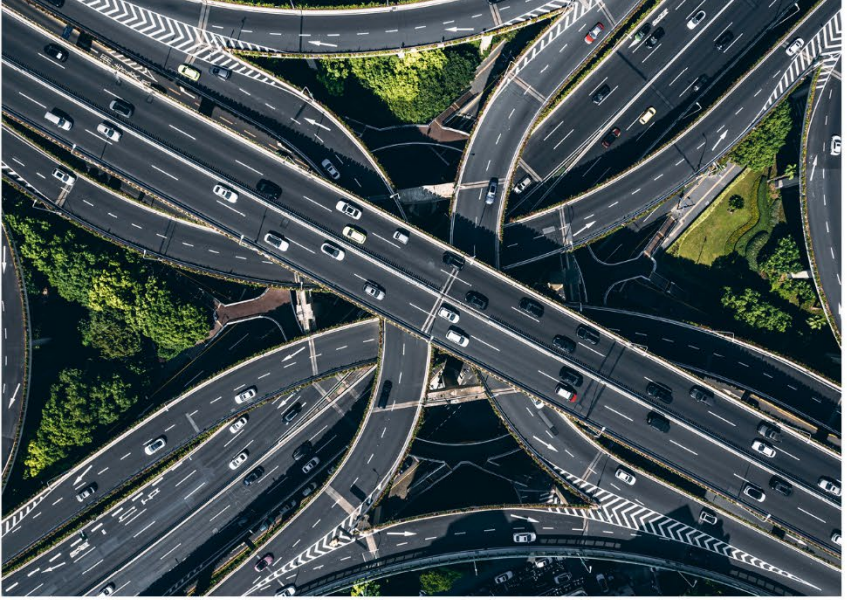


TRB
TRANSPORTATION RESEARCH BOARD
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DBE/MBE/WBE/SOCIAL AND ECONOMIC DISADVANTAGED BUSINESS PROGRAMS - Recent Legal Cases and Challenges

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Presented by: Keith Wiener, Partner | Holland & Knight LLP
1180 West Peachtree St., Ste. 1800 | Atlanta, GA 30309
404.817.8515 | keith.wiener@hklaw.com

Holland & Knight

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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.

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).

- **Courts apply intermediate scrutiny to gender-conscious programs.**
  - Restrictions subject to scrutiny are permissible so long as they are substantially related to serve an important governmental interest.

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.

Students for Fair Admissions, Inc. (SFFA) v. Harvard College and SFFA v. *University of North Carolina* (Affirmative Action University Admission cases)

- These two cases are challenges to university admissions policies that apply race as a diversity factor.
- Strict scrutiny standard applied similar to MBE/WBE/DBE cases: compelling governmental interest and narrow tailoring.
- Petitioners argue: (1) *Grutter v. Bollinger*, 539 U.S. 390 (2003) should be overruled and hold institutions of higher education cannot use race as a factor in admissions; and (2) These university admissions programs do not the satisfy strict scrutiny standard.
- The Court in *Grutter* applied strict scrutiny and upheld as valid the University of Michigan Law School admissions program that included the use of race in admissions decisions as satisfying a compelling government interest in obtaining educational benefits that flow from a diverse student body.
- *Grutter* held student body diversity can justify the use of race in university admissions, and the use of race was found narrowly tailored including because race was merely a potential "plus" factor.
- Potential impact on MBE/WBE/DBE/social and economic disadvantaged business contracting programs.

Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al, U.S. District Court for the Eastern District of Tennessee, 2:20-cv-00041-DCLC-CRW.

- The district court in *Ultima Services v. US Dep't of Agriculture*, discussed below, which involves a contractor challenging the Section 8(a) contracting Program for federal procurement as discriminating on the basis of race in awarding contracts (Program does not satisfy strict scrutiny) issued an Order on December 8, 2022 that directed the parties to:
  - File "letters" addressing whether a decision by SCOTUS overruling *Grutter* would impact the issues in *Ultima,* and
  - Whether the *Ultima* case should be stayed until SCOTUS releases its decision in the *SFFA* cases.
- Plaintiff, a small business contractor, filed a Complaint in federal district court in Tennessee against the US Dep't of Agriculture (USDA), US SBA, et. al. challenging the Section 8(a) program, and it appears as applied to a particular industry that provide administrative/technical support to USDA offices that implement the Natural Resources Conservation Service (NRCS) of the USDA.
- Plaintiff alleges there is no evidence that any racial or ethnic group is underrepresented in the administrative and/or technical support service industry, and no evidence that any underrepresentation was a consequence of discrimination by the federal government or that the government was a passive participant in discrimination.
- Plaintiff claims that the Section 8(a) Program discriminates on the basis of race.

Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al, U.S. District Court for the Eastern District of Tennessee, 2:20-cv-00041-DCLC-CRW.

- Plaintiff claims the SBA and USDA do not have a compelling governmental interest to support the discrimination in the operation of the Section 8(a) Program, and the Program is not narrowly tailored.

- Dispositive motions for summary judgment were filed by the parties in June and July 2022, which are pending.

- As noted above, the court requested the parties address whether a decision by SCOTUS overruling the *Grutter* case in the pending *SFFA v. Harvard and UNC* admission cases would impact the issues in this case.

- The parties filed on December 22, 2022 their responses to the court's Order both agreeing that the court should not stay its decision in this case, but differing on the impact of the *SFFA* cases:

  - Federal Defendants stating decision by SCOTUS overruling *Grutter* in the *SFFA* cases would not impact this case because they involve fundamentally different issues and legal bases for the challenged actions;
  - Plaintiffs stating it may impact or may not impact this case depending on the nature of the decision.

Christian Bruckner et al. v. Joseph R. Biden Jr. et al., U.S. District Court for the Middle District of Florida, Case No.; filed July 13, 2022.

- The Complaint filed on July 13, 2022 alleges that in the 2021 “Infrastructure Investment and Jobs Act” Congress authorized $370 billion in new spending for roads, bridges, and other surface transportation projects.

- The Complaint asserts that Congress implemented a set aside, or quota, requiring that at least 10% of these funds be reserved for certain “disadvantaged” small businesses.

- The Complaint alleges the law reserves more than $37 billion in contracts to be awarded to “small, disadvantaged business contractors” owned by certain minorities and women, and that Bruckner is a while male.

- The Complaint alleges the Infrastructure Act sets an unlawful quota based on race and gender because at least 10% of all contracts for certain infrastructure projects must be awarded based on race and gender, and that Defendants have no justification for the Act’s $37 billion race-and-gender quota.

- Plaintiff claims the court should declare this “quota” unconstitutional and enjoin its enforcement, "just as other courts have similarly enjoined other race-and-gender-based preferences,” *citing*, *Faust v. Vilsack*, 519 F. Supp. 3d 470 (E.D. Wis. 2021) (injunction against $4 billion Farmer Loan Forgiveness Plan Act; and *Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021) (injunction against American Rescue Act 28.6 billion Restaurant Revitalization Fund priority period)."

Christian Bruckner et al. v. Joseph R. Biden Jr. et al., U.S. District Court for the Middle District of Florida, Case No. 8:22-cv-1582-KKM-SPF; filed July 13, 2022.

- The Complaint alleges that Congress attempted to justify these race-and-gender classifications through findings of “race and gender discrimination” in the Infrastructure Act, "but none of these findings establish that Congress is attempting to remedy a specific and recent episode of intentional discrimination that it had a hand in."

- The Complaint alleges that "because he is a white male, Plaintiff Bruckner and his business cannot compete on an equal footing for contracts under the Infrastructure Act with businesses that are owned by women and certain racial minorities preferred by federal law."

- The Complaint alleges that the racial classifications under Section 11101(e)(2) & (3) of the Infrastructure Act are unconstitutional because they violate the equal protection guarantee in the United States Constitution, and that these racial classifications in the Infrastructure Act are not narrowly tailored to serve a compelling government interest.

- The Complaint alleges that the gender-based classification under Sections 11101(e)(2) & (3) of the Infrastructure Act is unconstitutional because it violates the equal protection guarantee in the United States Constitution.

Christian Bruckner et al. v. Joseph R. Biden Jr. et al., U.S. District Court for the Middle District of Florida, Case No. 8:22-cv-1582-KKM-SPF; filed July 13, 2022.

- The Complaint asserts this gender-based classification is not supported by an exceedingly persuasive objective, and the discriminatory means employed are not substantially related to the achievement of that objective.

- The Complaint requests the court:

  - A. Enter a preliminary injunction removing all unconstitutional race and gender-based classification in Section 11101(e)(3) of the Infrastructure Act.;
  - B. Enter a declaratory judgment that the race and gender-based classifications under Section 11101(e)(3) of the Infrastructure Act are unconstitutional; and,
  - C. Enter an order permanently enjoining Defendants from applying race and gender-based classifications when awarding contracts under Section 11101(e)(3) of the Infrastructure Act.

- The Plaintiffs filed in July 2022 an Amended Motion for Preliminary Injunction, which is pending. The federal Defendants filed a Reply in Opposition to the Motion for Preliminary Injunction on August 29, 2022.

- On September 27, 2022, the federal Defendants filed a Motion to Dismiss the Complaint, which is pending.

Christian Bruckner et al. v. Joseph R. Biden Jr. et al., U.S. District Court for the Middle District of Florida, Case No. 8:22-cv-1582-KKM-SPF; filed July 13, 2022.

- The court in November 2022 ordered the parties to address certain questions describing the administration and implementation process of the Federal DBE Program by December 2, 2022.
- In particular, the court requested the parties describe the authorization of funds by Congress and explain how state and local recipients award federally funded contracts.
- The court order provided Plaintiffs may clarify whether the complaint challenges the Federal DBE Program as it applies to direct contracting with the federal government.
- And, the court ordered the Defendants may file a statement certifying whether there are localities or federal agencies receiving funding from the Infrastructure Act that have set a DBE goal of 0%.
- Plaintiffs asserted the complaint "challenges a single sentence in federal law: Section 11101(e)(3) of the Infrastructure Investment and Jobs Act …" and that the "requested remedy is therefore narrow and precise: an injunction preventing Defendants from enforcing and implementing this one sentence." Plaintiffs' Verified Complaint only challenges Section 11101(e)(3), which contains a $37 billion race-and-gender preference.
- The Defendants submitted a supplemental briefing describing the administration and implementation process of the Federal DBE Program, and filed Declarations of DOT personnel attesting to the goals implemented by recipients.

Christian Bruckner et al. v. Joseph R. Biden Jr. et al., U.S. District Court for the Middle District of Florida, Case No. 8:22-cv-1582-KKM-SPF; filed July 13, 2022.

- The Defendants also addressed:
  - (a) how the DOT calculates and assesses whether recipients are fulfilling their DBE goals;
  - (b) whether a recipient's DBE goal influences the amount of federal funds awarded under the Act;
  - (c) the race neutral means used by recipients that employ only neutral means to award contracts;
  - (d) whether recipients and prime contractors are aware of a bidder's DBE status when determining whether to award a contract where a jurisdiction exclusively uses neutral means;
  - (e) whether a subcontractor knows before bidding if the recipient or prime contractor is employing race and gender conscious or neutral means to award subcontracts; and
  - (f) the certification process.
- The Motions remain pending at the time of this report.

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

- In 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").
- 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 RRF grant; 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.
- Vitolo requested: (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.

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

- The Sixth Circuit held the government cannot allocate coronavirus relief funds based on the race and sex of applicants, and enjoined the government from using "these unconstitutional criteria when processing" Vitolio's application.
- Court applied 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, Court holds government allegations of efforts to alleviate effects of societal discrimination is not a "compelling interest;" Court finds government does not identify specific incidents of past discrimination.

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

- Second, the government offers little evidence of past intentional discrimination against the groups to whom it grants preferences. The racial preferences in the government's regulation—preferences for Pakistanis but not Afghans; Japanese but not Iraqis; Hispanics but not Middle Easterners—are not supported by any evidence.
- 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. Statements by Congress that race- and sex-based grant funding would remedy past discrimination is not sufficient.
- Court stated Congress only identified a “theme” that MBE/WBEs needed relief from the pandemic because Congress's “prior relief programs had failed to reach” them; a “theme” of governmental discrimination is not enough.
- 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 is not 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. 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 government contends MBEs disproportionately struggled to obtain capital and credit. A race-neutral alternative exists: grant priority consideration to all business owners unable to obtain needed capital or credit during the pandemic.
- The Court rejected the argument that coronavirus relief programs "disproportionately failed to reach minority-owned businesses," finding a race-neutral alternative exists: 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.

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

- Court rejects argument RRF is not underinclusive because people of all colors can count as suffering "social disadvantage."
- The government's policy is "plagued" with underinclusivity. The Court found the requirement that a business must be at least 51% owned by women or minorities does not help remedy past discrimination.
- Black investors with shares in restaurants less than 51% does not 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 presumption enjoyed by designated minorities bears little relation to the problem the government is trying to fix. The Court notes the government's defense of its policy by citing a study showing it was harder for black business owners to obtain loans from banks.
- Rather than designating those owners as the harmed group, the Court stated 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 are invalid unless the government provides an "exceedingly persuasive justification." 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. 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 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 needs proof that discrimination occurred, by showing that the sex being favored "actually suffer[ed] a disadvantage" as a result of discrimination in a specific industry. 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."
- 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.
- Ruling by Sixth Circuit. The Plaintiffs are entitled to an injunction.

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

- The Court ordered the government to fund the Plaintiffs' grant application without regard to the applicants' race or sex. The government, however, may continue to give veteran-owned restaurants priority in accordance with the law.

- Plaintiffs-Appellants later filed a Motion to Dismiss the appeal stating they received their grant from Defendant-Appellee. The Court granted the Motion and dismissed the appeal terminating the case.

- Thus, the Sixth Circuit 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):

  - The court granted Plaintiffs' motion for temporary restraining order, and enjoins federal Defendants to process Plaintiffs' application for an RRF grant based on not satisfying strict scrutiny standard.
  - 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."
- 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 granted a stay of the proceedings pending the *Miller v. Vilsack case.*
- As a result of the federal government's repeal of ARPA Section 1005 in September 2022 and the subsequent Dismissal of the Class Action in *Miller v. Vilsack*, the parties filed a Stipulation of Dismissal, and the case was dismissed.
- Plaintiffs are seeking attorneys fees and costs of the litigation, which requests are pending at the time of this report.

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 court issued an Order staying the case pending the *Miller v. Vilsack case.*
- As a result of the federal government's repeal of ARPA Section 1005 in September 2022 and the subsequent Dismissal of the Class Action in *Miller v. Vilsack*, the parties filed a Stipulation of Dismissal, and the case was dismissed.
- Plaintiffs are seeking attorneys fees and costs of the litigation, which requests are pending at the time of this report.

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.

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- 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.
- As a result of the federal government's repeal of ARPA Section 1005 in September 2022, there was a voluntary Dismissal of the Class Action in *Miller v. Vilsack by the parties*, and the case was dismissed.

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

- There were multiple cases seeking to enjoin the U.S. Dep't of Agriculture 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.

- 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 courts granted the Defendants' Motion to Stay pending resolution of the *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.) class action litigation. The *Miller* court issued an injunction and certified a nationwide class action on the claims challenging the constitutionality of section 1005 (July 1, 2021).

- As a result of the federal government's repeal of ARPA Section 1005 in September 2022 and the subsequent Dismissal of the Class Action in *Miller v. Vilsack*, parties in these cases voluntarily dismissed the cases.
- Plaintiffs are seeking attorneys fees and costs of the litigation in certain cases, which requests are pending at the time of this report.

UPDATE: Circle City Broadcasting I, LLC ("Circle City") and National Association of Black Owned Broadcasters ("NABOB") (Plaintiffs) v. DISH Network, LLC, 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.
- The case is pending.

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

- This legislation passed Congress and was signed by the President on November 15, 2021.
- Public Law No. 117-58.
- As part of the Act, Congress reauthorized the U.S. DOT DBE Program

- **SEC. 11101. AUTHORIZATION OF APPROPRIATIONS.**

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

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- (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.

- 2) DEFINITIONS.—In this subsection, the following definitions apply:

- (A) SMALL BUSINESS CONCERN.—

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- (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.

- 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.

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]		*Christian Bruckner et al. v. Joseph R. Biden Jr. et al.*, U.S. District Court for the Middle District of Florida, Case No.; filed July 13, 2022[16]	
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 38)

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.**
16. ***Christian Bruckner et al. v. Joseph R. Biden Jr. et al.*, U.S. District Court for the Middle District of Florida, Case No.; filed July 13, 2022.**

Keith Wiener

Partner

Holland & Knight LLP
1180 West Peachtree Street, Suite 1800
Atlanta, GA 30309

404-817-8515

keith.wiener@hklaw.com