Promoting Opportunity and Equality in America

A Guide to Federal Circuit Authority on Permissible Government Actions to Promote Racial and Gender Equality

The **Opportunity** Agenda

Building the National Will to Expand Opportunity in America

ACLU

AMERICAN CIVIL LIBERTIES UNION

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About
The ACLU Racial Justice Program

The Racial Justice Program (RJP) is a program of the American Civil Liberties Union, the nation's leading advocate of civil liberties and civil rights. The RJP's mission is to preserve and extend the constitutional rights of people of color. Committed to combating racism in all its forms, our advocacy includes litigation, community organizing and training, legislative initiatives, and public education.

About
The Opportunity Agenda

The Opportunity Agenda was founded in 2004 with the mission of building the national will to expand opportunity in America. Focused on moving hearts, minds, and policy over time, the organization works with social justice groups, leaders, and movements to advance solutions that expand opportunity for everyone. Through active partnerships, The Opportunity Agenda synthesizes and translates research on barriers to opportunity and corresponding solutions; uses communications and media to understand and influence public opinion; and identifies and advocates for policies that improve people's lives. To learn more about The Opportunity Agenda, go to our website at www.opportunityagenda.org.

The Opportunity Agenda is a project of Tides Center.

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Preface

In this country, equal opportunity is a cherished value, and government officials are in a unique position to realize that value for all Americans.[1] Under the Constitution, government officials are authorized to make decisions that consider the impact of government programs on racial and gender equality. In certain circumstances, government officials may use racial and gender classifications as a factor in decision-making to promote opportunity, to advance equality, and to address discrimination.

As state and local governments continue to distribute billions of dollars of federal funds to programs intended to revitalize our economy, they must consider the effects that these programs will have on racial and gender equality, and structure the programs to further these goals. Such measures will ensure that *all* communities benefit from economic recovery efforts and that federal funds actually redress, rather than increase, racial and gender discrimination and inequality.

This guide is the second part of a two-part series. ***Promoting Opportunity and Equality in America Part I: A Guide for Federal, State and Local Governments***, which focused on racial equality, explained that the U.S. Supreme Court has interpreted the equal protection provisions of the U.S. Constitution to permit race-conscious government action in a wide variety of circumstances and, in a more narrow set of situations, to allow government uses of racial classifications.[2]

Government officials and advocates seeking to promote racial and gender equality through the design of government programs will find tailored circuit- and state-specific guidance in this report. Specifically, it reviews decisions by the U.S. Courts of Appeals ("Circuit Courts") that evaluate government contracting programs within their jurisdiction that use classifications based on race or gender. This report explains how Circuit Courts have clarified the requirements of the equal protection provisions of the Constitution and the Supreme Court's decisions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Adarand Constructors, Inc. v. Pena (Adarand I)*, 515 U.S. 200 (1995), and, under these cases, what a government contracting program using racial or gender classifications might require in order to be permissible.

This guide also provides state-specific information regarding the impact of so-called "anti-affirmative action" amendments to state constitutions, which prevent government actors in those states from using racial and gender classifications in ways that would otherwise be permitted by the U.S. Constitution.

Although this guide addresses Circuit Court authority on the constitutional use of racial and gender classifications on the sole point of government contracting, we hope it provides a useful starting point for identifying the legal standards that apply in other areas involving local jurisdictions' expenditure of federal funds. We also hope that this guide inspires further research on Circuit authority on race- and gender-*conscious* actions, which, as discussed in Part I of this series, are permissible in a wider variety of circumstances than actions based on race and gender *classifications*.[3]

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1 The research cited in this document is current as of May 2010. This document is intended as general guidance only. It is not intended to, and does not, constitute specific legal advice to lawyers in their capacity representing clients, prospective clients or other individuals, nor is it intended to be, and does not, constitute specific legal advice to any other individuals. This memorandum does not, and is not intended to, establish an attorney-client relationship. Prior to using this information to provide legal advice to any client, you should verify the information set forth herein, including the application of the information set forth herein to your client's particular circumstances and the applicability of the information set forth herein in the applicable jurisdiction. Individuals and groups seeking legal advice for themselves with respect to the matters referenced in this memorandum should consult with counsel and should not rely on this memorandum. This memorandum is provided "as is" without warranty of any kind and The Opportunity Agenda and the American Civil Liberties Union assume no liability for the use or interpretation of information set forth herein.

2 Memorandum from Nusrat Choudhury, ACLU Racial Justice Program on Expanding Opportunity Through the American Recovery and Reinvestment Act of 2009—The Legal Landscape (May 4, 2009), http://4909e99d35cada63e7f757471b7243be73e53e14.gripelements.com/pdfs/expanding_opportunity_through_the_arra_of_2009_legal_memo_aclu_5.05.09.pdf.

3 Under the equal protection provisions of the Constitution, the government uses a racial classification when it assigns an individual, business, or other entity a "race" for purposes of assigning benefits or burdens. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007). In contrast, the government uses a race-conscious measure when it addresses a governmental interest related to race by adopting a general policy that does not classify individuals,

businesses, or other entities by race. Such actions "do not lead to different treatment based on a classification that tells each [individual] he or she is to be defined by race." *Id.* at 789 (Kennedy, J., concurring). According to Supreme Court precedent, race-conscious action is permissible under the equal protection provisions of the Constitution in a wider range of circumstances than the use of racial classifications because strict scrutiny does not apply. *See*, *e.g.*, Bush v. Vera, 517 U.S. 952, 958 (1996) (plurality opinion) (explaining that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race"); *Parents Involved*, 551 U.S. at 789 ("[I]t is unlikely that [race conscious actions that do not require classification] would demand strict scrutiny to be found permissible.") (Kennedy, J., concurring); *id.* at 837 (Breyer, J., dissenting) ("Apparently Justice Kennedy also agrees that strict scrutiny would not apply in respect to certain 'race-conscious' school board policies.").

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Introduction

In our country's ongoing efforts to recover from the economic crisis of 2008, we must give special attention to the needs and potential for growth of our economy. Business ownership has been a gateway to opportunity for generations of Americans. However, there is an opportunity gap when it comes to the ability of businesses in this country to obtain contracts for government-funded projects.

We know that businesses owned by people of color and women face multiple barriers to recovery. As of February 1, 2010, black-, Latino-, and woman-owned businesses represented 5.2%, 6.8%, and 28.2% of all businesses respectively, yet they had only received 1.1%, 1.6%, and 2.4% of all federally contracted stimulus funds.[1] In other words, only 5% of these funds have gone to businesses owned by people of color and women, despite the fact that they represent nearly 40% of business owners.

In addition, the America's Recovery Capital Loan Program provides loans of up to $35,000 to help small businesses make it through the recession.[2] Of the nearly 4,500 loans disbursed this year, 3% went to Hispanic-owned businesses, 3% percent went to Asian- or Pacific Islander-owned businesses, and only 1.5% went to black-owned businesses. More than 91% of these loans went to white-owned businesses.[3]

As an example, this gap in opportunity persists for business contracts awarded through transportation funding, despite the goal established by the United States Department of Transportation (DOT) in the Transportation Equity Act for the 21st Century[4] to create "a level playing field on which [disadvantaged business enterprises] can compete fairly for DOT-assisted contracts."[5] Although the DOT had given out $163.8 million in direct contracts as of December 2009, only $16.8 million of that — or about 10% — had gone to all minority-owned businesses; $4.7 million, or about 3%, had gone to Hispanic-owned businesses. Not a single black-owned firm had received a contract from the DOT.[6]

The American Civil Liberties Union (ACLU) and The Opportunity Agenda have therefore created this guide to help policymakers navigate the requirements for using race or gender classifications in crafting laws, rules, or programs concerning the awarding of government contracts.[7] We intend this guide to be a user-friendly tool for all policymakers interested in advancing equity in their communities, counties, states, or regions. It will demonstrate how to foster equitable public structures and systems in a way that adheres to the U.S. Constitution, and to the particular rules and requirements necessary in your region of the country.

How to Use This Guide

For instance, if you are a public official living in Denver, Colorado, and you are interested in advancing equity by using a classification based on race or gender in a program, local rule, or regulation governing public contracting, you would look to the "Tenth Circuit" section of this guide (page 69), to determine if the specifics

1 The Ohio State Univ. Kirwan Inst. for the Study of Race & Ethnicity, ARRA and the Economic Crisis: One Year Later 2 (2010), *available at* http://fairrecovery.org/docs/ARRAEquityOneYearAnniv_Kirwan_Institute_Feb2010.pdf.

2 Aaron Glantz, *Minority Businesses Shut Out of Stimulus Loans*, New America Media, Dec. 17, 2009, http://news.newamericamedia.org/news/view_article.html?article_id=d40e83db3ee2eb66d27effb8a50ac34f.

3 Tyler Lewis, *Minority-Owned Businesses Not Getting Economic Recovery Loans*, The Leadership Conference, Dec. 22, 2009, http://www.civilrights.org/archives/2009/12/856-minority-owned-businesses.html.

4 Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1101(b)(1), 112 Stat. 107, 113 (1998).

5 *See* 49 C.F.R. pt. 26.1(b) (1999).

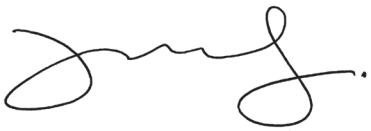
6 Aaron Glantz, *Black Businesses Shorted on Stimulus Contracts*, New America Media, Dec. 21, 2009), http://news.newamericamedia.org/news/view_article.html?article_id=6bab75852aacadbffbc46fa842c58cd6.

7 The analysis presented in this guide represents the case law current through May 2010. This document is intended as general guidance only.

of your proposed program meet the requirements necessary to meet the Constitution's Equal Protection standards, as interpreted by your region. To help you through this analysis, you might find it useful to refer to the flowchart related to the Tenth Circuit (page 68), to determine if you're considering each of the steps necessary to analyze this complicated and important question.

Addressing the opportunity gaps in the awarding of government contracts is crucial to strengthening the economic health of both minority communities and our larger economy. Minority and women business owners can be a greater source of jobs, economic development, and leadership, creating new pathways to shared prosperity. They strengthen the economy as a whole through increased employment, tax revenues, and services. By investing in a fair chance for a diversity of entrepreneurs, we are investing in the prosperity of our country as a whole.

Thank you.



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Disadvantaged/Minority/ Women Business Enterprise Programs

All of the federal, state, and local laws reviewed by the Circuit Court opinions discussed in this guide have established minority contracting preference programs through the use of set-asides or preferences for businesses that are majority-owned and -operated by minorities and/or women. The history of the development of this approach and the nomenclature associated with it are laid out briefly below.

Federal, state, and local governments spend significant sums of money each year to build roads and other public works, to procure goods, and to obtain professional services. Public contracts for these services often present vital opportunities for business growth and economic sustainability for businesses in communities across the country.

Since the Civil Rights Movement of the 1960s, federal, state, and local governments have acknowledged that racial and gender discrimination in the contracting industry often prevents firms owned by members of racial minority groups and women from bidding on and securing valuable public contracts, which contribute to the economic marginalization and disadvantage of these firms in comparison to others. Governments have also recognized that structural barriers, including bonding and capital requirements, may prevent firms owned by members of racial minority groups and women from securing public contracts. Firms owned by racial minorities and women tend to be smaller and have less access to capital and bonding due, in part, to their relatively small size, which may be the result of historical discrimination and structural barriers to entry.

Governmental entities at the federal, state, and local levels have sought to address historical racial and gender discrimination in the contracting industry as well as structural barriers to the participation of firms owned by members of racial minority groups and women. One approach has been to institute Disadvantaged Business Enterprise programs (DBEs) or Minority/Women's Business Enterprise programs (MBEs or WBEs). Legislative bodies instituting these programs have recognized that the exclusion of minority and women owned firms has contributed to the relative economic marginalization of minorities and women.

Although these programs vary in their definition of what constitutes a DBE or a WBE and what benefits accrue to DBEs and WBEs, they generally grant some form of preferential access to public contracting opportunities to firms in which a majority of the shares are owned by individuals who are women or members of identified racial minority groups. Some DBE/MBE/WBE programs set aside a certain portion of public contracts for bidding exclusively by firms owned by women and racial minorities. Others set aside a certain portion of contracting dollars to be awarded to these groups. While some programs are limited in their duration, others are instituted without any sunset provision. Although some programs permit firms that are not majority-owned by women or members of identified racial minorities the opportunity to gain certification as a DBE, others provide no such exceptions.

TEA-21 Overview

The Seventh, Eighth, Ninth, and Tenth Circuit Courts have all ruled on the constitutionality of the Transportation Equity Act for the 21st Century (TEA-21),[1] enacted by Congress in 1998, which sets goals for participation by disadvantaged business enterprises in federally-funded state highway projects.[2] This section provides a brief overview of the statute and its implementing regulations.

TEA-21 sets a national goal that 10 percent of federal highway funds are to be allocated to disadvantaged business enterprises (DBEs). DBEs are defined by TEA-21 as companies that are at least 51 percent controlled by "individuals who are both socially and economically disadvantaged,"[3] where "socially disadvantaged individuals" are defined as those who "have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities,"[4] and "economically disadvantaged individuals" are defined as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."[5] According to the statute, women and members of certain racial minority groups are rebuttably presumed to be socially and economically disadvantaged individuals.[6]

The specifics of this minority preference program are set forth in regulations promulgated by the U.S. Department of Transportation ("USDOT" or "DOT").[7] The regulations seek "to create a level playing field on which [disadvantaged business enterprises] can compete fairly for DOT-assisted contracts."[8] The regulations delegate to each state that accepts federal transportation funds the responsibility for implementing a DBE program that comports with TEA-21, and explain that the 10 percent DBE utilization goal established by the TEA-21 statute is merely "aspirational" in nature.[9]

TEA-21 regulations establish a two-step process that a state must follow to set a DBE utilization goal that reflects the level of DBE participation that would be expected absent the effects of discrimination.[10] In establishing this goal, a state must first calculate the relative availability of DBEs in its local transportation contracting industry, then adjust the figure to reflect the proven capacity of DBEs to perform work and to account for evidence of discrimination against DBEs obtained from statistical disparity studies.[11] The final, adjusted figure represents the proportion of federal transportation funding that a state must allocate to DBEs during the forthcoming fiscal year.[12]

A state must meet the maximum feasible portion of this goal through race-neutral means, including informational and instructional programs targeted toward all small businesses.[13] Even when the use of

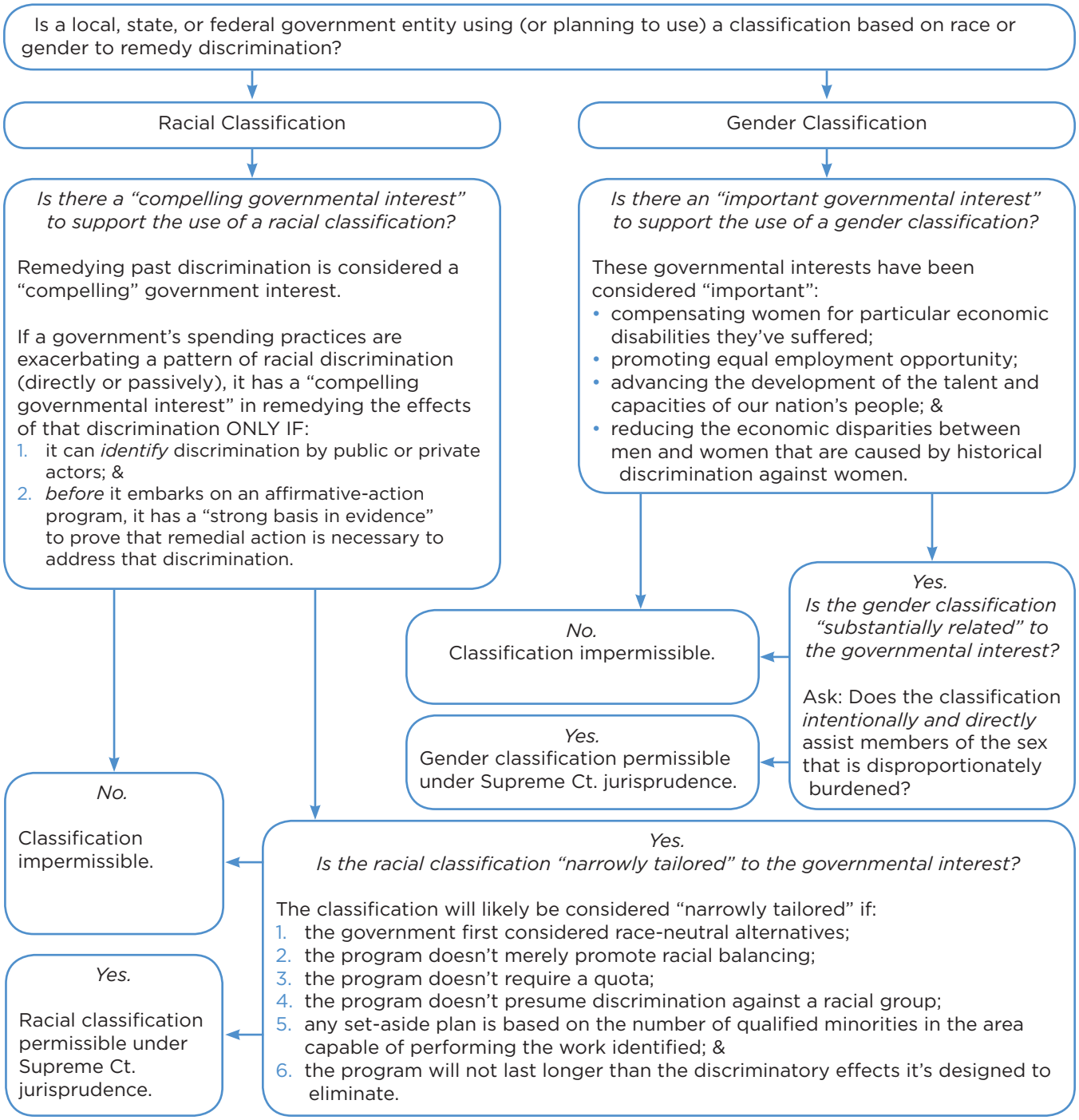
1 Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1101(b)(1), 112 Stat. 107, 113 (1998).
2 *See* N. Contracting, Inc. v. Illinois, 473 F.3d 715 (7th Cir. 2007); Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 124 S.Ct. 2158 (2004); W. States Paving Co., Inc. v. Wash. State Dep't of Trans., 407 F.3d 983 (9th Cir. 2005), *cert. dismissed sub nom.*, City of Vancouver v. W. States Paving Co., 546 U.S. 1170 (2006); Adarand Constructors, Inc. v. Slater (*Adarand VII*), 228 F.3d 1147 (10th Cir. 2000), *cert. dismissed sub nom.*, Adarand Constructors, Inc., v. Mineta, 534 U.S. 103 (2001).
3 *Id.* at 717; *see* 49 C.F.R. § 26.5 (2004).
4 15 U.S.C. § 637(a)(5) (2007).
5 15 U.S.C. § 637(a)(6)(A) (2007).
6 *See* 49 C.F.R. § 26.67(a)(1) (1999). TEA-21 regulations presume that Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and women are socially and economically disadvantaged. *Id.* § 26.67(a). The presumption of disadvantage is rebutted where the individual has a personal net worth of more than $ 750,000 or a preponderance of the evidence demonstrates that the individual is not in fact socially and economically disadvantaged. *Id.* § 26.67(b). Firms owned and controlled by someone who is not presumed to be disadvantaged can qualify for DBE status if the individual can demonstrate that he is in fact socially and economically disadvantaged. *Id.* § 26.67(d).
7 *See* 49 C.F.R. pt. 26 (1999).
8 *Id.* § 26.1(b).
9 *Id.* § 26.41(b).
10 *Id.* § 26.45(b).
11 *Id.* § 26.45(c), (d)(1).
12 *Id.* § 26.45(e)(1).
13 *Id.* § 26.51(a)-(b).

racial classifications is necessary in order to meet the goal, however, the regulations do not require that DBE utilization goals be included in every contract.[14] Prime contractors to whom a state awards federally funded transportation contracts must undertake good-faith efforts to satisfy the utilization goal by allocating the designated percentage of funds to DBE firms. States may not institute rigid quotas that do not permit good-faith efforts to suffice.[15]

14 *Id.* § 26.51(e)(2).
15 *Id.* § 26.53(a), 26.43(a).

U.S. Supreme Court

An Overview of Race and Gender Classification Requirements in Government Contracting



Equal Protection of the Law: U.S. Supreme Court Jurisprudence

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[16] The equal protection obligations imposed on state and local governments by the Fourteenth Amendment are identical to those imposed on the federal government by the Fifth Amendment.[17] These provisions have been interpreted by the U.S. Supreme Court to prohibit government actors from discriminating against individuals on the basis of race and gender.[18]

A. Standards Governing Racial Classifications

In its watershed decisions in *City of Richmond v. J.A. Croson Co.*[19] and *Adarand Constructors, Inc. v. Pena (Adarand I)*,[20] the Supreme Court explained the requirements of the equal protection provisions of the U.S. Constitution that must be met before a local, state, or federal government can use racial classifications to remedy discrimination in contracting.

In *Adarand I*, the Supreme Court established that the use of any racial classification by any level of government is subject to "strict scrutiny" review by courts to ensure that the use is permissible and does not overly burden constitutional rights to equal protection under the law.[21] Under the strict scrutiny standard, racial classifications "are constitutional only if they are narrowly tailored to further compelling governmental interests."[22] Strict scrutiny requires a "detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed."[23]

What is a Compelling Governmental Interest that May Support the Use of a Racial Classification?

The Supreme Court has recognized that several "compelling governmental interests" may justify the government's use of racial classifications. These interests include promoting student body diversity in higher education[24] and advancing student body diversity in other contexts.[25] The Supreme Court has also expressly held that remedying the effects of past or present racial discrimination may be a compelling governmental interest.[26] In *Croson*, the Court endorsed the view that governments may use racial classifications to "take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination."[27] A plurality of the Court concluded that such action is permissible even when the government has not directly discriminated against racial minorities, but has acted only as a "passive

16 U.S. Const. amend. XIV, § 1.
17 Adarand Constructors, Inc. v. Pena (*Adarand I*), 515 U.S. 200, 217 (1995) (collecting cases); *see also* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").
18 *See Adarand I*, 515 U.S. at 216, Schlesinger v. Ballard, 419 U.S. 498, 506-07 (1975).
19 488 U.S. 469 (1989).
20 515 U.S. 200 (1995).
21 *Id.* at 227
22 Grutter v. Bollinger, 539 U.S. 306, 326 (2003).
23 *Adarand I*, 515 U.S. at 227 (emphasis in original) (internal quotation marks and citation omitted).
24 *Grutter*, 539 U.S. at 328.
25 *Parents Involved* at 783 (by implication) (Kennedy, J., concurring); *id.* at 843 (Breyer, J., dissenting).
26 Shaw v. Hunt, 517 U.S. 899, 909 (1996) (citing *Croson*, 488 U.S. at 498-506); *see also Croson*, 488 U.S. at 491-92 (plurality opinion) ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.").
27 *Croson*, 488 U.S. at 504.

participant in a system of racial exclusion practiced by elements of the local construction industry," under which circumstances government may "eradicate the effects of private discrimination within its own legislative jurisdiction."[28]

The Supreme Court has made clear, however, that a government's interest in remedying the effects of racial discrimination may serve to justify the use of racial classifications *only if* the government can show that it seeks to remedy "identified discrimination" by public or private actors[29] and that it "had a strong basis in evidence to conclude that remedial action was necessary" to address the identified discrimination "*before* it embark[ed] on an affirmative-action program."[30] The Court has not identified what showing constitutes a "strong basis in evidence," but has stated that, "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality's prime contractors, an inference of discriminatory exclusion could arise."[31]

When is the Use of a Racial Classification Narrowly Tailored?

Even if a governmental entity can show that its use of a racial classification furthers a compelling government interest, classification is permitted only if it satisfies the requirements of "narrow tailoring."[32]

Courts find the following factors relevant to the determination of whether a classification is narrowly tailored: (1) the governmental entity considered race-neutral alternatives prior to adopting a program that uses racial classifications; (2) the program is more than a mere promotion of racial balancing; (3) the program does not require numerical quotas; (4) the program does not presume discrimination against certain minority groups; and (5) if the program involves a set-aside plan, the plan is based on the number of qualified minorities in the area capable of performing the scope of work identified (rather than the total number of minority businesses in the area covered by the program).[33] Another factor considered is whether the program was limited in duration, such that it will not last longer than the discriminatory effects it is designed to eliminate.[34]

B. Standards Governing Gender Classifications

Gender classifications are reviewed under "intermediate scrutiny" or "skeptical scrutiny," a less demanding standard of review than that applied to racial classifications. A gender classification is permissible if it is substantially related to an important state interest.[35] It must be motivated by an "exceedingly persuasive justification."[36] The Supreme Court has never reviewed a gender-based affirmative action program pertaining to government contracting. Indeed, it has reviewed very few gender-based affirmative action programs of any kind.

What is an Important Governmental Interest that May Support the Use of a Gender Classification?

In its most recent pronouncement on gender-based affirmative action, the Supreme Court identified various important interests that could support gender classifications, stating, "sex classifications may be used to compensate women for particular economic disabilities [they have] suffered, to promote equal employment opportunity, to advance full development of the talent and capacities of our Nation's people."[37] "Reduction of the disparity in economic condition between men and women caused by the long history of discrimination

28 *Id.* at 491-92 (plurality opinion).
29 *Shaw*, 517 U.S. at 909 (citing *Croson*, 488 U.S. at 499, 500, 505, 507, 509); *see also Croson*, 488 U.S. at 504 ("While the States and their subdivisions may take remedial action when they posses evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, *public or private*, with some specificity before they may use race-conscious relief." (emphasis added)).
30 *Shaw*, 517 U.S. at 910 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion) (emphasis in *Shaw*)) (internal quotation marks omitted).
31 *Croson*, 488 U.S. at 509.
32 *Adarand I*, 515 U.S. at 237.
33 *Croson*, 488 U.S. at 507-08.
34 *Adarand I*, 515 U.S. at 237-38.
35 Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982).
36 *Id*.
37 United States v. Virginia, 518 U.S. 515, 533 (1996) (internal citations and quotation marks omitted).

against women [is]. . . an important governmental objective" justifying a gender classification.[38] Mere recitation of a compensatory purpose is insufficient to satisfy the standard; courts will scrutinize gender-based classifications to ensure that they are substantially related to forwarding permissible purposes.

When is a Gender Classification Substantially Related to an Important Governmental Interest?

In order for a gender classification favoring one sex to be substantially related to an important state interest, it must "intentionally and directly assist[] members of the sex that is disproportionately burdened."[39] The Court has further stated, "[i]t is readily apparent that a State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification."[40] Thus, the Supreme Court found a public university's policy of excluding men from a nursing school to violate the Constitution, though the university defended the program as a form of affirmative action for women, when the university "made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the [nursing school] opened its door or that women currently are deprived of such opportunities."[41]

In contrast, the Court has upheld a statute that allowed women to eliminate more low-earning years than men in computing Social Security retirement benefits based on its conclusion that the statute took into account that "[women] as such have been unfairly hindered from earning as much as men" and "work[ed] directly to remedy" the resulting economic disparity.[42]

38 Califano v. Webster, 430 U.S. 313, 317 (1977).
39 *Hogan*, 458 U.S. at 728.
40 *Id.*
41 *Id.* at 729.
42 *Id.* at 728 (citing *Califano*, 430 U.S. at 318).

U.S. Courts of Appeals

Since issuing its 1995 decision in *Adarand I*, the Supreme Court has not considered the constitutionality of a governmental entity's use of racial classifications in awarding public contracts. As noted above, the Court has never ruled on the constitutionality of the use of gender classifications in a public contracting program.

Following *Adarand I*, lower federal courts have continued to develop the jurisprudence in this area. Nine of the twelve federal Courts of Appeals have considered equal protection challenges to the use of race in government contracting programs that have sought to remedy the effects of racial discrimination. Six Courts of Appeals have reviewed the use of gender classifications in public contracting programs. The opinions of these courts provide guidance regarding the use of race and gender classifications and, to a lesser degree, race- and gender-conscious actions that are permissible under the equal protection provisions of the Constitution. These opinions address several issues that the Supreme Court has not addressed, many of which concern the following evidentiary questions:

- **Standard of Review and Evidentiary Burden Applicable to Gender Classifications:** Are public contracting programs that use gender classifications subject to a less rigorous standard than the strict scrutiny standard applied to public contracting programs using racial classifications? How is the evidence required to meet "intermediate" scrutiny different from that required to meet strict scrutiny?
- **Identification of a Program as Using Racial Classifications:** What constitutes a race-based classification triggering strict scrutiny? Requiring government contractors to broaden their recruitment efforts to include women and minorities? Setting percentage "goals" for minority and women participation in contracts? Requiring the gathering of statistics on the racial makeup of an entity receiving government funds?
- **Evidence of Past Discrimination**: Must the government show that it was complicit in past discrimination in order to justify a compelling interest in remedying that discrimination?
- **Statistical Evidence in General:** What form of statistical evidence is sufficient to prove a governmental entity's claim that it used racial classifications to remedy racial discrimination by private or public actors in the contracting industry?
- **Disparity Studies:**[43] What types of disparity studies may give rise to a compelling government interest that would support the use of racial classifications in a public contracting program? What pool must be used to determine the number of minority-owned firms that are ready, willing, and able to perform work on public contracts? In order to constitute probative evidence of racial or gender discrimination, must the study account for relative differences in the sizes of firms owned by women and minorities and those that are not? Must the study account for possible causes of disparity other than discrimination?
- **Geographic Scope**: May statistical evidence of racial discrimination in a local or regional contracting industry be used to prove the existence of nationwide racial discrimination so as to support the use of racial classifications in a federal contracting program? Conversely, may evidence of nationwide racial discrimination be used to support the use of classifications in a local program? May statistical evidence of discrimination in one region be used to prove the existence of discrimination in another region? Is the standard different for classifications based on race and gender?
- **Burdens of Proof and Persuasion:** Which party has the burden of proof and of persuasion? Does the

43 A disparity study attempts to measure the difference—or disparity—between the number of contracts or contract dollars actually awarded to minority-owned businesses in a particular contract market and the number of contracts or contract dollars that would be expected to be awarded to minority-owned businesses in light of their presence in that particular contract market. Rothe Dev. Corp. v. U.S. Dep't of Def., 545 F.3d 1023, 1037 (Fed. Cir. 2008). Courts considering equal protection challenges to minority-participation programs have looked to disparity studies or to computations of disparity percentages to determine whether *Croson*'s evidentiary burden is satisfied. In many cases, courts have set a very high bar for determining the reliability of disparity studies. Any study proposed by a governmental entity seeking to justify an affirmative action program should be carefully structured to avoid the supposed failings of studies criticized by the various Circuit Courts.

government bear the burden of proving that racial discrimination has occurred and that it used racial classifications in order to remedy that discrimination? Must the challenger of the program prove that the program violated the right to equal protection?

- **Post-Enactment versus Pre-Enactment Evidence of Racial Discrimination:** Can evidence gathered *after* the institution of a government program using racial classifications be used to demonstrate that the government enacted the program to remedy racial discrimination, or is pre-enactment evidence of racial discrimination required? Does this determination depend on whether the plaintiff is bringing a facial or an as-applied challenge to the program?
- **Stale Evidence:** When does evidence of racial discrimination become too outdated to support a finding that the government enacted a race-based program to further a compelling governmental interest in remedying the effects of discrimination?
- **Narrow Tailoring:** What factors must be present in order to find that the program is narrowly tailored to serve the compelling government interest in remedying past discrimination? To what extent must the program rely on race-neutral means to achieve the remedial ends? Must the program contain a proviso that it will expire in a certain time period unless reauthorized? Must the minority and women participation goal closely track the evidence of past discrimination against those groups?

FIRST CIRCUIT

An Overview of Race and Gender Classification Requirements in Government Contracting

Is a government entity in Maine, Massachusetts, New Hampshire, Puerto Rico, or Rhode Island using (or planning to use) a classification based on race or gender to remedy discrimination?

Racial Classification

Use the analysis provided by the U.S. Supreme Court for racial classifications.

The First Circuit has not yet clarified how a public contracting program in particular might permissibly use a racial classification to remedy discrimination.

Gender Classification

Use the analysis provided by the U.S. Supreme Court for gender classifications.

The First Circuit has not yet clarified how a public contracting program might permissibly use a gender classification to remedy discrimination.

FIRST CIRCUIT

(Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island)

RACIAL CLASSIFICATIONS

The U.S. Court of Appeals for the First Circuit ("First Circuit") has not reviewed the constitutionality of a public contracting program's use of racial classifications. Nor has it otherwise explained the requirements that such programs must meet to withstand strict scrutiny review pursuant to constitutional equal protection provisions.

GENDER CLASSIFICATIONS

The First Circuit has not considered the constitutionality of a public contracting program using gender classifications. In the educational context, however, it has held that equal protection requires the government's use of gender classifications to meet intermediate scrutiny.

Cohen v. Brown University, 101 F.3d 155 (1st Cir. 1996)

A. Intermediate scrutiny is applied to the government's use of gender classifications.

In *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996), a Title IX athletics equity case, the First Circuit expressly rejected the argument that the analysis set out in *Croson* and *Adarand* applies to gender-based classifications, refusing to assume that the Supreme Court intended to include gender-based classifications within *Adarand*'s scope or to apply strict scrutiny to these classifications. The First Circuit concluded that intermediate scrutiny remained the appropriate test for such classifications under Supreme Court precedent, including the Supreme Court's 1996 decision in *United States v. Virginia*, which some observers have read to apply more searching scrutiny of gender classifications than traditional intermediate scrutiny.[44]

- Controlling Supreme Court precedent does not distinguish between invidious and benign discrimination in applying intermediate scrutiny: in reviewing either type of gender classification, "the burden of demonstrating an exceedingly persuasive justification for a government-imposed, gender-conscious classification is met by showing that the classification serves important governmental objectives and the means employed are substantially related to the achievement of those objectives."[45]
- The First Circuit further noted that "a gender-conscious remedial scheme is constitutionally permissible if it directly protects the interests of the disproportionately burdened gender."[46]

44 *Cohen*, 101 F.3d at 183 (citing United States v. Virginia, 518 U.S. 515 (1996)).
45 *Id.* at 183-84.
46 *Id.* at 184.

SECOND CIRCUIT

An Overview of Race and Gender Classification Requirements in Government Contracting

Is a government entity in Connecticut, New York, or Vermont using (or planning to use) a classification based on race or gender to remedy discrimination?

Racial Classification

Use the analysis provided by the U.S. Supreme Court for racial classifications.

Note: Government entities in the Second Circuit may use evidence from before or after the program with a racial classification was enacted to prove that the racial classification is necessary to remedy discrimination.

Gender Classification

Use the analysis provided by the U.S. Supreme Court for gender classifications.

The Second Circuit has not yet clarified how a public contracting program might permissibly use a gender classification to remedy discrimination.

SECOND CIRCUIT

(Connecticut, New York, Vermont)

RACIAL CLASSIFICATIONS

Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50 (2d Cir. 1992)

In *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50 (2d Cir. 1992), which was issued before the Supreme Court's decision in *Adarand I* established that strict scrutiny applies to the federal government's use of racial classifications, the U.S. Court of Appeals for the Second Circuit ("Second Circuit") affirmed the lower court's dismissal of the plaintiffs' equal protection claims against the New York Department of Transportation's implementation of a federal set-aside program.[47]

A. Post-enactment evidence may be constitutionally sufficient to justify a set-aside program.

The Second Circuit held that "[t]he law is plain that the constitutional sufficiency of a state's proffered reasons necessitating an affirmative action plan should be assessed on whatever evidence is presented, whether prior to or subsequent to the program's enactment."[48]

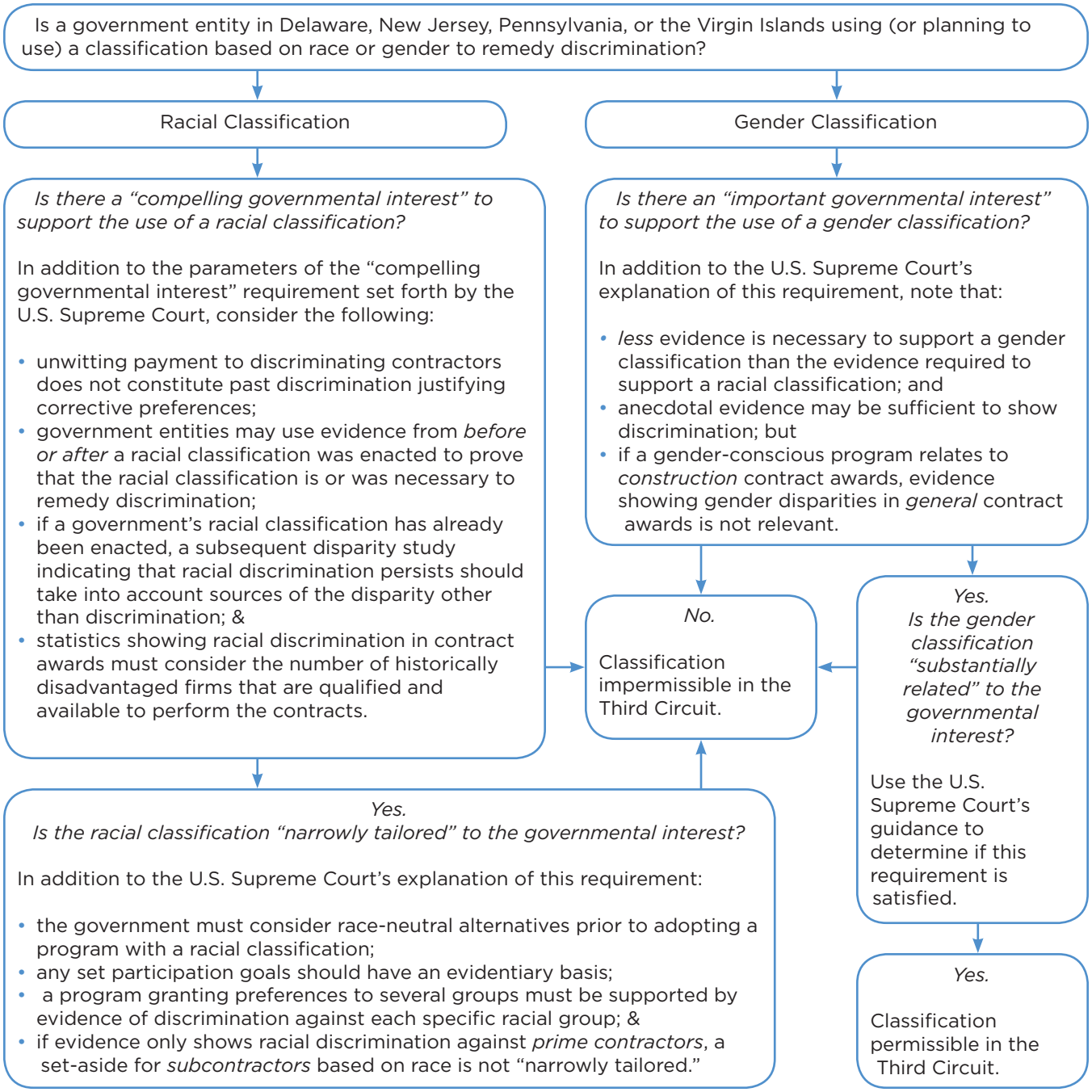
GENDER CLASSIFICATIONS

The Second Circuit has not reviewed the constitutionality of a public contracting program's use of gender classifications, nor has it otherwise explained the requirements that such programs must meet to withstand scrutiny under constitutional equal protection provisions.

47 *Harrison*, 981 F.2d at 53.
48 *Id.* at 60.

THIRD CIRCUIT

An Overview of Race and Gender Classification Requirements in Government Contracting



THIRD CIRCUIT

(Delaware, New Jersey, Pennsylvania, Virgin Islands)

RACIAL CLASSIFICATIONS

The U.S. Court of Appeals for the Third Circuit ("Third Circuit") has issued four decisions considering equal protection challenges to state and local contracting programs using racial classifications. In these decisions, the Third Circuit made the following key rulings: a disparity study must account for the number of MBEs and WBEs that are qualified and able to do the work; post-enactment evidence may be considered in determining the extent of discrimination; preferences must be granted based on evidence of discrimination against specific groups; payment of tax dollars to firms participating in discriminatory associations does not constitute passive discrimination; participation goals must track evidence of past discrimination; and the government must present evidence that it considered race-neutral alternatives prior to instituting a program using racial classifications.

Independent Enterprises, Inc. v. Pittsburgh Water and Sewer Authority, 103 F.3d 1165 (3d Cir. 1997)

In *Independent Enterprises, Inc. v. Pittsburgh Water and Sewer Authority*, 103 F.3d 1165 (3d Cir. 1997), the Third Circuit addressed an equal protection challenge to the Pittsburgh Water & Sewer Authority ("the Authority")'s "MBE/WBE Utilization Requirements," which required bidders on certain contracts to provide a plan identifying the portion of the work that would be subcontracted to certified minority- or women-owned firms.[49] The District Court dismissed the equal protection claim on the ground that the plaintiff lacked standing because the complaint failed to allege a causal connection between the Authority's MBE/WBE requirements and the injury—the rejection of bids made by Independent Enterprises, Inc.[50] The Third Circuit found that there was standing and remanded the case to the District Court.[51]

A. Standing to bring an equal protection challenge to a public contracting program using racial classifications is met when the complaint alleges that the use of the classifications caused the plaintiff to lose a bid on which it was the lowest bidder.

The complaint identified the challenged MBE/WBE Utilization Requirements and alleged that the requirements used racial and gender classifications, that bids that did not meet the requirements were rejected, and that the use of racial classifications was not undertaken "to remedy past discrimination or passive participation in discrimination by the city or the Authority against minority- or women-owned construction companies."[52] These factual allegations satisfied the requirements for standing—injury in fact, causation, and redressability—to bring the equal protection claim, despite the presence of alternate theories in the complaint according to which the Authority would be liable to the plaintiff for the denial of its bid.[53]

B. No clarification of the showing required to meet strict scrutiny review.

Because it did not reach the merits of the equal protection claim, the Third Circuit did not clarify what a government contracting program using race-based classifications must show to withstand strict scrutiny or

49 *Indep. Enter., Inc.*, 103 F.3d at 1168-69.
50 *Id.* at 1170.
51 *Id.* at 1176, 1180.
52 *Id.* at 1176.
53 *Id.* at 1176-77.

address whether the Authority's MBE Utilization Requirements withstood judicial review.

The Contractors Cases: Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia, 945 F.2d 1260 (3d Cir. 1991) ("Contractors I"), 6 F.3d 990 (3d Cir. 1993) ("Contractors II"), and 91 F.3d 586 (3d Cir. 1996) ("Contractors III")

In a series of three decisions in *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, the Third Circuit reviewed equal protection challenges by nine contractors' associations to a 1982 Philadelphia ordinance that set goals and preferences for the participation of minority-owned businesses, women-owned businesses, and businesses owned by people with disabilities in the awarding of construction contracts, Phila. Code § 17-500 *et seq*. ("the ordinance").

Contractors I

On the first appeal, the Third Circuit affirmed the District Court's ruling that the contractors' associations had standing to challenge the set-aside program, but reversed the grant of summary judgment in their favor because the intervenor, United Minority Enterprise Associates, had not been afforded a fair opportunity to develop a record documenting the existence of past discrimination in the Philadelphia construction market, which could justify the set-asides provided for by the ordinance.[54]

Contractors II

On the second appeal, the Third Circuit reviewed a second grant of summary judgment for the contractors' associations.[55] After concluding that the contractors had standing to challenge the program only as it applied to the award of construction contracts,[56] the Court affirmed the grant of summary judgment to the contractors' associations with respect to their equal protection challenges against the ordinance's preferences for women and nonminority contractors. The Court denied summary judgment with respect to the ordinance's preferences for black contractors, finding that the record reflected a genuine issue of material fact as to whether the portions of the ordinance requiring a set-aside for black contractors was permissible in that it was narrowly tailored to serve the city's compelling governmental interest in remedying the effects of past discrimination against black construction contractors in Philadelphia.[57]

A. Statistics purporting to show racial discrimination in the contracting industry to justify the use of racial classifications must take into consideration the number of minority firms that are "qualified" and "able" to do the work.

The evidence available to the Philadelphia City Council when it first passed the ordinance in 1982 ("pre-enactment evidence") compared the percentage of city contract dollars awarded to minority contractors to the percentage of total licensed businesses owned by minorities, without consideration of the proportion of minority-owned businesses that were available or qualified to perform city construction contracts.[58] The Third Circuit found that this evidence did not support the conclusion that there had been discrimination against women and minorities in the Philadelphia construction industry that necessitated the use of race- and gender-based classifications.[59]

54 *See Contractors I*, 945 F.2d 1260, 1267 (3d Cir. 1991).
55 *See Contractors II*, 6 F.3d 990, 993 (3d Cir. 1993).
56 *Id.* at 998-99.
57 *Id.* at 1007.
58 *Id.* at 1003.
59 *Id.*

B. "Post-enactment" evidence may be considered in determining whether there is a sufficient evidentiary basis for a contracting program's use of race-based classifications.

The Third Circuit found that post-enactment evidence was admissible, citing other Circuit Courts that had reached that conclusion.[60] The Court noted in particular the dilemma faced by a governmental entity of deciding whether to wait months to further develop the record, risking liability to minorities due to inaction, or risk liability to non-minorities for acting prematurely.[61] The Court held that consideration of post-enactment evidence was appropriate where the principal relief sought was an injunction.[62]

C. A public contracting program granting preferences to several groups, such as one granting preferences to several different racial groups and women, must be supported by evidence of discrimination against each specific racial and gender group.

After evaluating both pre- and post-enactment evidence, the Third Circuit found that the city failed to provide evidence to support an inference that the city discriminated against contractors who were women, Hispanic, Asian-American, or Native American.[63] As a result, the Court awarded summary judgment to the contractors on their equal protection challenges to the portions of the ordinance requiring set-asides for women and non-black minority contractors.[64]

Contractors III

Following remand, the District Court determined that the ordinance's set-aside for black contractors violated the equal protection clause. It found that the program was not instituted to further a compelling governmental interest in remedying discrimination against black contractors, because the record reflected no "strong basis in evidence" for a conclusion that discrimination against black contractors was practiced by the city, nonminority prime contractors, or contractors associations during any relevant period.[65] The District Court also determined that the ordinance was not narrowly tailored.[66] On its third consideration of the case, the Third Circuit affirmed the District Court's grant of summary judgment to the contractors associations.[67] It concluded that the ordinance violated the Equal Protection Clause for three main reasons:

- The ordinance provided race-based preferences for African-American subcontractors without a strong basis in evidence for concluding that they had suffered discrimination.
- The record failed to support a belief that a 15 percent set-aside of all prime city contracts for black subcontractors was necessary to remedy discrimination by the city in that market, particularly since black-owned firms represented only 0.7 percent of all firms that were able to perform such contracts.
- The City Council passed the ordinance without adequately considering available race-neutral alternatives or, at least, options that were less burdensome on non-black contractors that could promote participation by black contractors in city contracts.[68]

A. Allocation of the burdens of production and persuasion in an equal protection challenge to a government contracting program.

The Third Circuit set the following standards for the burdens of production and persuasion in an equal protection challenge to a government contracting program using racial classifications.[69] The government must first produce evidence showing that it identified discrimination whose remedy necessitated the use of race-

60 *Id.* at 1004 (citing Coral Constr. Co. v. King County, 941 F.2d 910, 921 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992), Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50, 60 (2d Cir. 1992)).
61 *Id.* (citing *Coral Constr.*, 941 F.2d at 921, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 291, 280-81 (1986) (O'Connor, J., concurring)).
62 *Id.*
63 *Id.* at 1007-08.
64 *Id.* at 1012.
65 Contractors Ass'n of E. Pa., Inc. v. City of Phila., 893 F. Supp. 419, 447 (E.D. Pa. 1995), *aff'd* 91 F.3d 586 (3d Cir. 1996).
66 *Id.*
67 *Contractors III*, 91 F.3d 586, 591 (3d Cir. 1996).
68 *Id.* at 609-10.
69 *Id.* at 598.

based classifications.[70] The challenger must then offer evidence showing that the discrimination identified by the government did not or does not exist, and/or that the program is not narrowly tailored to remedy the particular discrimination identified.[71] The challenger bears the ultimate burden of persuading the court that the program violates the equal protection provisions of the Constitution.[72]

- "[T]he burden of persuasion here is analogous to the burden of persuasion in Title VII cases."[73]

B. A single affidavit lacking a sound basis in fact is insufficient to constitute a "strong basis in evidence."

The city sought to prove the following two key facts by the presentation of two affidavits, one for each fact: prime contractors discriminated against black subcontractors from 1979 to 1981, before the ordinance's enactment, and the contractors associations had discriminated against black contractors.[74] The Third Circuit rejected these affidavits, which were unsupported by any additional proofs, as unreliable, and held that the city had failed to establish a strong basis in evidence to support its assertion of compelling government interest.[75]

C. The flow of city contract dollars to low-bidding contractors who participated in or paid dues to the contractors associations did not constitute "passive" participation in their membership discrimination.

The Third Circuit noted that even if the contractors associations discriminated against black contractors, the city had not shown that awarding contracts according to a competitive bidding scheme would result in its own passive participation in a system of private racial discrimination.[76]

D. A post-enactment disparity study may provide a sufficient basis to conclude that the city had discriminated against black prime contractors, but must account for sources of disparity other than discrimination.

The city submitted a disparity study conducted by expert Dr. Andrew Brimmer 10 years after the ordinance was passed, based on data from 1979 to 1981, which revealed a significant disparity index of 22.5 for black construction firms in the Philadelphia metropolitan area; Dr. Brimmer testified that the disparity was attributable to discrimination.[77] After acknowledging that there were circumstances when a 22.5 disparity index could constitute a strong basis in evidence for inferring the existence of discrimination, and dismissing a number of critics of the study (detailed below), the Third Circuit faulted the study for not considering the fact that the disparity may have resulted from forces other than discrimination.[78]

- The study was based on the number of black firms identified in the Office of Minority Opportunity directory, which the Third Circuit found acceptable and perhaps even "*underinclusive*" of the true number of black contractors qualified and willing to do public work.[79]
- The Third Circuit also observed that past discrimination in the contracting industry could discourage some

70 *Id.* at 597.
71 *Id.*
72 *Id. See also Contractors II*, 6 F.3d at 1005-06 (citing Johnson v. Transp. Agency, Santa Clara County, Cal., 480 U.S. 616, 626 (1989) and Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277-78 (1986)).
73 *Id.* at 598.
74 *Id.* at 600-01.
75 *Id.* at 600. The Third Circuit observed that the individual testifying as to 1979-1981 contracts had "examined only 25 to 30 percent of the project engineer logs" of the City and "that his only basis for identifying a name in that segment of the logs as an MBE was his personal memory of the information he had received in the course of approximately a year of work with the [City's Office of Minority Opportunity ("OMO")]." *Id.* Moreover, the witness admitted that there was "a very good possibility" that minority subcontractors did perform work on some City public works projects during fiscal years 1979 to 1981 and that he just did not see them in the project logs that he randomly selected to review. *Id.* (citing 893 F. Supp. at 434). In the case of contractor associations, the affiant stated, without explaining his conclusions, that based on a review of "the membership provisions of the bylaws for each of the plaintiff Associations [and] the 1982 OMO Directory of Certified MBE and WBE firms," a listed number of MBEs and WBEs were eligible for membership in the plaintiff Associations, but were not members. *Id.* at 601.
76 *Id.* at 602.
77 *Id.* at 594, 595, 602.
78 *Id.* at 602, 605.
79 *Id.* at 603. The Third Circuit discussed the process by which firms were certified for inclusion in the directory and noted that the process suggested that listed firms were "both qualified and willing to participate in public works projects." *Id.*

minorities who would otherwise be willing to do city projects from applying for such work.[80]

- The Third Circuit found that the District Court gave "excessive" weight to the fact that the disparity study used data from two different geographical areas to calculate a disparity index of 22.5.[81] Although there was a "minor mismatch in the geographic scope of the data," the mismatch was rendered insignificant by the magnitude of the disparity calculated by the study.[82]

E. A public contracting program that provides a preference or set-aside primarily for black *subcontractors* is not narrowly tailored to address discrimination by the city against black *prime contractors*.

The Third Circuit's most important ground for concluding that the ordinance was not narrowly tailored was its determination that, although there may have been a strong basis in evidence to conclude that the city discriminated against black *prime contractors*, the ordinance did not address this problem.[83] Instead, it created a set-aside for black *subcontractors*, and therefore was not narrowly tailored. The Third Circuit found that "the 15 percent participation goal and the system of presumptions, which in practice require non-black contractors to meet the goal on virtually every contract, result in a 15 percent set-aside for black contractors in the subcontracting market."[84]

- "Here, as in *Croson*, 'to a large extent, the set aside of subcontracting dollars seems to rest on the unsupported assumption that white contractors simply will not hire minority firms.' Here, as in *Croson*, there is no firm evidentiary basis for believing that nonminority contractors will not hire black contractors. Rather, the evidence, to the extent it suggests that racial discrimination has occurred, suggests discrimination by the City's Procurement Department against black contractors who were capable of bidding on prime City construction contracts. To the considerable extent that [the] program seeks to constrain decision making by private contractors and favor black participation in the subcontracting market, it is ill-suited as a remedy for the discrimination identified."[85]

F. A program setting a participation goal for the award of contracts to minority firms should base the amount of the participation goal on evidence in the record.

The Third Circuit determined that the 15 percent participation goal for black contractors was not narrowly tailored to address discrimination in prime contracting, because the 15 percent figure "was either arbitrarily chosen or, at least, the Council's sole reference point was the minority percentage in the local population."[86] The city was unable to provide an "evidentiary basis from which to conclude that a 15 percent set-aside is necessary to remedy discrimination against black contractors in the market for prime contracts."[87]

- The data underlying the disparity study indicated that only 0.7 percent of the construction firms qualified to perform work on city contracts were owned by African Americans. Although the Third Circuit took care to note that it did not suggest that the participation goal for black contractors should be limited to 0.7 percent of all city contracts, it determined that the 0.7 percent figure did not provide a strong basis in evidence to conclude that a much larger, 15 percent set-aside was necessary to remedy discrimination against black contractors in the prime contract market.[88]
- The Third Circuit rejected the city's argument that the 15 percent set-aside was required to offset waivers and exemptions from the provisions of the ordinance.[89]

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80 *Id.* at 604.
81 *Id.* The study used the City's data to determine the total amount of City contract dollars, the amount that went to MBEs, and the number of black construction firms, but used data from the Bureau of the Census for the number of total construction firms in the Philadelphia Standard Metropolitan Statistical Area. While the Census information was geographically bounded, any firm "could bid on City work" or "seek certification from the OMO." *Id.*
82 *Id.*
83 *Id.* at 606.
84 *Id.*
85 *Id.* (citing *Croson*, 488 U.S. at 502) (internal citation omitted).
86 *Id.* at 607.
87 *Id.*
88 *Id.* at 607-08.
89 *Id.* at 608.

G. The government must provide record evidence that it considered race-neutral alternatives prior to adopting a program using racial classifications to grant preferences or set-asides for minority firms.

The Third Circuit found that the record supported the "conclusion that the 'City Council was not interested in considering race-neutral measures, and it did not do so.'"[90]

- The city had not lowered administrative barriers to entry, instituted a training and financial assistance program, or carried forward the Office of Minority Opportunity's certification of minority contractor qualifications. These race-neutral options for increasing awards to black contractors were available prior to the enactment of the ordinance in 1982, but were not considered by the City Council.[91]
- Notably, the stated purpose for extending the ordinance in 1987 was to assist "minority and women contractors 'whose ability to compete in the free enterprise system has been impaired *due to diminished capital and credit opportunities* as compared to others in the same business area who are not socially disadvantaged."[92] The Third Circuit noted that the city did not consider race-neutral programs designed to address either of these particular challenges.[93]

GENDER CLASSIFICATIONS

Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia, 6 F.3d 990 (3d Cir. 1993) ("*Contractors II*")

As noted above, in *Contractors II*, the Third Circuit ruled on the constitutionality of a Philadelphia ordinance setting goals and preferences for the participation of minority-owned businesses, women-owned businesses, and businesses owned by people with disabilities in the awarding of construction contracts. The Court considered the ordinance's racial preferences, gender preferences, and disability preferences separately, applying intermediate scrutiny to the gender preferences and explicitly rejecting decisions in other courts applying strict scrutiny to such preferences.[94]

A. A governmental entity may rely on less evidence in enacting a gender-based preference than a racial preference.

The Third Circuit noted that case law provides little guidance as to what constitutes the "sufficient factual predicate" necessary to satisfy intermediate scrutiny.[95] The Court determined that it was unclear whether the government was required to put forward evidence of governmental discrimination or statistical evidence.[96] However, the Court found that "[l]ogically, a city must be able to rely on less evidence in enacting a gender preference than a racial preference because applying *Croson*'s evidentiary standard to a gender preference would eviscerate the difference between strict and intermediate scrutiny."[97] Based on these observations, the Third Circuit concluded that "probative evidence in support of [the] stated rationale for the gender preference" was required to uphold the program under intermediate scrutiny.[98] The Third Circuit did not further explain what "probative evidence" means in this context or how it differs from the strong basis in evidence required to support race classifications. However, the Court did note the Supreme Court's direction that "an affirmative

90 *Id.* at 609. The only record in the evidence that the City of Philadelphia had considered race-neutral alternatives was the testimony of a city council member that he had been aware of the Philadelphia Plan and the Urban Coalition program but could not recall details of the plans, and a reference in the preamble of the ordinance to the fact that the federal Small Business Administration had failed to increase the number of minority and women businesses. *Id.* at 609, n.26. The Third Circuit found that these two facts were "not constitutionally adequate consideration of the potential effectiveness of race-neutral measures for a particular industry in a particular locality." *Id.*
91 *Id.*
92 *Id.*
93 *Id.*
94 *Contractors II*, 6 F.3d at 1000-1001.
95 *Id.* at 1010.
96 *Id.*
97 *Id.*
98 *Id.* at 1010.

action program survives intermediate scrutiny if the proponent can show it was 'a product of analysis rather than a stereotyped reaction based on habit.'"[99]

B. Evidence pertaining to gender-based discrimination in the construction industry was required.

The Third Circuit first concluded that only evidence showing disparities or gender discrimination in city contracts related to women-owned *construction* businesses was cognizable, thereby dismissing the relevance of evidence showing disparities or discrimination in city contracts awarded to women-owned businesses generally.[100] The Court then found that the evidence presented on this narrow point, which consisted of a three-page affidavit alleging gender discrimination in the construction industry and a conclusory statement by one witness at a city council hearing, was insufficient to avoid summary judgment, though the Court did suggest that anecdotal evidence alone *could* meet the necessary standard despite its failure here.[101]

99 *Id.* (citing Metro Broad., Inc. v. F.C.C., 497 U.S. 547, 582-83 (1990) (*overruled on other grounds by Adarand I*, 515 U.S. at 227).
100 *Id.* at 1010-1011.
101 *Id.* at 1011.

FOURTH CIRCUIT

An Overview of Race and Gender Classification Requirements in Government Contracting

Is a government entity in Maryland, North Carolina, South Carolina, Virginia, or West Virginia using (or planning to use) a classification based on race or gender to remedy discrimination?

Racial Classification

Use the analysis provided by the U.S. Supreme Court for racial classifications.

The Fourth Circuit has not yet clarified how public contracting programs in particular might permissibly use racial classifications to remedy discrimination.

However, in other contexts, the court has emphasized that statistics alone cannot show discrimination unless the disparity is a gross one.

Gender Classification

Use the analysis provided by the U.S. Supreme Court for gender classifications.

The Fourth Circuit has not yet clarified how a public contracting program might permissibly use a gender classification to remedy discrimination.

FOURTH CIRCUIT

(Maryland, North Carolina, South Carolina, Virginia, West Virginia)

RACIAL CLASSIFICATIONS

The U.S. Court of Appeals for the Fourth Circuit ("Fourth Circuit") has not reviewed the constitutionality of a public contracting program's use of racial classifications. Nor has it otherwise explained the requirements that such programs must meet to withstand strict scrutiny under constitutional equal protection provisions.

However, the Court has indicated its views on what is required in order to satisfy strict scrutiny in other contexts. The following cases may be instructive in predicting how the Fourth Circuit will approach a future government contracting case. In *Alexander v. Estepp*, 95 F.3d 312 (4th Cir. 1996), the Court ruled that a fire department's affirmative action policy was unconstitutional because it was not narrowly tailored.[102] The policy relied on outright racial classifications when less drastic means were available and benefitted minority groups that had not been shown to have suffered discrimination; the program was also unwritten, making judicial examination difficult.[103] In *Maryland Troopers Association v. Evans*, 993 F.2d 1072 (4th Cir. 1993), the Court invalidated a consent decree between the Coalition of Black Troopers and the State Police, which contained numerical quotas, on the ground that the state lacked a compelling interest.[104] The Court faulted the government's statistical evidence, which, standing alone, has "serious deficiencies," since inferring past discrimination from statistics alone assumes "that the true measure of racial equality is always to be found in numeric proportionality."[105] Quoting *Croson*, the Court stated that, absent "gross statistical disparities between the racial composition of the employer's workforce and the racial composition of the labor pool," a court may not infer the existence of discrimination from statistics.[106]

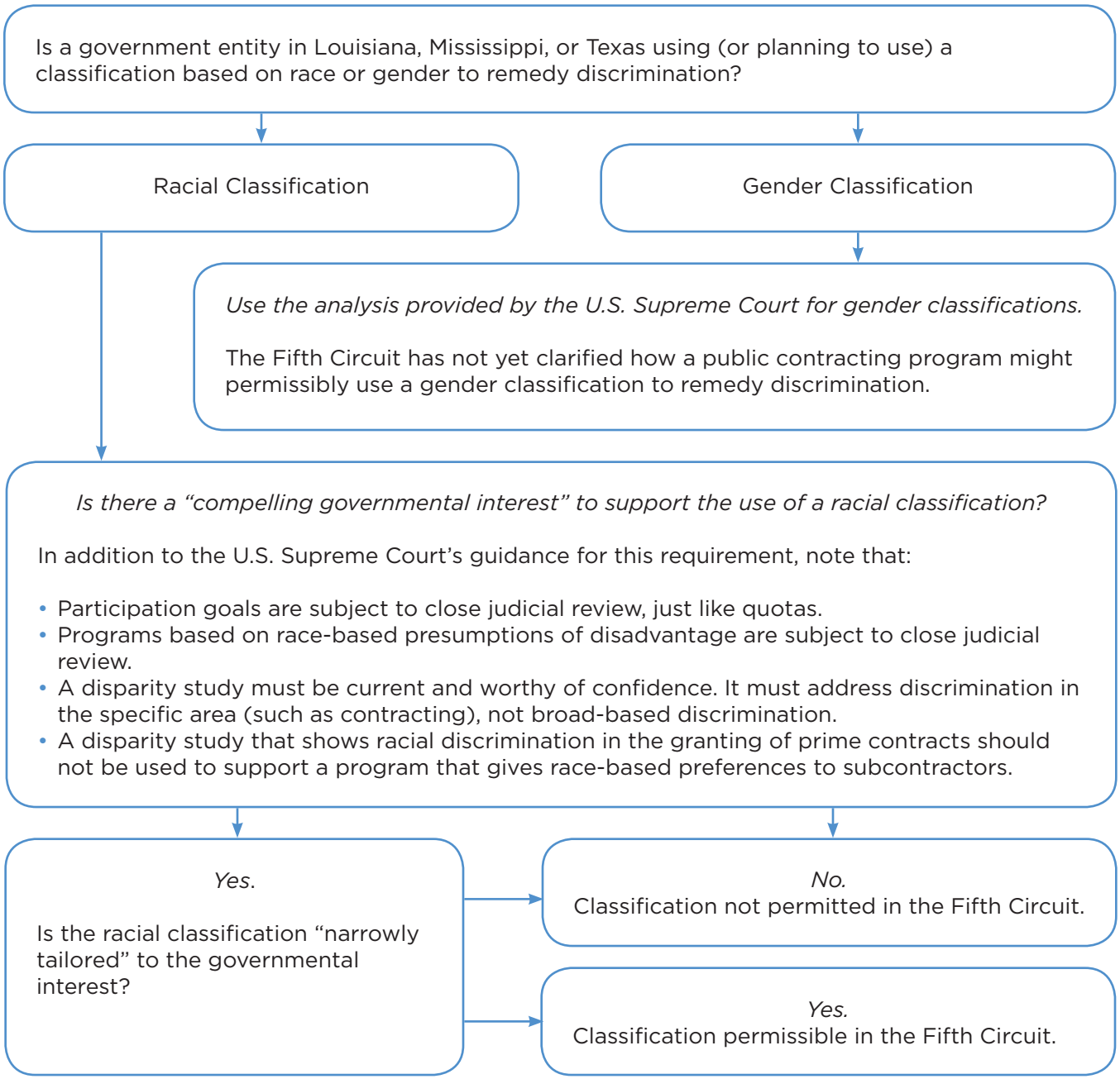
GENDER CLASSIFICATIONS

The Fourth Circuit has not reviewed the constitutionality of a public contracting program's use of gender classifications. Nor has it otherwise explained the requirements that such programs must meet to withstand scrutiny under constitutional equal protection provisions.

102 *Alexander*, 95 F.3d at 316.
103 *Id.*
104 *Maryland Troopers*, 993 F.2d at 1077.
105 *Id.*
106 *Id.* (quoting *Croson*, 488 U.S. at 501).

FIFTH CIRCUIT

An Overview of Race and Gender Classification Requirements in Government Contracting



FIFTH CIRCUIT

(Louisiana, Mississippi, Texas)

RACIAL CLASSIFICATIONS

W.H. Scott Construction Company, Inc. v. City of Jackson, Mississippi, 199 F.3d 206 (5th Cir. 1999)

In *W.H. Scott Construction Company, Inc. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999), the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit") struck down a municipal set-aside program for African-American contractors on equal protection grounds. The Court stated the circumstances under which a nonminority contractor has standing to challenge a public contracting program that uses racial classifications and clarified the evidence that the government must offer to prove that it enacted the program to promote a compelling governmental interest.

The Department of Public Works of Jackson, Mississippi established a set-aside policy in order to meet the city's goals for MBE and WBE contracting.[107] The Department included a special notice to bidders on all city construction contracts encouraging prime construction contractors to include 15 percent participation by subcontracts certified as Disadvantaged Business Enterprises (DBEs) and 5 percent participation by those certified as WBEs in their bids.[108] The special notice defined a DBE as "[a] small business concern which is owned and controlled by socially and economically disadvantaged individuals," defined in accordance with Section 8(d) of the Small Business Act, (15 U.S.C. § 637(d)(3)), and relevant regulations.[109]

The Fifth Circuit struck down the Department of Public Works' program on equal protection grounds. It held that the program's establishment of a 15 percent participation goal for MBE subcontractors was subject to strict scrutiny review, which the program failed to satisfy because it did not adopt particularized findings of discrimination in the city's construction industry.[110]

A. A plaintiff has standing to bring an equal protection challenge against a public contracting program if the plaintiff can show that the program places racial minorities and nonminorities on "unequal footing."

The Fifth Circuit affirmed the District Court's determination that W.H. Scott Construction Company ("Scott") had standing to challenge the Department of Public Works' DBE program even if it could not show that it lost a contract due to the program's use of racial classifications, as it need only show that it was forced to compete unequally.[111] Scott frequently bid on city construction contracts and represented that it would continue to do so.[112]

- The plaintiff was required to show that it had an "injury in fact," a "causal relationship" between the injury and the challenged program, and a likelihood that its injury could be redressed by a favorable decision from the court in order to have standing for its claim.[113]

107 *W.H. Scott*, 199 F.3d at 208.
108 *Id.* at 209. If a prime contractor did not meet the goal, it could meet the requirement by showing that it had made a good-faith effort to do so. *Id.*
109 *Id.* While Section 8(a) of the Small Business Act ("SBA") sets forth definitions for both "socially disadvantaged individuals" and "economically disadvantaged individuals," Section 8(d) provides that "prime contractors are to "'presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act.'" *Id.* (quoting 15 U.S.C. § 637(d)(3)(C) (2006)).
110 *Id.* at 219.
111 *Id.* at 213 . (citing Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993) ("The 'injury in fact' . . . is the denial of equal treatment resulting from the imposition of [a] barrier, not the ultimate inability to obtain the benefit.")).
112 *Id.* at 215.
113 *Id.* at 213.

- Although a non-DBE contractor could not use its own performance of part of the contract to satisfy the requirement to make good-faith efforts to meet the 15 percent DBE participation goal, a DBE contractor could do so.[114] The participation goal made it more costly and difficult for non-DBE contractors to secure contracts, because non-DBEs had to spend time engaging DBE subcontractors and had to forfeit profits to those entities.[115] They also faced an increased risk of termination of their contracts if they failed to satisfy the participation goal.[116]

B. A participation goal is no less subject to strict scrutiny than a quota.

The Fifth Circuit determined that the participation goals established in the Department of Public Works' special notice were subject to strict scrutiny: "[I]t is irrelevant whether the Special Notice establishes 'goals' or 'quotas' for DBE participation. . . . [T]he distinction is immaterial because '[a]ny one of these techniques induces an employer to hire with an eye toward meeting a numerical target. As such, they can and surely will result in individuals being granted a preference because of their race.'"[117]

C. A public contracting program that uses racial classifications in granting presumptions of disadvantage, such as those used in Section 8(d) of the Small Business Act, is subject to strict scrutiny review.

The Fifth Circuit held that the Department of Public Works' DBE program as set forth in the special notice was subject to strict scrutiny review because it created race-based presumptions. The Court rejected the argument that the presumption was based on race-neutral disadvantages, citing the language of the special notice, which stated that the Department implemented the program to ensure that "participation of minorities and women will be equitably distributed throughout the construction industry."[118]

- The Court noted that the program relied on Section 8(d) of the Small Business Act (SBA), 15 U.S.C. § 637(d)(3)(C), for the definition of a DBE.[119] Section 8(d) of the SBA provides that prime contractors are to "presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act."[120]
- The Court reasoned that because the Supreme Court held that strict scrutiny should apply to review of Section 8(d) of the SBA in *Adarand I*, the Department of Public Works' DBE program, which relied on Section 8(d) of the SBA, should also be reviewed under strict scrutiny.[121] The Court noted that although the SBA had been amended following *Adarand I* to lower the evidentiary burden for nonminority applicants to claim eligibility for DBE status, "racial presumptions remain incorporated explicitly in the SBA," and therefore strict scrutiny must be applied to the use of such presumptions.[122]

D. A disparity study first rejected by the government and later relied upon in response to a legal challenge cannot serve as a "strong basis" in evidence.

The Fifth Circuit rejected the city's effort to point to an old and formerly-rejected disparity study as evidence that the Department of Public Works' DBE program was enacted to further the compelling governmental interest of addressing racial discrimination in the construction industry.

- The city retained a company to conduct a disparity study in 1994, which concluded that the underutilization of African-American- and Asian-American-owned firms was statistically significant, and recommended that the city implement MBE goals ranging from 10 to 15 percent depending on the trade at

114 *Id.* at 214-15.
115 *Id.* at 215.
116 *Id.* at 214.
117 *Id.* at 215 (quoting Lutheran Church-Missouri Synod v. F.C.C., 141 F.3d 344, 350 (D.C. Cir. 1998)).
118 *Id.* at 216.
119 *Id.*
120 15 U.S.C. § 637(d)(3(C) (2006).
121 *W.H. Scott*, 199 F.3d at 216-17.
122 *Id.* at 217 n.10.

issue.[123] However, the city did not adopt the conclusions of the study and retained its 15 percent MBE goal while it searched for another company to conduct a disparity study.[124]

- Because the city refused to adopt the study when it was issued in 1995, the Fifth Circuit found unpersuasive the city's reliance on the study to show that it enacted the DBE program to address discrimination in the contracting industry.[125]

E. To serve as probative evidence of discrimination, a disparity study must identify the specific type of discrimination addressed by the program.

The Fifth Circuit concluded that even if it were to credit the 1995 disparity study, the study could not provide a strong basis in evidence to conclude that the Department of Public Works enacted the DBE program to remedy identified discrimination. Whereas the study identified racial disparities in the grant of *prime contracts*, the DBE program granted preferences to MBE firms in the *subcontract* market.[126] The Fifth Circuit reasoned that if the city had made "particularized findings of discrimination within its various agencies and set participation goals for each accordingly," the Department of Public Works' DBE program might have been justified.[127] Absent such a showing, the Department's decision to adopt a race-based DBE participation goal of 15 percent was not enacted to further a compelling interest, and therefore violated the right to equal protection.[128]

- The disparity study showed that white males received 94 percent of *all* contracts – not subcontracts – and 97.7 percent of all public works dollars, while African Americans received 6 percent of all contracts and 2.3 percent of all contract dollars.[129]

GENDER CLASSIFICATIONS

The Fifth Circuit has not considered the constitutionality of a public contracting program using gender classification, but it has addressed the appropriate level of review required by constitutional equal protection provisions for the government's use of gender classifications.

Dallas Fire Fighters Association v. Dallas, 150 F.3d 438 (5th Cir. 1998)

In *Dallas Fire Fighters Association v. Dallas*, 150 F.3d 438 (5th Cir. 1998), an employment case, the Fifth Circuit briefly considered the legal standard applicable to gender-conscious affirmative action and struck down the Dallas Fire Department's (DFD's) out-of-rank promotions of minority and female firefighters pursuant to a race- and gender-conscious affirmative action plan.[130]

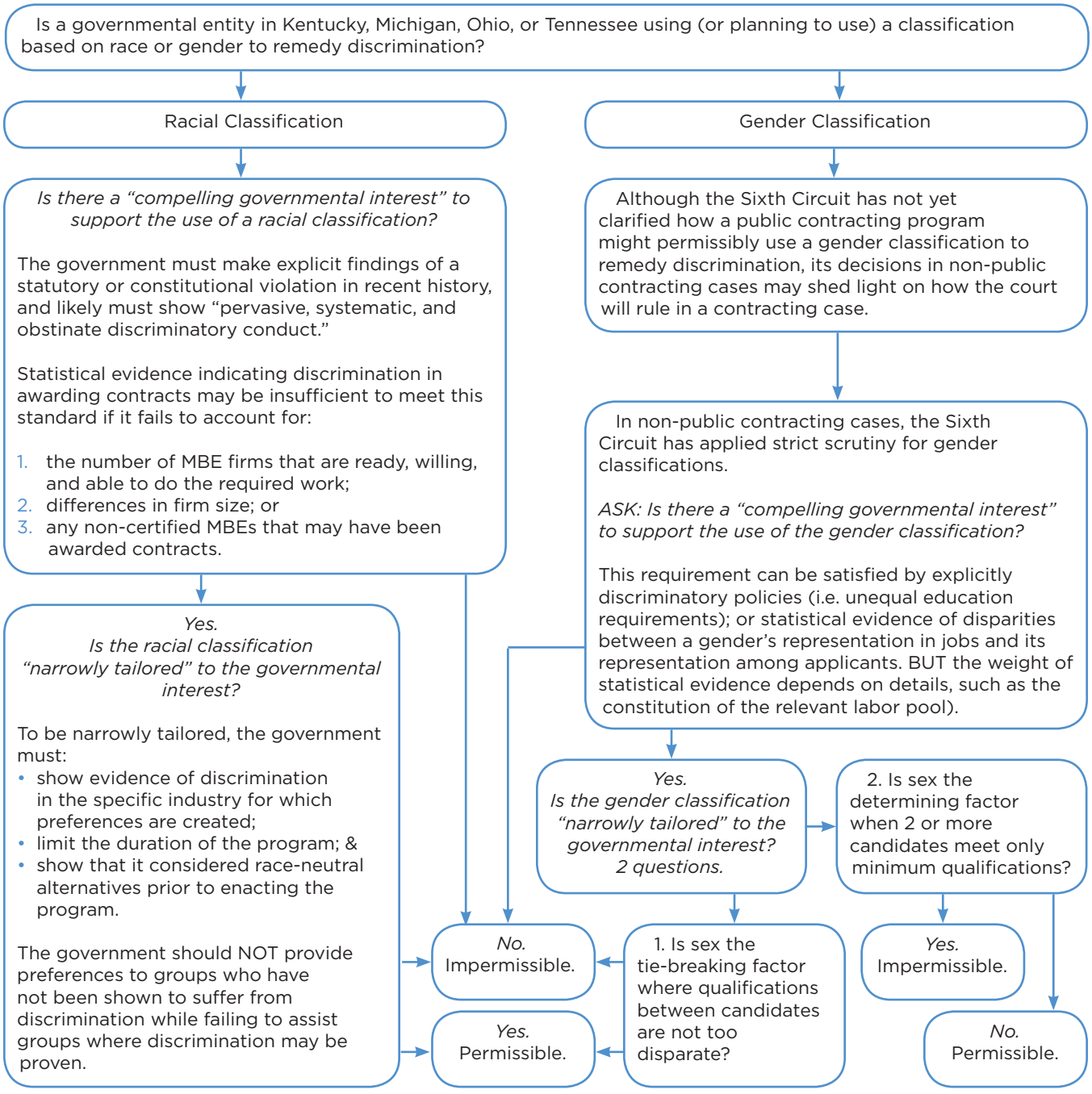
A. Intermediate scrutiny applies to gender classifications, but it is unclear what evidence is required to meet this standard.

The Fifth Circuit noted that "the less exacting intermediate scrutiny analysis [is] applicable to gender-based affirmative action," but nevertheless held the out-of-rank gender-conscious promotions unconstitutional, based on an absence of evidence of gender discrimination in the record.[131] The opinion does not indicate what, if any, evidence of gender discrimination the record did contain. The court stated, "[w]ithout a showing of discrimination against women in the DFD, or at least in the industry in general, we cannot find that the promotions are related substantially to an important government interest."[132] It is thus unclear whether evidence of gender discrimination in an industry, rather than evidence of discrimination in the particular program at issue, suffices to justify a gender-conscious affirmative action program in the Fifth Circuit.

123 *Id.* at 210.
124 *Id.*
125 *Id.* at 218.
126 *Id.*
127 *Id.* at 219.
128 *Id.*
129 *Id.* at 218.
130 *Dallas Fire Fighters*, 150 F.3d at 441.
131 *Id.* at 441-42.
132 *Id.* at 442.

SIXTH CIRCUIT

An Overview of Race and Gender Classification Requirements in Government Contracting



SIXTH CIRCUIT

(Kentucky, Michigan, Ohio, Tennessee)

RACIAL CLASSIFICATIONS

Associated General Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730 (6th Cir. 2000)

In *Associated General Contractors of Ohio, Inc., v. Drabnik*, 214 F.3d 730 (6th Cir. 2000), the U. S. Court of Appeals for the Sixth Circuit ("Sixth Circuit") struck down a state set-aside program for minority contractors on equal protection grounds, ruling in favor of a trade association of companies that included non-MBE firms.[133] The Court made a number of key rulings that significantly raised the bar for programs seeking to remedy past discrimination. The Court stated that a government must make explicit findings of discriminatory acts constituting constitutional or statutory violations and that statistical evidence indicating the presence of discrimination is likely insufficient, as the government must show pervasive, systematic, and obstinate conduct. Several other rulings by the Sixth Circuit in this case are in line with trends seen in other courts, such as the requirement that disparity studies account for the number of MBE firms ready and able to do the required work and that government show evidence of discrimination in the specific industry for which preferences are created.

The challenged program was created by Ohio's Minority Business Enterprise Act (MBEA), which set aside 5 percent of the value of all state construction projects for exclusive bidding by certified MBEs.[134] The program "define[d] an MBE as a venture owned and controlled, to the extent of 51 percent, for at least one year previous, by 'members of one of the following economically disadvantaged groups: Blacks, American Indians, Hispanics, and Orientals.'"[135] The Ohio Department of Administrative Services (DAS), which coordinates and manages state construction projects, had set aside a portion of a correctional facility building construction project for bidding by MBE firms only.[136] Non-MBE members of the plaintiff trade association sued on the ground that they were excluded from bidding on this aspect of the project and were restricted in their ability to participate in the overall project as subcontractors.[137]

Prior to the Supreme Court's decisions in *Croson* and *Adarand I*, the Sixth Circuit had upheld the constitutionality of the MBEA against an equal protection challenge.[138] After a hearing in this case, the District Court ruled from the bench that the MBEA violated the Equal Protection Clause.[139] Applying strict scrutiny, the Sixth Circuit held that the MBEA was not shown to further a compelling governmental interest and was not narrowly tailored.

A. The Sixth Circuit articulated a more stringent strict scrutiny standard than that articulated by the Supreme Court in *Croson* or *Adarand I*.

The Sixth Circuit stated that "the linchpin of the *Croson* analysis . . . is not simply its mandating of strict scrutiny, . . . but above all its holding that governments must 'identify discrimination with some specificity before they may use [racial classifications in fashioning relief];' *explicit 'findings of constitutional or statutory*

133 *Associated General*, 214 F.3d at 738.
134 *Id.* at 733 (citing Ohio Rev. Code Ann. § 123.151(C)(1) (2005) (no longer in force)).
135 *Id.* (citing Ohio Rev. Code Ann, § 122.71(E) (2009)).
136 *Id.*
137 *Id.*
138 *See* Ohio Contractors Ass'n v. Keip, 713 F.2d 167 (6th Cir. 1983).
139 *Associated General*, 214 F.3d at 734.

violation must be made.'"[140] This standard is more onerous than that set forth by the Supreme Court, which stated in *Shaw* that the government must point to "identified discrimination" by public or private actors.[141]

B. "Stale" evidence cannot support a finding that a program using racial classifications that has continued for decades was enacted to further a compelling governmental interest in addressing racial discrimination.

The Sixth Circuit concluded that the evidence of discrimination supporting the MBEA, which included four categories of data gathered between 1957 and 1979, was "too remote" to support an inference that the statute remained necessary to further a compelling governmental interest in remedying racial discrimination.[142]

- The Sixth Circuit emphasized that "this court has ruled that seventeen-year old evidence of discrimination is 'too remote to support a finding of compelling government interest to justify the affirmative action plan,'… Outdated evidence does not reflect 'prior unremedied or current discrimination.'"[143]

C. Statistical evidence of racial disparity in the award of public contracts may be insufficient to support the use of racial classifications in a public contracting program.

The Sixth Circuit discussed the following four pieces of data considered by the Ohio legislature before enacting the MBEA in 1980, and determined that the legislature had failed to make meet its burden of showing past discrimination sufficient to justify the use of racial classifications:

- From 1957 to 1979, 0.21 percent of all state construction contracts went to "identifiable minority businesses."[144]
- From 1959 to 1975, of the $1.14 billion paid out by the state in general construction contracts, only 0.24 percent went to minority businesses.[145]
- In 1975, 1976, and 1977, minorities garnered only 0.13, 0.3, and 0.18 percent, respectively, of all Ohio Department of Transportation (ODOT) construction contracts.[146]
- From 1975 to 1977, minority businesses comprised 7 percent of all Ohio businesses but received 0.5 percent of ODOT purchasing contracts.[147]

After discounting this data, the Sixth Circuit stated that "[t]he only cases found to present the necessary compelling interest sufficient to justify a narrowly tailored race-based remedy are those that expose . . . pervasive, systematic, and obstinate discriminatory conduct."[148] It is not clear to what extent this standard is substantively different than that relied upon by other Circuits, as the critiques made by the Court of the data, which are explained below, parallel those of several other Circuits.

D. Statistical data must account for readiness and capacity of MBEs to perform work and must assess disparity and/or discrimination in the award of contracts in the specific area the government seeks to remedy.

The Sixth Circuit found "glaringly clear" errors in each of the four pieces of data.[149] It noted that the calculations were not based on the number of minority construction contracting firms that were "ready, willing, and able to perform state construction contracts of any particular size."[150] It found that the statistics showing disparity in the award of purchasing contracts were "irrelevant to this case," which dealt with racial

140 *Associated General*, 214 F.3d at 735 (citing *Croson*, 488 U.S. at 497) (emphasis added).
141 Shaw v. Hunt, 517 U.S. 899, 909 (1996) (citing *Croson*, 488 U.S. at 499, 500, 505, 507, 509).
142 *Associated General*, 214 F.3d at 735-36.
143 *Id.* at 735 (quoting Brunet v. City of Columbus, 1 F.3d 390, 409 (6th Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994)).
144 *Id.* at 736.
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.* at 737 (internal quotation marks omitted).
149 *Id.* at 736.
150 *Id.*

preferences in the award of construction contracts.[151] Additionally, the Court found that the studies failed to account for differences in firm size.[152]

- "Even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified, in some minimal sense, to perform the work in question, would also fail to satisfy the Court's criteria. If MBEs comprise 10% of the total number of contracting firms in the state, but only get 3% of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete."[153]

E. Disparity statistics calculated using figures for the number of public contracts awarded to minority-owned firms that were certified or listed as MBEs, rather than *all* minority-owned firms, did not provide a strong basis in evidence to conclude that racial classifications were used to remedy racial discrimination.

The Sixth Circuit faulted the statistics purporting to demonstrate that minority-owned firms were underutilized in public contracting on the ground that "they do not report the actual use of minority firms; they only report the use of minority firms who have gone to the trouble of being certified and listed among the state's 1,180 MBEs."[154] The Court reasoned that some minority firms that would qualify as MBEs may simply have "never sought such preference, whether from principle, oversight, calculation of the worth of the program, or for some other reason."[155] The Court feared that Ohio's underutilization statistics might have exaggerated the actual racial disparity in the granting of state contracts, because the statistics were calculated based on the number of certified MBEs awarded contracts and did not account for any non-certified MBEs that may have been awarded contracts during that time period.[156]

- Even if it "might be true that most or all of the relevant firms" were certified and listed as MBEs, the state's disparity study was not reliable evidence that the MBEA was enacted to further the compelling governmental interest in addressing racial discrimination, because it failed to examine "whether contracts are being awarded to minority firms who have never sought such preference … and who have been awarded contracts in open bidding."[157]

F. Narrow tailoring is not satisfied if a program provides preferences to racial minorities who have not been shown to have suffered from discrimination and fails to assist racial minorities who have been shown to suffer from discrimination.

The Sixth Circuit concluded that the MBEA was not narrowly tailored because it was both over- and under-inclusive. The program "lump[ed] together the groups of Blacks, Native Americans, Hispanics, and Orientals" and failed to define the latter two categories.[158] The program was over-inclusive because it benefited racial minorities against whom there was no record of discrimination, such as Thai people who had recently moved to the state, and was under-inclusive because the awarding of such contracts to citizens without a history of discrimination in the state would occur at a cost to African Americans, who had suffered discrimination.[159] As a result, the program was not narrowly tailored and "may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven."[160]

151 *Id.*
152 *Id.* at 736-37.
153 *Id.* at 736.
154 *Id.* at 737.
155 *Id.*
156 *Id.*
157 *Id.*
158 *Id.*
159 *Id.*
160 *Id.*

G. The use of racial classifications in a government contracting program must be limited in duration.

The Sixth Circuit faulted the MBEA for being in force for 20 years with no set expiration date.[161] The Court emphasized that not only was the data underlying the program outdated, but also narrow tailoring required the program to be "appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate."[162] The Court determined that the record presented "at best, marginally adequate evidence of discrimination from 1975, 1978, and 1979," and that even if such evidence initially supported the enactment of the MBEA, it did not provide a basis for it to remain in force for 20 years.[163]

H. Narrow tailoring requires at least *some* record evidence that the government considered race-neutral alternatives prior to enacting a public contracting program that uses racial classifications.

The Sixth Circuit found that the "historical record contains no evidence that the Ohio General Assembly gave *any* consideration to the use of race-neutral means to increase minority participation in state contracting before resorting to race-based quotas."[164] This dearth of evidence was fatal to the Department's claim that the program was narrowly tailored.

GENDER CLASSIFICATIONS

The Sixth Circuit has not considered the constitutionality of a public contracting program using gender classification, but it has issued multiple decisions in which it has applied strict scrutiny, rather than intermediate scrutiny, in reviewing challenges to gender-conscious affirmative action in public employment.

Conlin v. Blanchard, 890 F.2d 811 (6th Cir. 1989)

In *Conlin v. Blanchard*, 890 F.2d 811 (6th Cir. 1989), the Court considered Michigan's affirmative action plan for state employment, which included gender preferences for certain positions in certain circumstances. Citing *Wygant* and *Croson*, the Court held that strict scrutiny must be applied: "In order for a race- or sex-based remedial measure to withstand scrutiny under the fourteenth amendment there must first be some showing of prior discrimination by the governmental entity involved, and second, the remedy adopted by the state must be tailored narrowly to achieve the goal of righting the prior discrimination."[165]

A. Statistical evidence could be sufficient to establish a government interest, if it were properly captured.

The Court stated that statistical evidence showing past and present disparities between the representation of women in the relevant labor pool and the representation of women in a particular job category *could* be enough "to satisfy the state's burden of proving past discrimination as a predicate for affirmative action under *Croson*," but this would depend on details such as the constitution of the relevant labor pool.[166]

B. The program was not narrowly tailored.

The Court found that if the affirmative action plan were applied so that sex were the determining factor when two or more candidates met *minimal* qualifications, "such a remedy could conceivably stray far afield from the past discrimination it seeks to correct."[167] On the other hand, "if sex were only a 'tie-breaking' factor in a decision in which qualifications were not too disparate, then the remedy may be considered narrowly tailored."[168]

161 *Id.* at 738.
162 *Id.* at 737 (internal quotation marks omitted).
163 *Id.* at 737-38.
164 *Id.* at 738 (internal quotation marks omitted) (emphasis supplied).
165 *Conlin*, 890 F.2d at 816.
166 *Id.*
167 *Id.*
168 *Id.* at 817.

Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992)

Three years after its decision in *Conlin*, the Sixth Circuit again applied strict scrutiny to gender-conscious affirmative action in *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992). The Court found ample evidence of past sex discrimination in the form of explicitly discriminatory policies in the Cincinnati Police Department—such as requiring more education of females than males for entry level positions and statistical evidence of a large disparity between women's representation on the force and women's representation among applicants for the force during the relevant time period. The Court determined that the government's claim as to the necessity of the program was supported by a strong basis in evidence.[169]

Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993)

In *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993), the Sixth Circuit for the first time addressed the argument that, under Supreme Court precedent in *Mississippi Univ. for Woman v. Hogan*, 458 U.S. 718 (2982), intermediate scrutiny rather than strict scrutiny should be applied to gender-conscious affirmative action. The panel noted that its decision in *Conlin* applied strict scrutiny based on its reading of the Supreme Court's more recent decisions in *Croson* and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and therefore it was bound to apply strict scrutiny to gender-conscious affirmative action plans in the Sixth Circuit.[170]

MICHIGAN STATE LAW

In November 2006, Michigan voters approved the Michigan Civil Rights Initiative, also known as Proposal 2, enacting a constitutional amendment prohibiting affirmative action programs in public contracting. Article I, Section 26 of the Michigan Constitution, titled "Affirmative Action Programs," now provides that

> [t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.[171]

The prohibition against the use of racial classifications in public contracting applies to state programs as well as the programs of any city, county, public college, university, community college, school district, or other political subdivision or governmental entity of or within the State of Michigan.[172] Nonetheless, the amendment includes an important exception permitting any race-based state action necessary to comply with federally mandated affirmative action requirements, where noncompliance would result in a loss of federal funds to Michigan.[173] The Michigan Supreme Court has yet to interpret the scope of Article 1, Section 26.

In its 2006 decision in *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006), the Court of Appeals for the Sixth Circuit upheld the constitutionality of the amendment against First Amendment, Fourteenth Amendment, and federal preemption challenges. The Sixth Circuit clarified that "[t]he First and Fourteenth Amendments to the United States Constitution, to be sure, *permit* States to use racial and gender preferences under narrowly defined circumstances. But they do not *mandate* them, and accordingly they do not prohibit a State from eliminating them."[174] With respect to the Equal Protection Clause claim, in particular, the Court further noted that "[s]urely a State may offer more equal protection than the Fourteenth Amendment requires, and surely a State may end racial preferences some years before they must do so. In the end, a law eliminating presumptively invalid racial classifications is not itself a presumptively invalid racial classification."[175]

169 *Vogel*, 959 F.2d. at 600-601. For reasons that are unclear, the court did not specifically analyze whether the program was narrowly tailored, though it concluded that it was. *Id*. at 601.
170 *Brunet*, 1 F.3d at 403.
171 Mich. Const. art. I, § 26.
172 *Id*. § 26(3).
173 *Id*. § 26(4).
174 *Coal. to Defend Affirmative Action*, 473 F.3d at 240.
175 *Id*. at 249.

Notably, the Sixth Circuit's decision in *Granholm* upheld the constitutionality of Article I, Section 26 only insofar as it bans *racial classifications*. It did not address the constitutionality of the provision with respect to any impact it might have on the permissibility of *race-conscious* government actions in Michigan—actions by which the government does not grant preferential treatment on the basis of race, but rather considers race and the promotion of racial equality as a factor in policymaking.

MICHIGAN

An Overview of Race and Gender Classification Requirements in Government Contracting in the State of Michigan

Does a program of or within the state of Michigan use a race or gender classification or is it merely conscious of racial or gender equality as a factor in policymaking?

Race or gender classification.

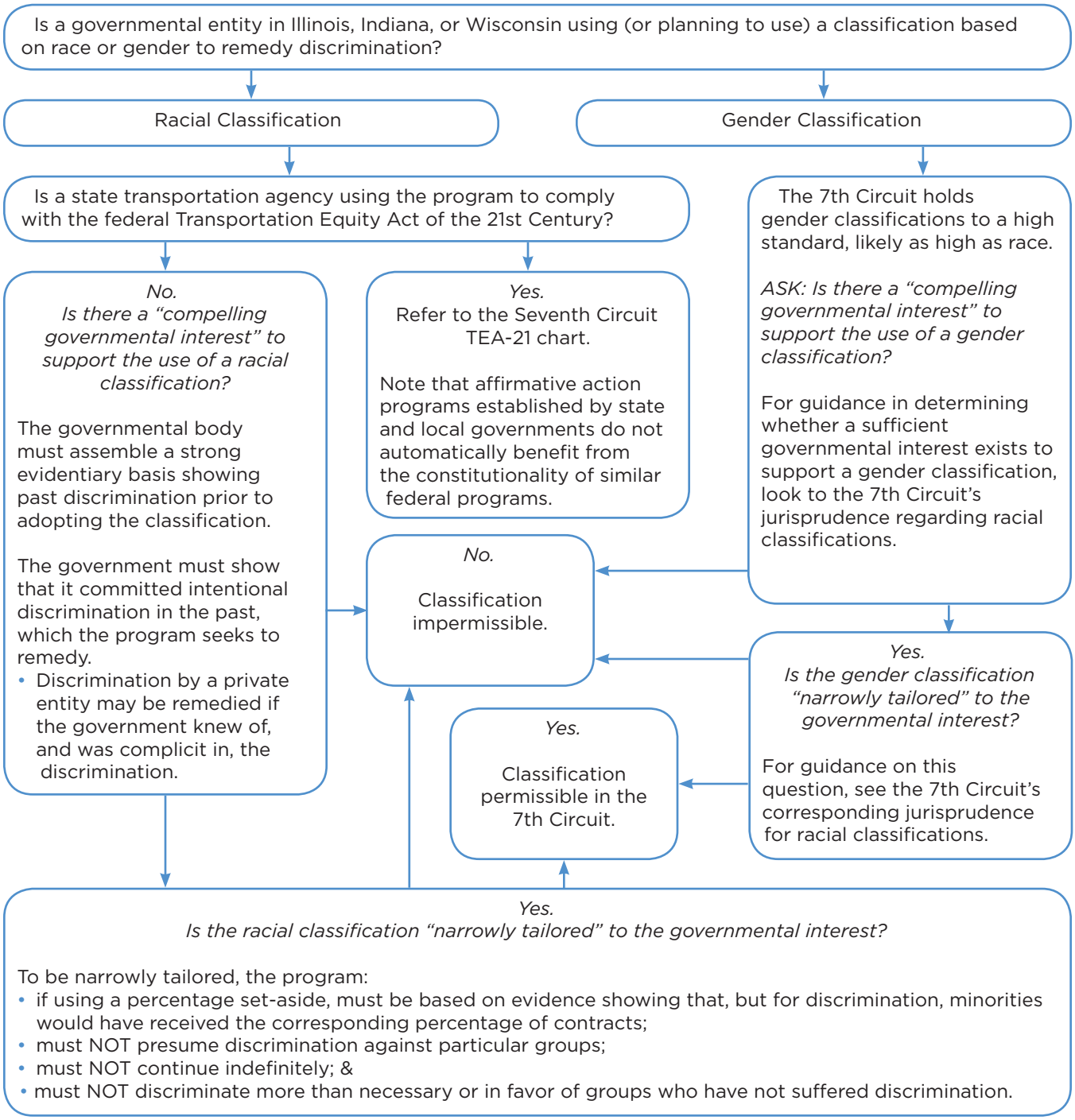
The program is likely prohibited by the Michigan Civil Rights Initiative (Proposal 2).

Race or gender conscious government action.

The program might NOT be prohibited by the Michigan Civil Rights Initiative, especially if failure to consider race or gender equality as a factor in decisionmaking would be an abrogation of federally mandated affirmative action requirements and would result in the Michigan program's loss of federal funds.

SEVENTH CIRCUIT

An Overview of Race and Gender Classification Requirements in Government Contracting



SEVENTH CIRCUIT

(Illinois, Indiana, Wisconsin)

RACIAL CLASSIFICATIONS

The U.S. Court of Appeals for the Seventh Circuit ("Seventh Circuit") has issued two major decisions considering equal protection challenges to state and local contracting programs using racial classifications. In *Builders Association of Greater Chicago v. County of Cook*, 256 F.3d 642 (7th Cir. 2001), the Seventh Circuit struck down a minority set-aside program. The Court adopted a stringent strict scrutiny test and clarified which narrowly-tailored programs with racial classifications the government could use to promote compelling governmental interests. However, in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 (7th Cir. 2007), the Seventh Circuit upheld a federal set-aside program for minority contractors as implemented by the State of Illinois. These cases provide important examples for the types of government affirmative action programs the Seventh Circuit will deem constitutionally permissible.

Builders Association of Greater Chicago v. County of Cook, 256 F.3d 642 (7th Cir. 2001)

In this case, the Seventh Circuit considered an equal protection challenge to a county contracting plan that required the award of a minimum of 30 percent of the total value of any county construction contract to enterprises that were at least 51 percent owned by members of specific minority groups, including African Americans and Hispanics, and the award of a minimum of 10 percent of the total value of each contract to enterprises at least 51 percent owned by women.[176] In most instances, the set-asides were achieved when prime contractors hired minority- or women-owned subcontractors to conduct portions of each contract.[177] Applying strict scrutiny, the Seventh Circuit held the program unconstitutional, determining that it was not enacted to address a compelling governmental interest related to race and was not narrowly tailored.[178]

A. A race-based classification may only be used if the discrimination to be remedied was caused by the public entity that seeks to apply preferential treatment.

The Seventh Circuit, applying strict scrutiny, stated that a law that grants preferential treatment on the basis of race or ethnicity does not deny the equal protection of the laws if it is a remedy for intentional discrimination committed by the public entity that seeks to apply preferential treatment and discriminates no more than is necessary to accomplish the remedial purpose.[179] According to this formulation, a governmental entity using racial classifications cannot justify its action based on a compelling governmental interest in remedying *private* discrimination in the contracting industry, unless the government "has been given responsibility by the state for enforcing state or local laws against private discrimination."[180]

- The Seventh Circuit concluded that Cook County provided "no credible evidence" that it "ever intentionally (or for that matter unintentionally) discriminated against any of the [racial minority] groups favored by the program."[181]
- The Court found unpersuasive the county's sole piece of evidence of discrimination in the subcontracting

176 *Builders Ass'n*, 256 F.3d. at 643.
177 *Id.*
178 *Id.* at 645-48.
179 *Id.* at 643-44 (emphasis added).
180 *Id.* at 644.
181 *Id.* at 645.

market, which demonstrated that prime contractors were more likely to solicit minority subcontractors to bid for pieces of public contracts rather than private contracts.[182] The Seventh Circuit found this state of affairs to be "an artifact of the ordinance" itself, which effectively required prime contractors on public projects to set aside for minority contractors a portion of the subcontracts for each project.[183]

B. Pre-enactment evidence of racial discrimination is required to show that the government had a strong basis in evidence for the use of racial classifications in a contracting program. Post-enactment evidence is insufficient.

The Seventh Circuit found it significant that the county failed to offer pre-enactment evidence of discrimination against racial minorities or women in public contracting.[184] The Court noted that "[a]lthough there was some testimony by minority subcontractors that they had suffered discrimination earlier, it was introduced only to show that the later evidence was persuasive."[185] This evidence was insufficient to show that the county had a strong basis in evidence to believe the ordinance was necessary to remedy past or present discrimination by the government in subcontracting. "A public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy."[186]

C. The government must show that it was complicit in private sector discrimination if it argues that it enacted a program using racial classifications in order to combat its "passive participation" in a system of private discrimination.

The Seventh Circuit found that there was no basis to attribute to the county any discrimination by prime contractors against minorities and women. Noting *Croson*'s holding that a government may show a compelling interest if it was a passive participant in private discrimination, the Court construed this rule as requiring some complicity on the part of the government in the discrimination.[187]

- Had the county produced evidence that it had "known" that prime contractors on public projects were discriminating against firms owned by racial minorities, "the county might be deemed sufficiently complicit … to be entitled to take remedial action."[188]

D. A program that presumes discrimination against certain racial minorities is over-inclusive and is not narrowly tailored to remedy identified discrimination.

The Seventh Circuit held that a narrowly tailored remedy requires a "close match between the evil against which the remedy is directed and the terms of the remedy."[189] The Cook County contracting plan was not narrowly tailored because the "remedy goes further than necessary to eliminate the evil against which it is directed."[190]

- The ordinance included in its "laundry list of favored minorities" two groups: "persons whose ancestors came to the United States from Spain or Portugal." These categories were overbroad because "the concern with discrimination on the basis of Hispanic ethnicity is limited to discrimination against people of South or Central American origin, who often are racially distinct from persons of direct European origin because their ancestors include blacks or Indians or both," and not "Spanish or Portuguese people" or "persons of Spanish or Portuguese ancestry born in the United States."[191]

182 *Id.*
183 *Id.*
184 *Id.*
185 *Id.*
186 *Id.*
187 *Id.* (citing *Croson*, 488 U.S. at 492 (plurality opinion)).
188 *Id.*
189 *Id.* at 646.
190 *Id.* at 647. The Seventh Circuit noted that although the District Court found that the ordinance was not narrowly tailored, Cook County failed to brief this issue on appeal and addressed it with "extreme brevity." *Id.* at 646. The county argued in its briefs that if it could prove that there was discrimination in the past, it was entitled to a remedy through the use of racial classifications, and the burden then must shift to the plaintiff to show that the remedy is not narrowly tailored. The Seventh Circuit did not address this argument. *Id.*
191 *Id.*

- "A state or local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian-Americans and women. Nor may it discriminate more than is necessary to cure the effects of the earlier discrimination. Nor may it continue the remedy in force indefinitely."[192]

F. A public contracting program using racial classifications is not narrowly tailored if the percentage set aside for firms owned by racial minority groups is not tied to what MBEs would have been awarded absent discrimination.

The Seventh Circuit found that the amount of the set-aside for minority- and women-owned subcontracting firms created by the ordinance was not narrowly tailored because it was not linked to evidence in the record. The Court faulted the county for failing to show that "were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of county construction contracts,"[193] corresponding to the amount of set-asides.

Northern Contracting, Inc. v. Illinois, 473 F.3d 715 (7th Cir. 2007)

In *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 (7th Cir. 2007), the Seventh Circuit considered a claim by a nonminority construction company against the state transportation agency challenging the constitutionality of the agency's program for compliance with the federal Transportation Equity Act for the 21st Century (TEA-21),[194] which set goals for participation by disadvantaged business enterprises in federally funded state highway projects.[195] The Seventh Circuit held that the program as-applied withstood strict scrutiny because the federal government had a compelling interest in remedying past discrimination in the industry and the state was insulated from attacks on its implementation of the program as long as it did not exceed the authority granted to it by federal law.[196]

A. A state implementing a federal set-aside program at the local level may properly rely on the federal government's compelling interest in remedying the nationwide effects of past discrimination.

Affirming its pre-*Adarand I* decision in *Milwaukee County Pavers Ass'n v. Fielder*, 922 F.2d 419 (7th Cir. 1991), the Court found that the Illinois Department of Transportation (IDOT), "[a]s a state entity implementing a congressionally mandated program," could rely on the federal government's identified compelling interest in remedying the effects of past discrimination in the national highway construction market, even absent specific evidence of discrimination within the Illinois construction market.[197]

B. A state implementing a federal set-aside program is insulated from "collateral attacks" on Congress for "failing" to narrowly tailor the programs and can only be held liable if the state exceeds the authority granted to it by the federal law.

The Seventh Circuit stated that a state or local government implementing federal affirmative action policy will benefit from any findings regarding the constitutionality of the federal policy – including the use of racial classifications as "narrowly tailored" to meet a "compelling governmental interest" – as long as the state government does not exceed its authority under federal law.[198] The Court found that the Supreme Court's opinion in *Adarand* did not change this outcome.[199] "A state is insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority."[200]

192 *Id.* at 646.
193 *Id.* at 647.
194 Transportation Equity Act for the 21st Century § 1101(b)(1), 112 Stat. at 113.
195 *N. Contracting*, 473 F.3d at 717.
196 *Id.* at 724.
197 *Id.* at 720.
198 *Id.* at 721. A different outcome was reached by the Eighth Circuit in Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., 345 F.3d 964, 971 (8th Cir. 2003) and the Ninth Circuit in W. States Paving Co., Inc. v. Wash. State Dep't of Transp., 407 F.3d 983 (2005), in which the Court stated that, "to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny." *Id.* at 996-97.
199 *Id.* at 722.
200 *Id.* at 721.

In distinguishing between this case and *Builders Association*, the Seventh Circuit noted that the Cook County ordinance at issue in *Builders Association* was not enacted to carry out a federal mandate. In this case, IDOT was "acting as an instrument of federal policy" and the plaintiff was not permitted to collaterally attack federal regulations by challenging the state's program.[201]

C. State and local government affirmative action programs that are instituted *independently* of federal mandates must be shown separately and independently to have been enacted to further a compelling state or local government interest in remedying past discrimination in that jurisdiction.

The Seventh Circuit held that state and local government established affirmative action programs do not automatically benefit from the constitutionality of similar federal programs. "[S]tate and local governments that independently create[] affirmative action programs are subject to strict scrutiny" and the state is required to demonstrate that its program is narrowly tailored to remedy the specific discrimination perpetrated by the state.[202]

D. The program was narrowly tailored because it used the maximum race-neutral means, properly calculated the availability of DBEs, and adjusted its numbers based on local market conditions.

The Seventh Circuit concluded that the state met the maximum feasible portion of its overall DBE goal through race-neutral means and that the state agency used "nearly all of the methods described" in the federal regulations "to maximize the portion of the goal that will be achieved through race-neutral means."[203] The Court accepted the State's calculation of the relative availability of DBEs in Illinois, determining that "the remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net" than using Illinois's prequalified DBEs list.[204]

- The Court favorably noted that "IDOT has sponsored different types of informational sessions, provided technical and financial training to DBEs and other small businesses, and has initiated a bonding and financing assistance program."[205]
- The relative availability analysis was based on a custom census designed by the National Economic Research Associates, Inc., a private consulting firm, instead of a simple count of the number of registered and prequalified DBEs under Illinois law.[206]
- The state was *not* required to separate prime contractor availability from subcontractor availability, principally because the "[federal] regulations require the local goal to be focused on overall DBE participation in the recipients' DOT-assisted contracts" and that "[i]t would make little sense to separate prime contractor and subcontractor availability . . . when DBEs will also compete for prime contracts and any success will be reflected in the recipient's calculation of success in meeting the overall goal."[207]

GENDER CLASSIFICATIONS

The Seventh Circuit has determined that equal protection challenges to public contracting programs that use gender classifications are, like racial classifications, subject to strict scrutiny and not the lesser standard of intermediate scrutiny.

Builders Association of Greater Chicago v. County of Cook, 256 F.3d 642 (7th Cir. 2001)

In *Builders Association*, the Seventh Circuit noted that the issue of "whether a different, and specifically a more

201 *Id.* at 722.
202 *Id.*
203 *Id.* at 724.
204 *Id.* at 723.
205 *Id.* at 724.
206 *Id.* at 722-23.
207 *Id.* at 723.

permissive, standard is applicable to preferential treatment on the basis of sex rather than race or ethnicity" was "unresolved."[208] The Court observed that the Eleventh Circuit had applied a more permissive standard in these circumstances, in "an effort to make sense of the fact that the Supreme Court has so far held racial discrimination to a stricter standard than sex discrimination, though the difference between the applicable standards has become vanishingly small."[209] The Court further noted that applying a more permissive standard to gender-conscious affirmative action plans "creates the paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes."[210] The Court concluded that strict scrutiny must be applied to the entire ordinance, and that the ordinance failed this test.[211]

208 256 F.3d at 644.
209 *Id.* (internal citations omitted).
210 *Id.*
211 *Id.* at 646-47.

SEVENTH CIRCUIT

Racial Classification Requirements in Government Contracting under TEA-21

Is a state or local transportation agency in Illinois, Indiana, or Wisconsin implementing a program using a racial classification in an effort to act in compliance with the federal Transportation Equity Act of the 21st Century (TEA-21)?

Yes.
Is there a "compelling governmental interest" to support the use of a racial classification?

Yes. The state transportation agency can rely on the federal government's established compelling interest supporting TEA-21.

No, the state or local program using a racial classification was instituted independently of the TEA-21.

Use original 7th Circuit chart for racial classifications. The state is required to demonstrate that its program is narrowly tailored to remedy specific discrimination perpetuated by the state.

Does the state or local program act within its authority under federal law?

The program acts within its authority under federal law if it:

1. uses nearly all the methods described in the federal regulations to remedy discrimination through race-neutral means as much as possible;
2. properly calculates the relative availability of disadvantaged businesses enterprises (DBEs) in the state;
3. casts a "broader net" than the state's prequalified DBE list; &
4. in calculating the availability of the DBEs, separates prime contractor availability from subcontractor availability.

Yes.

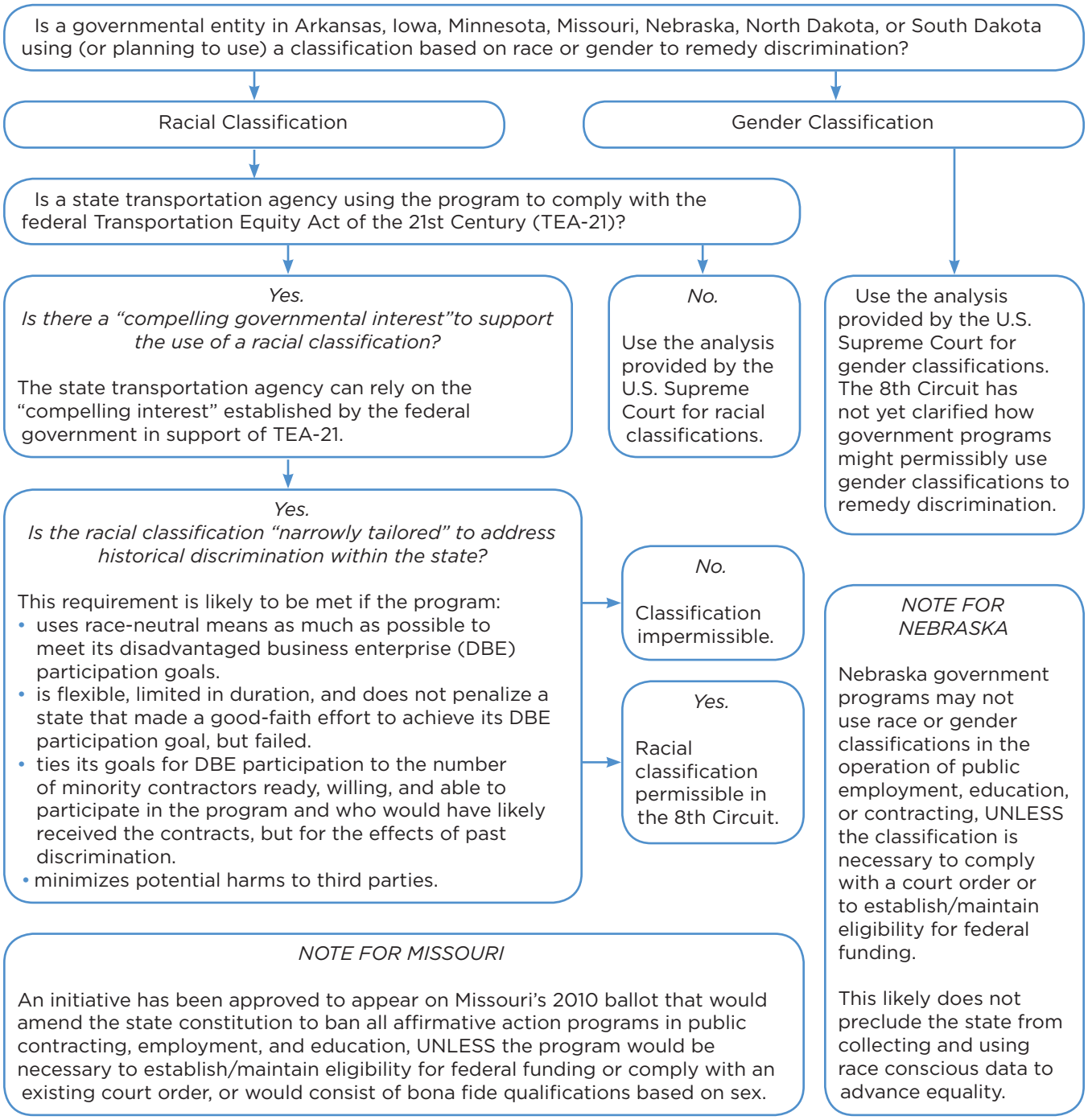
The racial classification is permissible in the 7th Circuit.

No.

Classification impermissible in the 7th Circuit.

EIGHTH CIRCUIT

An Overview of Race and Gender Classification Requirements in Government Contracting



EIGHTH CIRCUIT

(Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota)

RACIAL CLASSIFICATIONS

Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, 345 F.3d 964 (8th Cir. 2003)

In *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 124 S.Ct. 2158 (2004), the Eighth Circuit held that the Transportation Equity Act for the 21st Century (TEA-21) was constitutional. The statute was challenged by two nonminority contracting firms that provided landscaping services to prime contractors on federally assisted highway projects. Objecting to the preferences included in the TEA-21 scheme, the contractors sued the Minnesota Department of Transportation (MDOT) and its commissioner as well as the Nebraska Department of Roads and its director. The Court held that TEA-21 was constitutional both on its face and as applied, holding that the federal DBE program satisfied strict scrutiny, and Minnesota and Nebraska need not establish that their implementations of the DBE program survive strict scrutiny independently of the federal DBE program.[212]

A. The government has the burden of demonstrating that it has a compelling interest in implementing an affirmative action plan that uses racial classifications, while plaintiffs bear the burden of showing that the plan was not narrowly tailored to address the stated governmental interest.

The Seventh Circuit stated that, in an equal protection challenge to a local contracting program implementing a federal law using racial classifications, the challengers must prove that the program is not narrowly tailored and is unconstitutional.[213] Although Sherbrooke and Gross Seed presented contrary evidence that remedial action was not necessary because "minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts," the Court found that the appellants failed to meet their burden.[214]

B. A state implementing a federal plan that uses racial classifications is *not* required to establish a separate governmental interest outside those interests properly articulated by Congress.

The Eighth Circuit held that a grantee state implementing a federal race-based program is subject to strict scrutiny review, but the state need not independently establish a compelling government interest apart from the one identified for the federal program, which applies "nationwide."[215]

- "Compelling government interest looks at a statute or government program on its face. When the program is federal, the inquiry is (at least usually) national in scope. If Congress or the federal agency acted for a proper purpose and with a strong basis in evidence, the program has the requisite compelling government interest nationwide, even if the evidence did not come from or apply to every State or locale in the Nation."[216]
- "Congress has spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry."[217]

212 *Sherbrooke Turf*, 345 F.3d at 967-68.
213 *Id.* at 970, 971.
214 *Id.* at 970 (citing Rothe Dev. Corp. v. U.S. Dep't of Def., 262 F.3d 1306, 1317 (Fed. Cir. 2001)).
215 *Id.*
216 *Id.*
217 *Id.*

C. A state implementing TEA-21 must show narrow tailoring.

The Eighth Circuit held that, "because the revised DBE program affords grantee States substantial discretion," the state must show that its particular implementation of the federal program is narrowly tailored to address an actual need for race-based measures within the state.[218] The Court found that both Minnesota and Nebraska presented sufficient evidence that race-conscious means were necessary to meet a DBE participation goal based on disparity studies demonstrating a gap between the number of available and capable DBE firms and the actual participation rate of DBE firms in state highway contracting. Although the plaintiff nonminority contractor presented evidence attacking the reliability of the data used by Minnesota for its disparity studies, the Court found that the plaintiff "failed to establish that better data was available" or that Minnesota was "otherwise unreasonable in undertaking this thorough analysis and in relying on its results."[219]

- "[T]o be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny."[220]
- "While our compelling interest analysis focused on the record before Congress, the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies."[221]

D. A remedial program that uses racial classifications will be found to be appropriately narrowly tailored if it is flexible and limited in duration, uses "race-neutral" methods, minimizes potential harms to third parties, and considers specific local market conditions to meet its objectives.

The Eighth Circuit applied the following factors in its narrow tailoring analysis: (1) the efficacy of alternative remedies; (2) the flexibility and duration of the race-conscious remedy; (3) the relationship of the numerical goals to the relevant labor market; and (4) the impact of the remedy on third parties.[222] Applying these factors, the Court concluded that the federal DBE program was narrowly tailored to meet its compelling interest of remediating widespread intentional discrimination in the highway contracting industry:

- The regulations place a strong emphasis on "the use of race-neutral means to increase minority business participation in government contracting,"[223] requiring the state to meet the "maximum feasible portion" of its overall DBE participation goal through race-neutral means.[224]
- The DBE program has "substantial flexibility" and does not penalize a state for failure to meet its overall DBE participation goal, provided it demonstrates a good-faith effort to achieve it.[225]
- The DOT had tied the goals for DBE participation to the relevant labor markets, requiring states to set overall goals based upon the likely number of minority contractors that would have received federally assisted highway contracts but for the effects of past discrimination.[226] Each state's DBE participation goal must be based on "demonstrable evidence" as to the number of DBEs who are "ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts."[227]
- Congress and the DOT had taken "significant steps to minimize the race-based nature of the DBE program," defining the beneficiary class broadly as "socially and economically disadvantaged" persons rather than making race the determinative factor.[228]

218 *Id.* at 970-71.
219 *Id.* at 973.
220 *Id.* at 971.
221 *Id.*
222 *Id.* at 971 (citing United States v. Paradise, 480 U.S. 149, 171, 187 (1987) (plurality and concurring opinions)).
223 *Id.* at 972 (quoting *Adarand I*, 515 U.S. at 237-38).
224 *Id.* at 971; 49 C.F.R. § 26.51(a), (c) (1999).
225 *Sherbrooke Turf*, 345 F.3d at 972.
226 *Id.* at 972.
227 *Id.* at 971; 49 C.F.R. § 26.45(d) (2010).
228 *Sherbrooke Turf*, 345 F.3d at 972.

GENDER CLASSIFICATIONS

The Eighth Circuit has not reviewed the constitutionality of a public contracting program's use of gender classifications. Nor has it otherwise explained the requirements that such programs must meet to withstand scrutiny under constitutional equal protection provisions.

MISSOURI STATE LAW

At present, no provision of the Missouri Constitution prohibits governmental entities from adopting programs designed to promote equality of opportunity along race or gender lines in the awarding of public contracts. However, an initiative has been approved to appear on the 2010 ballot that proposes a state constitutional amendment banning all affirmative action programs in public contracting, employment, and education. The certified ballot language reads as follows:

> Shall the Missouri Constitution be amended to ban affirmative action programs designed to eliminate discrimination against, and improve opportunities for, women and minorities in public contracting, employment and education while continuing to allow preferential programs necessary to establish or maintain eligibility for federal funding, to comply with an existing court order, or consisting of bona fide qualifications based on sex?[229]

NEBRASKA STATE LAW

In November 2008, a referendum passed in Nebraska that amended the Nebraska Constitution to include the following language:

> [t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.[230]

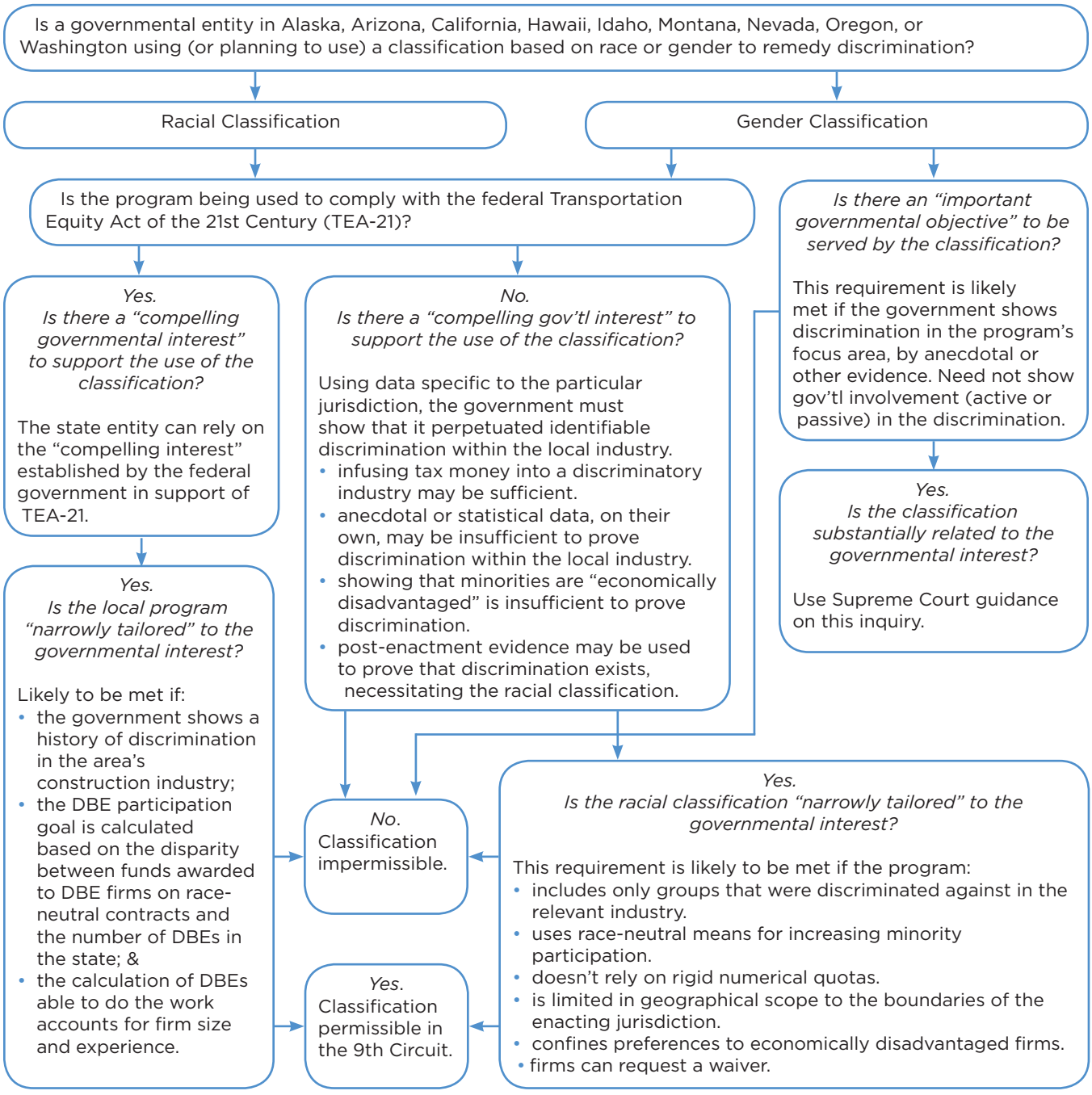
The amendment permits preferential programs necessary either to comply with an existing court order[231] or to establish or maintain eligibility for federal funding where ineligibility would result in a loss of federal funds to the state.[232] Neither state nor federal courts have interpreted its scope with respect to government uses of racial or gender classifications, or race-/gender-conscious actions.

In a recent decision, the Nebraska Supreme Court suggested, but did not hold, that Article 1, Section 30 is evidence of an express public policy against racial discrimination that does not preclude the state from using "race conscious" data to advance equality.[233] On this basis, the Court refused to enforce an arbitration award that would have reinstated a former state policeman who was fired for his affiliation with the Ku Klux Klan.[234] The Court, in discussing the "importance of ensuring *that citizens perceive* law enforcement to be free of discrimination," suggested that the collection of race-based data required by Nebraska's anti-racial profiling act does not violate Article I, Section 30.[235]

229 News Release, **Missouri Secretary of State, Seven Initiative Petitions Approved for Circulation for 2010 Ballot (Aug. 6, 2009)**, *available at* http://www.sos.mo.gov/news.asp?id=833.
230 Neb. Const. art I, § 30.
231 *Id.* § **30(4).**
232 *Id.* § 30(5).
233 State v. Henderson, 762 N.W.2d 1, 14-16 (Neb. 2009).
234 *Id.* at 3.
235 *Id.* at 16 (citations omitted).

NINTH CIRCUIT

An Overview of Race and Gender Classification Requirements in Government Contracting



NINTH CIRCUIT

(Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington)

The U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") has issued four major decisions considering equal protection challenges to state and local contracting programs using racial classifications. In addition to upholding the TEA-21 program on several grounds enumerated below, the Ninth Circuit has concluded that the government may rely on post-enactment evidence to justify affirmative action programs; the infusion of tax dollars into a discriminatory industry is sufficient to establish passive participation in discrimination; the government in most cases must provide statistical and anecdotal evidence of discrimination; the failure to subject minority and women contractors to minority and women subcontractor hiring requirements constitutes unequal treatment requiring strict scrutiny; and general findings of economic disadvantage are insufficient to establish grounds for a race-based remedy. The Ninth Circuit has also provided detailed guidance on the factors that must be present in order to find narrow tailoring.

RACIAL CLASSIFICATIONS

Western States Paving Co., Inc. v. Washington State Dep't of Trans., 407 F.3d 983 (2005)

In *Western States Paving Co., Inc. v. Washington State Dep't of Trans.*, 407 F.3d 983 (2005), the Ninth Circuit upheld the federal Transportation Equity Act for the 21st Century (TEA-21),[236] against a facial challenge, finding that Congress had a strong basis in evidence for concluding that discrimination within the transportation contracting industry hinders minorities' ability to compete for federally funded contracts, and that the statute was narrowly tailored to further the compelling interest of enabling full minority participation.[237] However, the Ninth Circuit determined that Washington State's implementation of the program was not narrowly tailored because the state had offered no evidence to show a history of discrimination in the state's transportation contracting industry.[238]

A. Burden of Proof

The Ninth Circuit stated that the federal government bore the burden of demonstrating that the federal statute and regulations satisfied strict scrutiny, and Washington State bore the same burden with respect to its application of the statute. "The burden of justifying different treatment by ethnicity or sex is always on the government."[239]

B. The federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effects of public or private discrimination.

The Ninth Circuit cited the plurality opinion in *Croson* for the proposition that any public entity "has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."[240] The Court further indicated that the government need not show that it was complicit in the discrimination or that the firms affected by the legislation had a particular history of discrimination.

236 Transportation Equity Act for the 21st Century § 1101(b)(1), 112 Stat. at 113.
237 *Western States*, 407 F.3d at 993-94.
238 *Id.* at 1001-02.
239 *Id.* at 990.
240 *Id.* at 991 (quoting *Croson*, 488 U.S. at 492).

- "The Constitution does not obligate Congress to stand idly by and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice."[241]

C. Congress's presentation of statistical and anecdotal evidence to support the implementation of TEA-21 constituted a "strong basis in evidence."

The Court referred to the Tenth Circuit's 2000 decision in *Adarand Constructors, Inc. v. Slater*, which it found to provide an "especially exhaustive inquiry" into the evidence relied upon by Congress, and determined that Congress had a strong basis in evidence to support its assertion of a compelling interest in rectifying the disparities in minorities' ability to compete in the government contracting market.[242] The Ninth Circuit stated that both statistical and anecdotal evidence of discrimination are relevant in identifying the existence of discrimination, and noted that Congress need not produce evidence of discrimination in every state's contracting market.[243] However, "Congress may not merely intone the mantra of 'discrimination' to satisfy the searching examination mandated by equal protection."[244]

D. TEA-21 is narrowly tailored.

The Ninth Circuit cited four factors relevant to the narrow tailoring analysis: "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."[245] Although exhaustion of every race-neutral alternative is not required, a government must demonstrate a "serious, good faith consideration" of workable race-neutral alternatives.[246] The Court found that TEA-21 was narrowly tailored within these parameters.

- TEA-21 regulations require states to use race-neutral means – including informational and instructional programs targeted towards all small businesses – to the maximum extent before turning to race-conscious measures.[247]
- TEA-21 regulations prohibit the use of quotas, and instead include a flexible system of contracting goals.[248]
- TEA-21 is appropriately time-limited, as it is subject to periodic reauthorization by Congress, ensuring regular reevaluation of the existence of a compelling interest to justify the program.[249]
- TEA-21 regulations do not establish a mandatory nationwide standard for minority participation, but instead provide for each state to establish a DBE utilization goal that is based on the proportion of ready, willing, and able DBEs in the state's transportation contracting industry, ensuring that the goal reflects realities in the local labor market. The 10 percent goal listed in the statute is "aspirational."[250]
- TEA-21 regulations minimize the burden on nonminority firms by allowing them to qualify as DBEs if the owners can demonstrate that they are socially and economically disadvantaged and by placing a $750,000 net worth cap on DBEs.[251]

E. The harm suffered by non-DBE firms as a result of the program does not invalidate the program.

The Ninth Circuit recognized that implementation of TEA-21's race-based goals "will inevitably result" in bids submitted by non-DBE firms being rejected in favor of higher bids from DBE firms, but stated that this

241 *Id.* (quoting Adarand Constructors, Inc. v. Slater (*Adarand VII*), 228 F.3d 1147 (10th Cir. 2000)).
242 *Id.* at 993.
243 *Id.* at 991-92.
244 *Id.* at 991 (internal quotations omitted).
245 *Id.* at 993 (citing United States v. Paradise, 480 U.S. 149, 171 (1987)).
246 *Id.* (citing *Grutter*, 539 U.S. at 339).
247 *Id.*
248 *Id.* at 994.
249 *Id.*
250 *Id.* at 994-95.
251 *Id.* at 995.

fact alone did not invalidate the statute. "If it did, all affirmative action programs would be unconstitutional because of the burden on non-minorities."[252] Quoting Justice Lewis F. Powell, Jr., the Court stated that, "[w]hen effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a sharing of the burden by innocent parties is not impermissible."[253]

F. A state need not demonstrate an independent compelling interest for a DBE program enacted to carry out a federal program that is supported by a compelling governmental interest.

The Ninth Circuit found that Washington need not demonstrate an independent compelling interest. The Court relied on the analysis of the Eighth Circuit's opinion in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003), in which the Eighth Circuit concluded that it was unnecessary for Minnesota and Nebraska to establish that their programs, which were enacted to carry out TEA-21, were premised on an independent compelling interest, given that the federal government had presented sufficient evidence to show that it had a nationwide interest in remedying past discrimination.[254]

G. A state must demonstrate that its program is narrowly tailored to remedy discrimination in the state. Under this rule, Washington's implementation of TEA-21 was not narrowly tailored.

The Ninth Circuit stated that the question of whether Washington's program was narrowly tailored depended upon a showing of discrimination in the state's construction industry.[255] Without such a showing, the state's program would not serve a remedial purpose, but would instead provide an "unconstitutional windfall" to minority contractors.[256] Furthermore, a remedial program is narrowly tailored only if its application is limited to those minority groups that have suffered discrimination.[257]

Washington had no statistical studies showing past discrimination, nor did Washington present any relevant anecdotal evidence.[258] The state calculated its DBE participation goal based on the disparity between the amount of work performed by minority firms and the capacity for work, which was based on the amount of work that had been performed on state contracts that included affirmative action components.[259] The Court determined that these studies could not be relied upon and instead looked at the disparity between the proportion of DBE firms in the state and the amount of funds awarded to DBEs on race-neutral contracts, which resulted in a far smaller disparity percentage than that underlying the state program.[260] Further undermining the results of the disparity calculation was the fact that Washington's statistics on the number of firms able to perform contracting work did not account for the possibility that differences in firm size and experience, rather than discrimination, were responsible for the lesser amount of contracting dollars awarded to minority firms.[261] Regarding anecdotal evidence, the Court found that affidavits signed by applicants seeking DBE status were insufficient to show discrimination, as they referred only to society-wide discrimination, not local discrimination in the contracting industry.[262] Accordingly, Washington's program was not narrowly tailored to remedy the harm of past discrimination.

- "[T]o be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny."[263]
- "[C]laims of general societal discrimination--and even generalized assertions about discrimination in an

252 *Id.*
253 *Id.* (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280-81 (1986) (plurality op. of Powell, J.) (internal quotation marks omitted)).
254 *Id.* at 996.
255 *Id.* at 998
256 *Id.*
257 *Id.*
258 *Id.* at 1000-01.
259 *Id.* at 999-1000.
260 *Id.* at 1000.
261 *Id.* at 1000-01.
262 *Id.* at 1002.
263 *Id.* at 996-97 (quoting *Sherbrooke Turf*, 345 F.3d at 971).

entire industry--cannot be used to justify race-conscious remedial measures."[264]

- "The 'exact connection' between means and ends that is a prerequisite to the use of racial classifications is demonstrably absent from Washington's DBE program."[265]

Monterey Mechanical Company v. Wilson, 125 F.3d 702 (9th Cir. 1997)

In *Monterey Mechanical Company v. Wilson*, 125 F.3d 702 (9th Cir. 1997), an nonminority contractor, Monterey Mechanical, brought an equal protection challenge against a California statute requiring general contractors to subcontract percentages of work to non-white (not less than 15 percent), women (not less than 5 percent), and disabled veteran-owned (not less than 3 percent) subcontractors, or otherwise to demonstrate good-faith efforts to do so.[266] In order to demonstrate good faith, a bidder was required to identify potential subcontractors, advertise in papers focusing on minorities and women, and solicit bids from minorities and women, after which the bidder must document its efforts with the University.[267] Despite submitting the lowest bid, Monterey Mechanical did not secure a contract with California Polytechnic State University for a utilities upgrade construction project because it did not achieve the percentage goal or properly document its good-faith efforts to secure the goal, whereas the winning bidder did comply with the documentation requirement.[268] The Ninth Circuit held that, in the absence of any evidentiary showing by the state that the University's race-based measures were narrowly tailored to remedy past active or passive discrimination by the state, the statute violated the Equal Protection Clause.

A. Standing in a contracting set-aside case is established if the policy places minorities and non-minorities on unequal footing, even if the challenger cannot show the loss of a contract.

Rejecting the District Court's conclusion that Monterey Mechanical lacked standing because the winning contractor was not a women or minority business enterprise (and therefore the lost bid did not result from discrimination), the Ninth Circuit held that to establish standing in challenging a set-aside statute, bidders "need only show that they are forced to compete on an unequal basis."[269] Under the University's rule, while minority contractors could satisfy the percentage requirement by performing the work themselves, nonminority contractors would be subject to the increased cost of subcontracting or demonstrating good faith, which constituted competition on an unequal basis.[270] The program also resulted in unequal treatment because it required distribution of information only to members of designated groups, without any requirement or condition that persons in other groups receive the same information.[271] Additionally, the Ninth Circuit determined that there was standing on the ground that a general contractor is hurt by a law that requires him or her to discriminate or to try to discriminate on the basis of race or sex, which is an "odious" requirement.[272]

B. A provision allowing a minority- or woman-owned contracting firm to satisfy minority and women subcontractor percentage requirements by performing work itself rather than subcontracting constitutes the use of a racial classification requiring strict scrutiny review.

The Ninth Circuit found that the University's program treated minorities and nonminorities differently, because the former could meet requirements by performing work themselves, avoiding the difficulty and cost of locating subcontractors or demonstrating good-faith efforts.[273] Minorities and women who fulfilled the percentage requirement in this manner were thereby excused from making "good faith" efforts to secure minority subcontractors.[274] The Ninth Circuit disagreed with the District Court's holding that these differences

264 *Id.* at 1002.
265 *Id.* (quoting Gratz v. Bollinger, 539 U.S. 244, 270 (2003)).
266 *Monterey Mech.*, 125 F.3d at 704; Cal. Pub. Cont. Code § 10115(c) (1992).
267 *Monterey Mech.*, 125 F.3d at 704.
268 *Id.*
269 *Id.* at 707 (quoting Bras v. Cal. Pub. Util. Comm'n, 59 F.3d 869 (9th Cir. 1995), which construed Ne. Fla. Contractors v. Jacksonville, 508 U.S. 656 (1993)).
270 *Id.*
271 *Id.* at 711.
272 *Id.* at 707.
273 *Id.* at 709.
274 *Id.* at 711.

were *de minimus*, and noted that there was no *de minimus* exception to equal protection requirements.[275] As a result, strict scrutiny was required.[276]

- "Bidders in the designated groups are relieved, to the extent they keep the required percentages of work, of the obligation to advertise to people in their groups. The outreach the statute requires is not from all equally, or to all equally."[277]

C. A non-rigid system of goals and good-faith efforts, as opposed to rigid quotas, may still qualify as a classification under the Equal Protection Clause.

The Ninth Circuit rejected the argument that the absence of rigid quotas excused the program from exacting review, stating that "the relevant question is not whether a statute *requires* the use of such measures, but whether it *authorizes or encourages* them."[278] The Court found that the University's program included "mandatory requirements with concreteness" with respect to targeted solicitation of women and minority subcontractors.[279] The Ninth Circuit implied that, had the program prescribed "non-discriminatory outreach" efforts that required general contractors to advertise for subcontracting bids "in such a manner as to assure that all persons, including women-owned and minority-owned firms, have a fair opportunity to bid," it would not have implicated the Equal Protection Clause and would not have been subject to strict scrutiny review.[280]

D. A racial classification must be narrowly tailored to remedy discrimination, active or passive, perpetuated by the governmental entity making the classification.

Although the Ninth Circuit did not explicitly identify a narrow tailoring standard, the Court faulted the government for failing to offer evidence that the state or University had previously discriminated, actively or passively, against the groups benefitted by the statute.[281] The Court did not state what would constitute passive discrimination, though it did specify that findings of societal discrimination would not suffice.[282]

E. Legislative findings that minorities and women are "economically disadvantaged" are insufficient to carry the government's burden to justify different treatment based on race or sex.

Holding that the burden of justifying different treatment by ethnicity or sex is "always on the government," the Ninth Circuit found that the University failed to meet its burden because it offered no evidence whatsoever to show that the state had engaged in past active or passive discrimination.[283] Instead, the legislative findings stated that prices and opportunities would be advanced by the policy of the state to aid disadvantaged businesses.[284] Because the state made no attempt to justify the race and sex discrimination it imposed, the Court did not reach the question of how much or what kinds of evidence would suffice to justify this or a similar statute.[285]

F. The inclusion of groups unlikely to have been discriminated against in the California construction industry rendered the program over-inclusive.

The Court noted that the term "minority" was defined to include any person who is black, Hispanic, Native American, Pacific-Asian, Asian-Indian, or "any other group of natural persons identified as minorities," and stated that various members of these groups were "highly unlikely" to have been discriminated against in the California construction industry.[286]

275 *Id.* at 709, 712.
276 *Id.* at 712.
277 *Id.* at 711.
278 *Id.*
279 *Id.*
280 *See id.* ("The Equal Protection Clause as construed in *Adarand* applies only when the government subjects a 'person to unequal treatment.' There might be a non-discriminatory outreach program which did not subject anyone to unequal treatment. But this statute is not of that type.")
281 *Id.* at 713.
282 *Id.*
283 *Id.* (citing *Adarand I*, 515 U.S. at 224; United States v. Virginia, 518 U.S. at 533). The University stated that there was no such study and that one was not necessary because the "goal requirements" of the scheme "do not involve racial or gender quotas, set-asides or preferences," a conclusion with which the Court did not agree. *Id.* at 704-05.
284 *Id.*
285 *Id.*
286 *Id.* at 714 (citing *Wygant*, 476 U.S. at 284 n.13; *Croson*, 488 U.S. at 505-06).

- "[S]ome of the groups designated are, in the context of a California construction industry statute, red flags signaling that the statute is not, as the *Equal Protection Clause* requires, narrowly tailored."[287]

Coral Construction Company v. King County, 941 F.2d 910 (9th Cir. 1991)

Coral Construction Company v. King County, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992), addressed a challenge by a nonminority contractor to the King County Minority and Women-Owned Business Enterprise (MWBE) set-aside program for public contracts. The MWBE program included two methods for according preferential treatment to MWBEs bidding on county contracts: for contracts of $10,000 or less, an MWBE or a firm using MWBEs would receive a preference if its bid was within 5 percent of the lowest bid.[288] For contracts greater than $10,000, a bidder was required to use MWBEs for a prescribed percentage of the work, individually determined according to the availability of qualified MWBEs.[289] A reduction in the amount of set-asides was permitted if it was not feasible to meet higher levels, if MWBEs were unqualified, or if MWBE price quotes were not competitive, and in certain circumstances the requirement could be waived altogether.[290]

Following a victory in the District Court, King County amended its MWBE program to incorporate two consultant reports into the record that documented through statistics and anecdotal evidence the impact of discrimination in various local markets.[291] The county also changed the 5 percent preference to a flexible one, and required that all prime contractors, even those that were minority and women-owned, were to employ minority- and women-owned subcontractors, unless the prime contractor planned to perform 25 percent or more of the contract.[292] Last, the new ordinance required monitoring of the program in order to ensure that it did not favor certain groups or remain in force longer than necessary.[293] After reviewing the District Court's opinion, the Ninth Circuit remanded the case for determination of whether the post-enactment studies provided by the county constituted a strong basis in evidence establishing a compelling governmental interest and for an assessment of whether there existed a causal link between the program's geographic overbreadth and Coral Construction's injury.[294]

A. In order to establish a compelling government interest, a proponent of a race-based preference must show identifiable discrimination perpetuated by a government actor.

The Ninth Circuit stated that a set-aside program was valid only if "actual, identifiable discrimination has occurred within the local industry affected by the program."[295] The governmental actor enacting the program must have perpetuated the discrimination to be remedied, although passive participation would suffice: "[m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong."[296]

B. Use of data gathered by other government bodies that were within the geographical boundaries of King County was permissible.

Coral Construction contested King County's reliance on information compiled by the City of Seattle, the Port of Seattle, the Municipality of Metropolitan Seattle, and Pierce County, Washington.[297] Noting that data sharing presented the risk that data regarding societal discrimination would become the factual basis for an MBE program, the Ninth Circuit nevertheless approved the reliance on the first three sets of data, finding that

287 *Id.*
288 *Coral Constr.*, 941 F.2d at 914.
289 *Id.*
290 *Id.*
291 *Id.* at 915.
292 *Id.*
293 *Id.*
294 *Id.* at 933.
295 *Id.* at 916.
296 *Id.*
297 *Id.* at 917.

those government entities were either within or coterminous with the boundaries of King County.[298] Data from Pierce County, a neighboring jurisdiction, were disregarded.[299]

- "To prevent overbreadth, the enacting jurisdiction should limit its factual inquiry to the presence of discrimination within its own boundaries."[300]

C. Neither anecdotal evidence nor statistical evidence is enough on its own to satisfy the government's burden in the absence of statistical evidence.

Analyzing the evidence that was before the District Court, which did not include the two statistical studies, the Ninth Circuit found that affidavits from 57 minority or women contractors, each of whom complained of discrimination in the local construction industry, with some specifying blatantly racist statements on the part of prime contractors who refused to hire them, were not enough to satisfy the government's burden.[301] Although the Court left a small space for a claim to succeed absent statistical evidence, it was unclear what amount of anecdotal evidence could meet that burden given the Court's rejection of the 57 affidavits.[302]

- "Statistical evidence often does not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral…. [A]necdotal evidence, standing alone, suffers the same flaws as statistical evidence"[303]

D. A governmental entity may rely on post-enactment evidence to satisfy the requirements of strict scrutiny.

The Ninth Circuit recognized that before a city may implement an affirmative action program, it must have "some concrete evidence" that the remedy is warranted, but stressed that a program would not be struck down simply because the evidence before the government at the time of enactment does not fulfill both prongs of strict scrutiny.[304] Instead, the factual predicate for the program should be evaluated based on "all the evidence" presented to the District Court, regardless of whether the evidence was gathered post-enactment.[305] Because King County relied on post-enactment evidence gathered after the District Court's decision, the Ninth Circuit remanded the matter for analysis of whether the studies were sufficient to establish a compelling government interest.[306]

- "A state or municipality, when presented with evidence of its own culpability in fostering or furthering race discrimination, might well be remiss if it failed to act upon such evidence. Thus, a municipality having such evidence would face the dilemma of deciding whether to wait the months necessary for further development of the record, risking constitutional culpability due to its inaction, or to act and to risk liability for acting prematurely but otherwise justifiably."[307]

E. A program is narrowly tailored if it employs race-neutral means, does not employ quotas, and is limited to the boundaries of the enacting jurisdiction.

The Court focused on three factors pertaining to the narrow tailoring analysis: (1) an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting; (2) the program should apply minority utilization goals set on a case-by-case basis, not a system of rigid numerical quotas; and (3) the program must be limited in its effective scope to the boundaries

298 *Id*.
299 *Id*.
300 *Id*.
301 *Id*. at 917-19.
302 *See id*. at 919 ("While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.").
303 *Id*.
304 *Id*. at 920.
305 *Id*.
306 *Id*. at 922.
307 *Id*. at 921.

of the enacting jurisdiction.[308] The Court found that the county considered alternatives, but they were not available, and that the county implemented two race-neutral measures, including training sessions for small businesses and providing information on accessing small business assistance programs.[309] The Court also found that the MBE program did not contain a quota and allowed for a waiver in appropriate circumstances.[310]

F. A program is not narrowly tailored if a business receives preferential treatment outside of the implementing authority's jurisdiction.

Under the program, a minority-owned business could qualify for preferences if it had been discriminated against in its home operating area. The Court held that this definition was overly broad, as the proper inquiry was whether a business had been discriminated against in King County.[311] Clarifying the evidentiary burden, the Court stated that an MBE would be eligible for relief if it had previously sought to do business in the county, on the theory that "malignant discrimination" would have affected that business.[312]

Associated General Constructors, Inc. v. Coal. for Economic Equity, 950 F.2d 1401 (9th Cir. 1991)

In *Associated General Constructors, Inc. v. Coal. for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991), the Ninth Circuit upheld the denial of a preliminary injunction against a challenge by an association of contractors against a San Francisco ordinance providing for a 5 percent bidding preference for minority and women contractors. The Court held that the government had shown a compelling interest, citing studies showing large statistical disparities and the significant anecdotal evidence gathered over the course of numerous public hearings, both of which detailed significant discrimination in the industry.[313] The Court further determined that the remedy was narrowly tailored because the "modest" system of bid preferences was not comparable to quotas, the preference was confined to firms that were economically disadvantaged, and firms could request a waiver.[314]

- "[T]here is no requirement that the legislative findings specifically detail each and every instance that the legislative body has relied upon in support of its decision that affirmative action is necessary."[315]

GENDER CLASSIFICATIONS

The Ninth Circuit has affirmed that intermediate scrutiny applies to gender-conscious affirmative action programs in contracting post-*Croson*.

Monterey Mechanical Company v. Wilson, 125 F.3d 702 (9th Cir. 1997)

In *Monterey Mechanical*, discussed above, the Ninth Circuit stated that classifications based on sex must be justified by an "exceedingly persuasive justification" and serve "important government objectives," and that the means must be "substantially related to the achievement of those objectives."[316]

Coral Construction Co. v. King County, 941 F.2d 910 (1991)

In *Coral Construction*, discussed above, the Ninth Circuit applied intermediate scrutiny to the use of gender classifications in a public contracting program. The Court described the test as follows: "a gender-based classification must serve an important government objective, and there must be a direct, substantial

308 *Id.* at 922 (citing *Croson*, 488 U.S. at 507-08 (majority), 491-92 (O'Connor, J., joined by Rehnquist, C.J., and White, J.).
309 *Id.* at 923.
310 *Id.* at 924.
311 *Id.* at 925.
312 *Id.*
313 *Associated General*, 950 F.2d at 1414-16.
314 *Id.* at 1417-18.
315 *Id.* at 1416.
316 125 F.3d at 712 (citing United States v. Virginia, 518 U.S. 515, 530 (1996)).

relationship between the objective and the means chosen to accomplish the objective."[317] Although "intermediate scrutiny does not require any showing of governmental involvement, active or passive, in the discrimination it seeks to remedy,"[318] "[s]ome degree of discrimination must have occurred in a particular field before a gender-specific remedy may be instituted in that field."[319]

The Ninth Circuit concluded that King County's WBE preference survived intermediate scrutiny because it had "a legitimate and important interest in remedying the many disadvantages that confront women business owners," the means chosen for furthering the objective were substantially related to the objective and not onerous, and the record showed discrimination against women in the King County construction industry.[320] The Court found a lengthy affidavit by a female contractor documenting her difficulties in obtaining private contract work "particularly telling."[321] The Court cautioned that, "[i]f the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."[322]

ARIZONA STATE LAW

No provision of the Arizona Constitution prohibits affirmative action programs designed to promote equal opportunity in public contracting along the lines of race and gender, despite unsuccessful efforts by Ward Connerly to achieve certification of the Arizona Civil Rights Initiative, also known as Proposition 104, for inclusion in the 2008 ballot. On June 22, 2009, however, the Arizona State Senate approved a nearly identical proposal for a constitutional amendment that will appear on the 2010 ballot for voter consideration.[323] If approved by voters in the 2010 election, Article II of the Arizona Constitution will be amended by adding Section 36, titled "Discrimination or preferential treatment prohibited," as follows:

> This State shall not discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting.[324]

If passed, the new amendment could affect set-aside and bid preference programs across the state.

CALIFORNIA STATE LAW

The California Civil Rights Initiative, also known as Proposition 209, was passed by referendum in 1996, making California the first state in the nation to ban affirmative action in public employment, public education, and public contracting. Proposition 209 amended the California Constitution by adding Section 31 to Article I, which provides that:

> [t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.[325]

This prohibition against the use of racial and gender classifications in public contracting applies to state

317 *Coral Constr.*, 941 F.2d at 931.
318 *Id.* at 932.
319 *Id.* (citing Miss. Univ. for Woman v. Hogan, 458 U.S. 718, 729 (1982)).
320 *Id.* at 932-33.
321 *Id.* at 933. The Court referenced an earlier case holding that a program extending preferences to some fields in which women were not disadvantaged could survive a facial challenge, on the ground that an overinclusive program was still substantially related to the goal of compensating women for disparate treatment in the workplace, although an industry-specific challenge based on a lack of evidence of discrimination against women might fare differently. *Id.* at 932 (citing Assoc. Gen. Contractors v. City and County of S.F., 813 F.2d 922, 942 (9th Cir. 1987)).
322 *Id.* at 932 (quoting *Hogan*, 458 U.S. at 725).
323 Howard Fischer, *Ballot item to bar race, sex preferences advances*, Ariz. Daily Star, June 11, 2009, *available at* http://azstarnet.com/news/local/govt-and-politics/article_00f80f9e-f573-5d8f-ab3e-05e92538c8e0.html (last visited Aug. 2, 2010).
324 S. Con. Res.1031, 49th Leg., 1st Reg. Sess. (Ariz. 2009).
325 Cal. Const. art. 31 § I(a).

programs as well as programs of any city, county, public college, university, community college, school district, or other political subdivision or governmental entity of or within California.[326] The amendment includes an exception permitting race-based state action necessary to comply with a prior court order or consent decree, or to comply with federally mandated affirmative action requirements, where noncompliance would result in a loss of federal funds to California.[327] The Ninth Circuit has upheld Article 1, Section 31 against an equal protection challenge, reasoning that "[a] law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender" and that "[i]mpediments to preferential treatment do not deny equal protection."[328]

Supporters of Article 1, Section 31 have used it to challenge both minority "participation goals" and "targeted outreach" programs in public contracting.[329] In *Hi-Voltage Wire Works, Inc. v. City of San Jose*, the California Supreme Court held that an affirmative action program requiring contractors bidding on government projects to utilize a specified percentage of minority or women subcontractors or otherwise to document good-faith efforts to include such subcontractors in their bids violated the California Constitution.[330] Certain forms of "targeted outreach" may also be impermissible under Article 1, Section 31. For example, the provision prohibits instituting a program that requires contractors bidding on government projects to conduct outreach to minority and women subcontractors, while not requiring similar outreach to nonminority, non-women subcontractors.[331]

Article 1, Section 31 does not, however, prohibit all race- and gender-conscious action. The California Supreme Court has acknowledged that California voters "intended to preserve outreach efforts to disseminate information about public employment, education, and contracting . . . ."[332] Race- and gender-conscious outreach or recruitment efforts that are designed to "broaden the pool of potential applicants" for a government contract without reliance on racial classifications are constitutionally permitted.[333] In addition, monitoring programs that collect and report data concerning the participation of women and minorities in governmental programs do not violate Article 1, Section 31.[334]

In *American Civil Rights Foundation v. Berkeley Unified Sch. Dist.*, 172 Cal. App. 4th 207 (Cal. App. 2009), the California Court of Appeals interpreted Article 1, Section 31 to permit other race-conscious actions to promote racial equality and equal opportunity. The Court held that educators can continue to adopt race-conscious policies designed to achieve racial diversity, so long as no racial classifications are used to prefer individuals of one race over those of another.[335] For example, a school district can consider the racial demographics of a neighborhood in assigning students to school.[336] A school district is also permitted to collect data concerning the geographic distribution of students by race.[337] These types of activities, though conscious of race and designed to achieve a fair allocation of resources, are nonetheless viewed by the state courts as "race-neutral" and thus consistent with the requirements of the state Constitution.[338]

Notably, the use of racial classifications by governmental authorities is permitted under Article 1, Section 31(e) if the governmental entity can show that there is *substantial evidence* that a government program based on racial classifications is *necessary* to prevent the loss of federal funding, and that such race-based measures are *narrowly tailored* to minimize racial discrimination.[339] Whether the use of racial classifications is

326 Cal. Const. art. 31 § I(f).
327 Cal. Const. art. 31 § I(e).
328 Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 702, 708 (9th Cir. 1997).
329 *See* Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068 (Cal. 2000); Connerly v. State Pers. Bd., 92 Cal. App. 4th 16 (Cal. App. 2001).
330 *Hi-Voltage Wire Works, Inc.*, 12 P.3d at 1084.
331 *Id.*
332 *Connerly*, 92 Cal. App. 4th at 42.
333 *Id.* at 46.
334 *Id.* at 46-47.
335 *Am. Civil Rights Found.*, 172 Cal. App. 4th at 222.
336 *Id.* at 217-18.
337 *Id.* at 221.
338 *Id.* at 222.
339 C & C Constr., Inc. v. Sacramento Mun. Util. Dist., 18 Cal. Rptr. 3d 715, 723 (Cal. App. 2004).

a "necessary" remedial measure is determined by the federal statute, not by the state agency implementing the statute.[340] Article 1, Section 31(e) offers a very narrow exception to the general prohibition of the use of racial classifications, however, because race-based remedial measures are generally permitted subject to strict scrutiny, but not *required* under federal law.

WASHINGTON STATE LAW

In 1998, the Washington State Civil Rights Initiative, entitled "Discrimination, preferential treatment prohibited," was enacted into a state statute, RCW 49.60.400, which provides that

> (1) [t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> . . .
>
> (3) This section does not affect any law or governmental action that does not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin.[341]

The statute contains an exception for actions that are necessary to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state, and for actions necessary to comply with any court order or consent decree already in force as of December 3, 1998, when the statute went into effect.[342] The statute defines "state" as including, but not limited to, the state itself, any city, county, public college or university, community college, school district, special district, or other political subdivision or governmental instrumentality of or within the state.[343]

In *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*,[344] the Washington State Supreme Court addressed the question of whether RCW 49.60.400 prohibits all race-cognizant state government action or whether the act allows some race-cognizant state actions while limiting others.[345] In this case, a group of parents challenged a Seattle school district's "open choice" assignment plan, which had been adopted to avoid *de facto* segregation that would result from assigning children to schools purely based on their locations.[346] The plan permitted students to rank the schools they wished to attend and provided four "tiebreakers," including a racial integration tiebreaker, to assign students to school when their first choice was oversubscribed.[347] The school district argued that the plan was adopted to further its compelling interest in promoting racial diversity in schools.[348] The plaintiffs argued, among other things, that RCW 49.60.400 barred the plan because the statute "prohibits more than just the 'reverse discrimination' style of affirmative action, and that any racially cognizant government decision or action is now unlawful."[349]

The Washington Supreme Court squarely rejected the plaintiffs' interpretation of RCW 49.60.400 and ruled that the statute permits race- and gender-conscious actions like that of the School District's open choice assignment plan. It concluded that although the statute prohibits "affirmative action programs which advance a less qualified applicant over a more qualified applicant," it did not prohibit "all, race-cognizant

340 *Id.* at 724.
341 Wash. Rev. Code (ARCW) § 49.60.400 (1998).
342 Wash. Rev. Code (ARCW) §§ 49.60.400(5) (6) (1998).
343 Wash. Rev. Code (ARCW) §§ 49.60.400(7) (1998).
344 72 P.3d 151 (Wash. 2003). The Supreme Court later ruled that, although schools may use race conscious means to achieve diversity, the methods employed in this case were not sufficiently narrowly tailored. *See Parents Involved* 551 U.S. at 787 (Kennedy, J., concurring in judgment).
345 *Id.* at 152.
346 *Id.* at 154-55.
347 *Id.* at 155.
348 *Id.* at 161, n.9.
349 *Id.* at 156.

government action."[350] Furthermore, "[p]rograms which are racially neutral, such as the Seattle School District No. 1's open choice plan, are lawful,"[351] even if they "take positive steps to achieve greater representation of underrepresented groups."[352] It reasoned that Subsection (3) of RCW 49.60.400, which provides that the statute "does not affect any law or governmental action that does not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin," provided strong evidence that "some race conscious decisions are acceptable."[353] The Court interpreted this subsection to "carve[] out from the prohibition of the statute *government action cognizant of race, sex*, color, ethnicity, or national origin that does not discriminate against or grant preferential treatment based on the enumerated characteristics,"[354] and to "suggest[] that some race conscious decisions or actions by the State would be permitted."[355] The Washington Supreme Court confirmed that RCW 49.60.400 "does not end all affirmative action programs" and "prohibits only those programs that use race or gender to select a less qualified applicant over a more deserving applicant for a public job, contract or admission to a state college or university."[356] It noted that the "the average informed voter" who voted to enact the statute by referendum understood the distinction between the impermissible application of racial preferences and permissible "racially neutral programs designed to foster and promote diversity to provide enriched educational environments."[357]

350 *Id.* at 152-53.
351 *Id.*
352 *Id.* at 159.
353 *Id.* at 164.
354 *Id.* (emphasis supplied).
355 *Id.* at 165.
356 *Id.* at 166.
357 *Id.*

ARIZONA, CALIFORNIA, WASHINGTON

Specific Rules for Race and Gender Classification Requirements in Arizona, California, and Washington

ARIZONA

A proposed constitutional amendment will appear on the 2010 ballot which, if enacted, would prohibit the use of affirmative action mechanisms to remedy the effects of discrimination in public employment, public education, or public contracting.

CALIFORNIA

Government programs in California are prohibited from using racial and gender classifications in public contracting, public education, and public employment UNLESS:

1. the program is necessary to comply with a court order, consent decree, or federally mandated affirmative action requirements; or
2. there is substantial evidence that the racial classification is necessary to prevent the loss of federal funding and the program is narrowly tailored to minimize racial discrimination.

This prohibition applies to programs requiring either participation goals or targeted outreach to minorities or women.

BUT, the following race- & gender-conscious actions are permitted:

- outreach or recruitment efforts designed to broaden the pool of potential applicants, without relying on racial classifications.
- programs to collect and report data on the participation of women and minorities in government programs.
- in education, policies designed to achieve racial diversity or a fair allocation of resources, as long as no racial classifications are used to prefer individuals of one race over those of another.

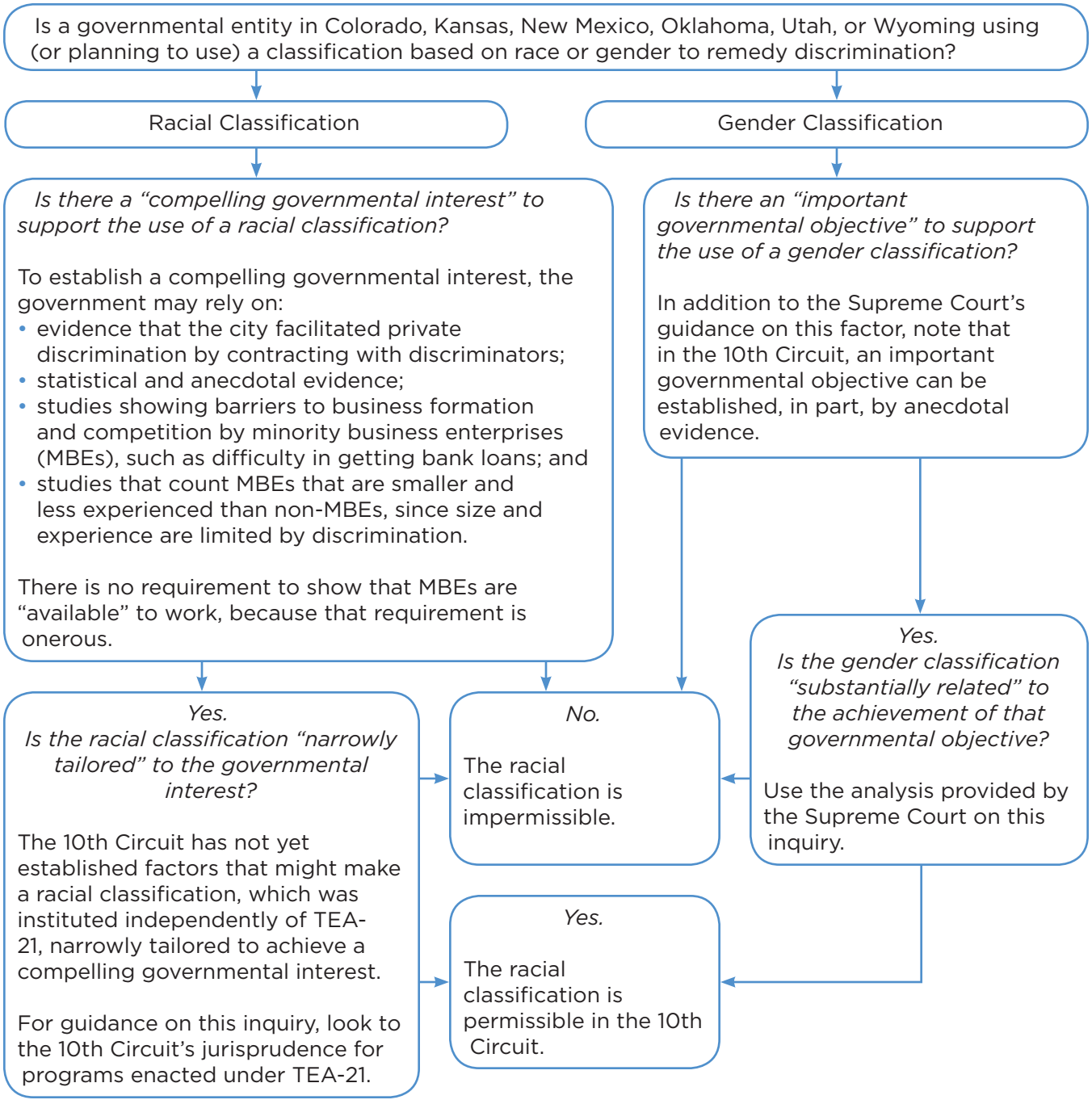
WASHINGTON

Washington government programs may not use race or gender classifications in the operation of public employment, education, or contracting, UNLESS the classification is necessary to comply with a court order or consent decree, or to establish or maintain eligibility for federal funding.

BUT, *race- & gender-conscious* government actions designed to foster and promote diversity are permissible, so long as they do not use race or gender to select a less qualified applicant over a more deserving applicant for a public job, contract, or admission to a state college or university.

TENTH CIRCUIT

An Overview of Race and Gender Classification Requirements in Government Contracting



TENTH CIRCUIT

(Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming)

RACIAL CLASSIFICATIONS

In two lengthy decisions, the U.S. Court of Appeals for the Tenth Circuit ("Tenth Circuit") has determined the evidentiary requirements for a governmental entity to establish a compelling interest in remedying discrimination and clarified the standards for finding narrow tailoring.

Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) ("Adarand VII")

In *Adarand Constructors, Inc. v. Slater* ("*Adarand VII*"), 228 F.3d 1147 (10th Cir. 2000), *cert. dismissed sub nom.*, *Adarand Constructors, Inc., v. Mineta*, 534 U.S. 103 (2001), the Tenth Circuit considered the constitutionality of the U.S. Department of Transportation's disadvantaged business enterprise (DBE) program in place at the time of the District Court's decision following remand from *Adarand I* and following revisions to the DBE regulations.[358] It concluded that, while the system of financial incentives considered in *Adarand I* was not narrowly tailored, the new DBE program, known as the Transportation Equity Act for the 21st Century (TEA-21), which authorized the use of race and sex-based preferences in federally funded transportation contracts, was constitutional on its face. *Id.* at 1187. The Tenth Circuit did not consider TEA-21's constitutionality as applied by a specific state.

A. Evidence that private discrimination had created barriers to the formation of minority subcontracting enterprises and barriers to fair competition between minority and nonminority subcontractors was sufficient to establish a strong basis in evidence for the government's compelling interest.

The Tenth Circuit undertook an exhaustive inquiry into the evidence and found that the record showed that Congress had a compelling interest in remedying the federal government's passive complicity with private discrimination in the construction industry, which contributed to discriminatory barriers in federal contracting.[359] It concluded that the government's evidence demonstrated that "both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises . . . are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market."[360] Congress is not required to acquiesce in the workings "of an ostensibly free market that would direct the profits to be gleaned from disbursements of public funds to non-minorities alone."[361] As a result, the evidence was found to "more than satisf[y] the government's burden of production regarding the compelling interest for a race-conscious remedy."[362]

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358 *Adarand VII*, 228 F.3d at 1167-87. The Tenth Circuit's decision in *Adarand VII* was issued after a series of decisions were issued subsequent to the Supreme Court's remand of the case to the District Court for the application of strict scrutiny review in *Adarand I*. *Adarand I*, 515 U.S. at 200, 205. On remand, the District Court determined that Congress had a compelling interest in redressing discrimination, but that the challenged U.S. Department of Transportation incentive program was not "narrowly tailored." Adarand Constructors, Inc. v. Pena (*Adarand II*), 965 F. Supp. 1556, 1580 (D. Colo. 1997), *rev'd*, Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir 2000) (*Adarand VII*), *cert. dismissed sub nom.*, Adarand Constructors, Inc., v. Mineta (*Adarand VIII*), 534 U.S. 103 (2001). The District Court enjoined the USDOT's DBE program. *Id.* Adarand then sued the state of Colorado, challenging its use of "disadvantaged business enterprise" ("DBE") programs in administering federal highway programs. Colorado modified its regulations in response, which led Adarand to become certified as a DBE. As a consequence, the Tenth Circuit Court of Appeals rejected the government's appeal of *Adarand II*, concluding that the case was moot due to Adarand's DBE status. Adarand Constructors, Inc. v. Slater (*Adarand VII*), 169 F.3d 1292 (10th Cir. 1999), *rev'd*, 120 S.Ct 722 (2000). The Supreme Court reversed the decision and remanded the case to the Tenth Circuit.

359 *Adarand VII*, 228 F.3d at 1167-75.

360 *Id.* at 1175-76.

361 *Id.* at 1175.

362 *Id.* at 1176.

B. Evidentiary requirements for identifying the existence of discrimination.

The Tenth Circuit stated that both statistical and anecdotal evidence of discrimination are relevant to identifying the existence of discrimination, although anecdotal evidence by itself is not sufficient.[363] Also relevant are direct and circumstantial evidence, including post-enactment evidence and legislative history.[364] The Court stated that it would consider evidence of public and private discrimination in the construction industry generally, not just in government procurement contracts.[365]

After the government makes an initial showing, the burden shifts to the nonminority to rebut the showing.[366]

C. The TEA-21 program was narrowly tailored based on an analysis of six factors.

The Tenth Circuit concluded that the TEA-21 program as implemented by the revised statute was narrowly tailored, based on its analysis of the following factors: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the Subcontractor Compensation Clause ("SCC") and DBE certification programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness.[367]

- "Congress over a period of decades attempted to correct by race-neutral means the problem of too few minority subcontractors for government construction contracts, and only after it continued to find discriminatory effects did it first implement a race-conscious remedy."[368]
- The revised regulations implementing the program required recipients to meet the maximum possible portion of the overall goal by using race-neutral means.[369]
- A company's status as a DBE was limited to 10.5 years, and a business would "graduate" early if it no longer met the criteria. Additionally, businesses were required to seek renewal of DBE certification every three years.[370]
- The statute did not require the use of DBEs in subcontracting against the will of the prime contractor and included the possibility of waiver.[371]
- An aspirational goal of 10 percent minority participation that accounted for the number of DBEs available and willing to do the work and that required only that firms make a good-faith effort to meet the goal was flexible enough to survive scrutiny.[372]
- There was insufficient likelihood that innocent third parties would shoulder the burden of awarding contracts to DBEs under the program.[373]
- The earlier version of the statute was over-inclusive because it presumed economic disadvantage based on membership in certain racial groups.[374] The revised statute cured this deficiency by requiring applicants to submit a narrative statement describing the circumstances of their purported economic disadvantage.[375]

Concrete Works of Colorado, Inc. v. City & County of Denver, 321 F.3d 950 (10th Cir. 2003)

In *Concrete Works of Colorado, Inc.*, 321 F.3d 950 (10th Cir. 2003), the Tenth Circuit addressed a challenge

363 *Id.* at 1166.
364 *Id.*
365 *Id.* at 1166-67.
366 *Id.* at 1166.
367 *Id.* at 1178.
368 *Id.*
369 *Id.*
370 *Id.* at 1179-80.
371 *Id.* at 1180.
372 *Id.* at 1181-83.
373 *Id.* at 1183.
374 *Id.* at 1184.
375 *Id.* at 1185.

to Denver's affirmative action ordinance, which established participation goals for racial minorities and women on certain city construction and professional design projects, and held that the ordinance survived strict scrutiny review. The ordinance was enacted following several exhaustive studies of discrimination against minority and women-owned construction businesses. The Tenth Circuit found that the plaintiff failed to rebut the findings of these studies as presented by the government, and determined that a "strong basis in evidence" existed to support Denver's enactment of the affirmative action ordinance.[376]

A. The city need not present evidence that it was responsible for the discrimination.

The Court rejected the plaintiff's argument that evidence of marketplace discrimination was irrelevant, citing *Croson* and *Shaw* for the proposition that a government may satisfy the requirement to identify discrimination by identifying public *or private* discrimination with specificity.[377]

- Anecdotal evidence and the District Court's factual finding that contractors who refuse to do business with MBEs were regularly given city contracts supported Denver's position that it indirectly contributed to private discrimination in the Denver construction industry.[378]
- Because Denver was permitted to address its passive role in private discrimination, its overutilization of MBEs and WBEs in comparison to their percentage of the business market did not defeat its argument that it had a compelling interest in addressing discrimination.[379]

B. Lending discrimination studies and business formation studies are probative evidence of racial discrimination in the public contracting market.

Denver introduced evidence of several sophisticated studies measuring barriers to business formation and fair competition, which the Tenth Circuit found had been improperly discounted by the District Court.[380] The Court stated that evidence of barriers to fair competition (through discriminatory lending) was relevant because it demonstrated that existing MBEs and WBEs were precluded from competing for public contracts.[381] Similarly, evidence that private discrimination resulted in barriers to business formation was relevant because it demonstrated that MBEs and WBEs were precluded "*at the outset*" from competing for public construction contracts.[382]

C. Assumptions made by disparity studies relied on by Denver were permissible.

Plaintiff criticized the use of several variables in the disparity studies, including size and experience, specialization, and the counting of firms as "available" based on whether they were qualified or whether they were bidding.[383] The Tenth Circuit dismissed the plaintiff's arguments, determining that the assumptions made by the studies were permissible.[384]

- Relative Firm Size: The plaintiff argued that the apparent disparities might be due to firm size and experience rather than discrimination. The plaintiff acknowledged that MBEs and WBEs are generally smaller and less experienced, but submitted expert testimony stating that firm size has little effect on qualifications or ability to provide services because firms can hire additional employees or pay subcontractors. The Court noted that experience and size are not race- and gender-neutral variables, as minority firms are generally smaller and less experienced because of industry discrimination. The Court further noted that the plaintiff did not conduct *its own* study using marketplace data showing that controlling for size eliminated the disparities, and thus had not met its burden to show that Denver's studies were flawed.[385]

376 *Concrete Works of Colo., Inc.*, 321 F.3d at 991.
377 *Id.* at 976.
378 *Id.* at 977.
379 *Id.* at 984.
380 *Id.* at 977, 979.
381 *Id.* at 977.
382 *Id.* (emphasis in original).
383 *Id.* at 980-84.
384 *Id.*
385 *Id.* at 980-82.

- Specialization: The District Court faulted the disparity studies for failing to account for firm specialization. The Tenth Circuit stated that there was no evidence that minority firms were more or less likely to specialize than other firms. Furthermore, the plaintiff failed to show that controlling for this variable would eliminate the apparent disparity in the data, and accordingly failed to meet its burden.[386]
- Availability: The plaintiff's expert contended that M/WBE availability data was unreliable because it was not a measure of those firms who were actually bidding on city construction projects. The Court rejected this requirement, stating that it would be onerous, and also that it was likely to produce inaccurate results, as firms might bid on projects without being qualified.[387]

GENDER CLASSIFICATIONS

Concrete Works of Colorado v. Denver, 36 F.3d 1513 (10th Cir. 1994)

In this decision, the Tenth Circuit considered a program that awarded contracting preferences to women- and minority-owned businesses without distinguishing between the two types of preferences. The Court determined that intermediate scrutiny applied, and that Denver could meet its burden by demonstrating that the gender-based preferences served important governmental objectives, which could be shown by demonstrating that the ordinances were based on reasoned analysis rather than mechanical assumptions, and were substantially related to the achievement of those objectives.[388]

- Denver met its burden in part by submitting anecdotal evidence that women were discriminated against in applying for private sector and city projects, including evidence that women were made to fulfill extra requirements, were sometimes rejected after submitting the lowest bid, were verbally harassed and physically assaulted on the job, and were declined loans despite being qualified.[389]

COLORADO STATE LAW

No provision of the Colorado Constitution prohibits governmental entities from taking measures to promote racial and gender equality and equal opportunity. In 2008, the Colorado Civil Rights Initiative, also known as Amendment 46, was proposed to amend the state constitution to prohibit government from discriminating against or granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.[390] Although backers of the initiative secured enough signatures for the proposal to appear on the November 2008 ballot, the initiative was defeated.[391]

OKLAHOMA STATE LAW

No provision of the Oklahoma Constitution prohibits governmental entities from taking measures to promote racial and gender equality and equal opportunity. The Oklahoma Civil Rights Initiative, also known as Oklahoma State Question No. 737, sought to prohibit the government from discriminating or giving preferential treatment on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. The backers of the Initiative failed to secure the requisite number of valid signatures and, after legal challenges to the validity of the signatures, withdrew their initiative, which never made it onto the November 2008 election ballot.[392]

386 *Id*. at 982-83.
387 *Id*. at 983.
388 *Id*. at 959.
389 *Id*. at 969.
390 *See* Colorado Civil Rights Initiative: Actual Language, http://coloradocri.org/ballot_language.html (last visited Sept. 16, 2009).
391 Naomi Zeveloff, *Amendment 46 to repeal affirmative action loses despite hefty odds*, The Colorado Independent, Nov. 7, 2008, *available at* http://coloradoindependent.com/14699/amendment-46-to-repeal-affirmative-action-loses-despite-hefty-odds (last visited Sept. 25, 2009).
392 *See* Reginald Stuart, *Connerly Campaign Surrenders in Oklahoma* (Apr. 8, 2008), *available at* http://www.diverseeducation.com/artman/publish/ar-

TENTH CIRCUIT

Racial Classification Requirements in Government Contracting under TEA-21

Is a state or local transportation agency in Colorado, Kansas, New Mexico, Oklahoma, Utah, or Wyoming using a racial classification in an effort to act in compliance with the federal Transportation Equity Act of the 21st Century (TEA-21)?

Yes.
Is there a "compelling governmental interest" to support the use of a racial classification?

Yes. The state transportation agency can rely on the federal government's established compelling interest supporting TEA-21.

*This requirement may be met if a governmental entity passively complies with private discrimination, which contributes to discriminatory barriers in federal contracting.

Yes.
Is the racial classification "narrowly tailored" to the governmental interest?

The program will likely be narrowly tailored if:
- it relies, as much as possible, on race-neutral means to increase minority participation in government contracts.
- it is limited in duration.
- it does not require that subcontracts go to disadvantaged business enterprises (DBEs) against the will of the prime contractor, and includes the possibility of a waiver.
- it minimizes the burden to innocent 3rd parties.
- it requires applicants to submit a narrative statement describing the circumstances of their economic disadvantage.
- any percentage goals for minority participation:
  1. are aspirational;
  2. are proportionate to the number of DBEs available and willing to do the work;
  3. require a good faith effort to meet the goal; &
  4. are flexible.

No.

The racial classification is impermissible.

Yes.

The racial classification is permissible in the 10th Circuit.

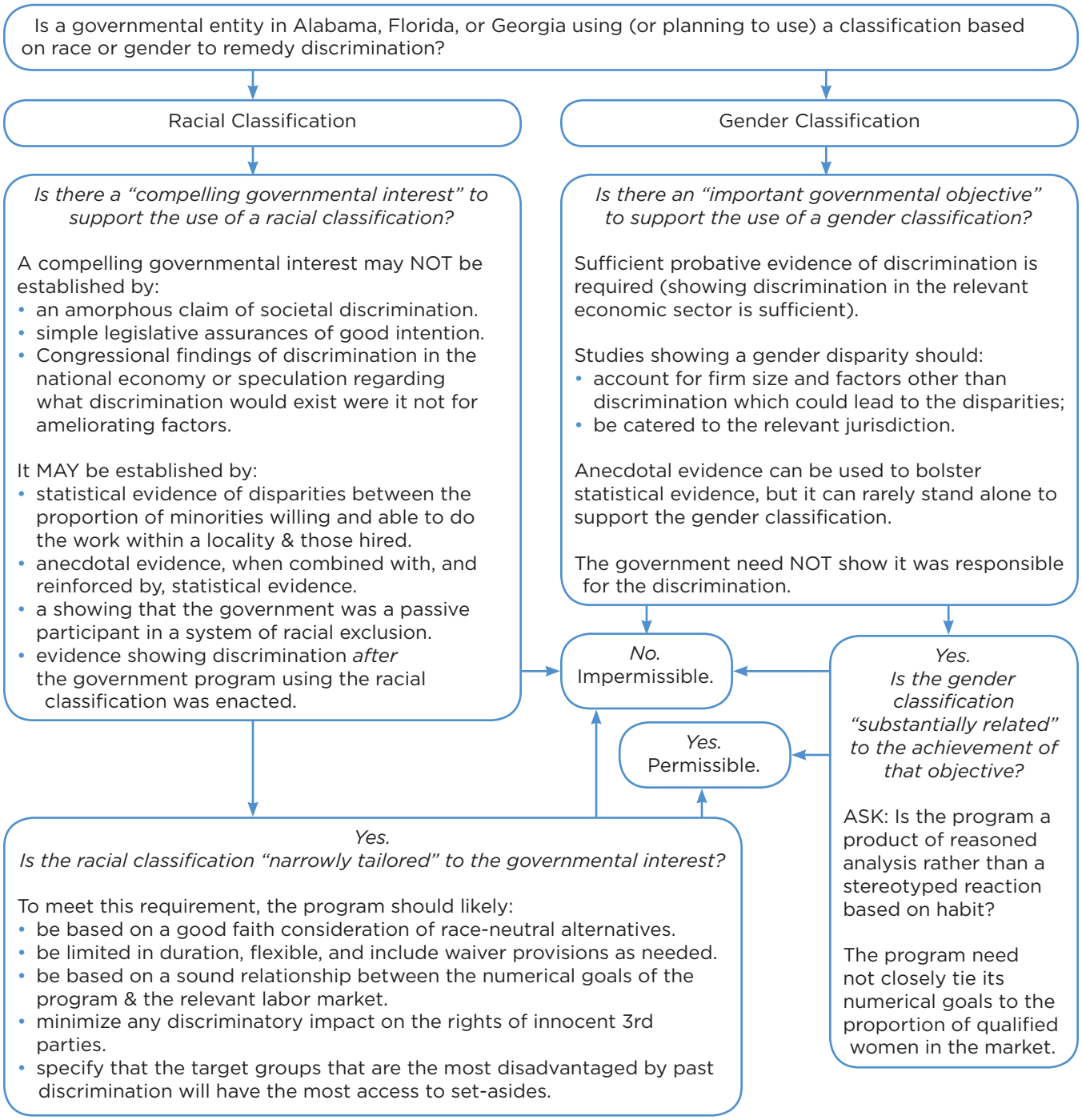
No.
The state or local program using a racial classification was instituted independently of the TEA-21.

Use original 10th Circuit chart for racial classifications. The state is required to demonstrate that its program is narrowly tailored to remedy a compelling governmental interest.

ticle_10973.shtml; *see also* Press Release, ACLU of Oklahoma Challenges Anti-Civil Rights Ballot Measure (Mar. 7, 2008), *available at* http://www.aclu.org/racialjustice/aa/34697prs20080307.html.

ELEVENTH CIRCUIT

An Overview of Race and Gender Classification Requirements in Government Contracting



ELEVENTH CIRCUIT

(Alabama, Florida, Georgia)

RACIAL CLASSIFICATIONS

The U.S. Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") has offered substantial guidance regarding the qualifications for standing to challenge a public contracting program that uses racial classifications, what forms of classifications trigger strict scrutiny, what forms of evidence are sufficient to show that a government action seeks to remedy past discrimination, and what constitutes narrow tailoring.

Virdi v. DeKalb County School District, 135 Fed. Appx. 262 (11th Cir. 2005)

In this case, the Eleventh Circuit considered a challenge to the DeKalb County School District's Minority Vendor Involvement Program (MVP) brought by an architect of Indian descent, who alleged race-based discrimination in the awarding of architectural contracts in violation of equal protection. The Court issued an unpublished *per curiam* decision striking down the program.[393]

In 1989, the school board appointed a committee to study female and minority business involvement with the district. The resulting report stated the committees' impression that minorities had not received contracts in proportion to their community presence; this conclusion was based on a "general feeling" rather than any evidence of past discrimination.[394] The report recommended that the district advertise bids in papers targeting minorities, conduct seminars to educate minorities on doing business with the district, notify minority firms regarding bidding opportunities, and publish a "how to" booklet available to any business wanting to do business with the district.[395] The report recommended goals of 15 percent participation for "Black Businesses," 5 percent participation for "Female Businesses," and 5 percent participation goal for "Other Minorities."[396] These "goals" were aspirational and not mandatory.[397] The district adopted the report's recommendations and created the MVP program to implement them.[398]

A. Strict scrutiny applies to all racial classifications

In reviewing the constitutional challenge to the MVP program, the Eleventh Circuit applied strict scrutiny, reversing the District Court's ruling that, because the MVP did not explicitly direct government actors to withhold or confer benefits based on the applicant's race, the MVP was not subject to strict scrutiny.[399]

- "To the extent that Defendants argue that the MVP did not contain racial classifications because it did not include set-asides or mandatory quotas, we note that strict scrutiny applies to *all* racial classifications, not just those creating binding racial preferences. The MVP includes racial classifications. It is therefore subject to strict scrutiny."[400]

B. A racial classification is not narrowly tailored in the absence of consideration of race-neutral alternatives and when it is of unlimited duration.

The Eleventh Circuit held that the MVP's racial goals were not narrowly tailored for two reasons. First, the

393 This case does not create binding precedent but may be cited as persuasive authority. U.S. Ct. of App. 11th Cir. R. 36-2.
394 *Virdi*, 135 Fed. Appx. at 264.
395 *Id.*
396 *Id.*
397 *Id.*
398 *Id.* at 264-65.
399 *Id.* at 267.
400 *Id.* (citing *Grutter*, 539 U.S. at 326).

District failed to produce evidence that it had considered race-neutral alternatives to achieve its purported goal of tracking its activities to avoid unwitting discrimination. Second, the "unlimited duration" of the MVP's racial goals meant that there was no mechanism for recognizing a correction of the harm.[401] Because the program was not narrowly tailored, the Eleventh Circuit found the MVP facially unconstitutional.

- "While narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake."[402] The Court suggested that race-neutral alternatives could have been effectively employed, such as tracking the participation and success of qualified minority-owned businesses in the bidding process in comparison to comparable nonminority owned firms, in response to its standard outreach practices.[403]

Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895 (11th Cir. 1997)

In *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895 (11th Cir. 1997), the Eleventh Circuit held that three affirmative action programs enacted by Miami Dade County—the Black Business Enterprise program (BBE), the Hispanic Business Enterprise program (HBE), and the Women Business Enterprise program (WBE)—violated the equal protection clause of the Fourteenth Amendment. The Court based its holding in part on a finding that the county failed to proffer sufficiently strong statistical evidence of discrimination in the county construction market to create a "foundation" for anecdotal evidence to build upon.[404]

The three affirmative action programs in Miami Dade County, collectively known as the MWBE programs, established participation goals of 15 percent for BBEs, 19 percent for HBEs, and 11 percent for WBEs for all construction contracts funded in whole or in part by the county in excess of $25,000.[405] Under the MWBE programs, the county was required to "make every reasonable effort to achieve the participation goals," including use of any of the following "contract measures":

- set-asides, whereby a contract is set aside for bidding exclusively among MWBEs, when at least three MWBEs are available to perform the contract;
- subcontractor goals, whereby the county requires prime contractors to subcontract a fixed percentage of work to MWBEs;
- project goals, whereby the county creates a pool of MWBE subcontractors from which it selects firms for specified types of work under county contracts;
- bid preferences, whereby the county factors in a 10 percent discount on MWBEs' bids for purposes of determining the lowest bid; and
- selection factors, whereby the county can boost MWBE ratings on certain evaluation factors other than price by up to 10 percent.[406]

A. Standing: Plaintiff nonminority firms need not present evidence that they would be affected by the MWBE programs.

The Eleventh Circuit held that, to establish standing, a party challenging a set-aside program need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.[407] The parties' stipulation that the county would likely exclude the plaintiffs' non-

401 *Id.* at 268 (citing *Grutter*, 539 U.S. at 342).
402 *Id.* (citing *Grutter*, 539 U.S. at 339).
403 *Id.* at 268 & n.8.
404 *Eng'g Contractors Ass'n*, 122 F.3d at 926.
405 *Id.* at 901.
406 *Id.*
407 *Id.* at 906 (quoting Ne. Fla. Contractors v. City of Jacksonville, 508 U.S. 656, 666 (1993)).

MWBE members in the future—based on racial, ethnic, and sexual criteria—from biding for certain contracts provided a sufficient basis on the record to establish plaintiffs' standing.[408]

B. General societal discrimination or speculation cannot constitute a sufficient evidentiary basis to establish a compelling government interest.

To uphold an affirmative action program using racial classifications, a district court must make a factual determination that there exists a strong basis in evidence to support the conclusion that remedial action is necessary.[409] A strong basis in evidence *cannot* rest on "an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy."[410] Nor may a strong basis in evidence arise from "sheer speculation" regarding what discrimination would exist, were it not for certain ameliorating factors (such as the existence of an affirmative action program)."[411]

C. The government may present statistical and anecdotal evidence to show discrimination.

A governmental entity may justify affirmative action by demonstrating "gross statistical disparities" between the proportion of minorities hired and the proportion of minorities willing and able to do the work.[412] Anecdotal evidence may also be used to document discrimination, but will likely only satisfy the government's burden when "combined with and reinforced by sufficiently probative statistical evidence."[413]

- The county produced "disparity indices," measuring the amount of contracts actually awarded to MWBEs against the amount that would have been expected based on MWBEs' bidding activity and awardee success rate. The Court found that disparity indices of 80 percent or greater are not evidence of discrimination.[414]
- The statistical studies were rejected because, unlike regression analyses, they failed to take into account firm size, a factor that explained most of the unfavorable disparities.[415]

D. A showing of the government's passive participation in racial discrimination is sufficient.

The Eleventh Circuit cited *Croson* for the proposition that, if a county could show that it had become a "passive participant" in a system of racial exclusion by elements of the local construction industry, the county could take affirmative steps to dismantle such a system.[416]

E. The plaintiff bears the burden of rebutting the inference of discrimination based on statistical evidence.

When the government produces statistical evidence sufficient to support an inference of discrimination, the plaintiff, in order to prevail, bears the burden of rebutting that inference[417] by providing a "neutral explanation" and doing one of three things: showing that the statistics are flawed, showing that the disparities are not significant or actionable, or producing contrasting statistical data.[418] In this case, the Court found that the plaintiffs produced sufficient evidence to establish a neutral explanation for the disparity indices, given that minority-owned firms tended to be smaller and thus less able to handle contracts.[419]

408 *Id.* at 905.
409 *Id.* at 906.
410 *Id.* at 907.
411 *Id.* at 912.
412 *Id.* at 907.
413 *Id.* at 925.
414 *Id.* at 914.
415 *Id.* at 924.
416 *Id.* at 907 (citing *Croson*, 488 U.S. at 492)).
417 *Id.* at 916 (citing *Concrete Works*, 36 F.3d at 1522 (10th Cir. 1994); *Contractors Ass'n*, 6 F.3d at 1006 (3d Cir. 1993); Howard v. McLucas, 871 F.2d 1000, 1007 (11th Cir. 1989)).
418 *Id.*
419 *Id.*

F. Evidence of discrimination may be drawn from post-enactment studies.

The Eleventh Circuit stated that "'the Supreme Court has never required that, before implementing affirmative action, the employer must have already proved that it has discriminated. On the contrary, formal findings of discrimination need neither precede nor accompany the adoption of affirmative action.'"[420] However, if the government presents post-enactment evidence that tends to understate the effects of discrimination (due to the positive effects of the program), the District Court is not free to speculate on what discrimination would have been found absent the programs.[421]

- "Government actors are free to introduce post-enactment evidence in defending affirmative action programs, but if that evidence fails to meet the applicable evidentiary burden, a federal court cannot simply presume that, absent the programs, sufficient evidence of discrimination would have been found."[422]

G. Four factors are considered in the narrow tailoring inquiry.

The Eleventh Circuit concluded that, even had the county provided a sufficient evidentiary foundation supporting enactment of the MWBE programs, the programs were not sufficiently linked to the stated legitimate purpose of remedying the effects of past and present discrimination against blacks, Hispanics, and women in the Dade County construction market.[423] The Court held that, in the Eleventh Circuit, fours factors are considered in a narrowly tailoring inquiry:

- 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 numerical goals to the relevant labor market; and
- the impact of the relief on the rights of innocent third parties.[424]

The Eleventh Circuit found that the county's MWBE programs failed on the first of these four factors, because the county failed to give serious and good-faith consideration to the use of race- and ethnicity-neutral measures to increase Black Business Enterprise and Hispanic Business Enterprise participation in the county construction market, failed to take any action to discover and respond to instances of discrimination in the county's own contracting process, and failed to pass any local ordinances to outlaw discrimination by local contractors, subcontractors, suppliers, bankers, or insurers.[425]

- The Court found that many of the race-neutral alternatives identified by Justice O'Connor in the plurality opinion for *Croson* could have been applied in this case, such as "simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races."[426]
- "The first measure every government ought to undertake to eradicate discrimination is to clean its own house and to ensure that its own operations are run on a strictly race- and ethnicity-neutral basis."[427]

Cone Corporation v. Hillsborough County, 908 F.2d 908 (11th Cir. 1990)

In *Cone Corporation v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990), *cert. denied*, 498 U.S. 983 (1990), the Eleventh Circuit declined to strike down the Hillsborough County Minority Business Enterprise (MBE) program for minority and women contractors on equal protection grounds. The Court distinguished

420 *Id.* at 911 (quoting Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1580 (11th Cir. 1994)).
421 *Id.* at 912.
422 *Id.*
423 *Id.* at 927.
424 *Id.* (quoting *Ensley Branch*, 31 F.3d at 1569).
425 *Id.* at 927-29.
426 *Id.* at 928 (quoting *Croson*, 488 U.S. at 509-10 (plurality opinion)).
427 *Id.* at 929.

the Hillsborough County program from the one struck down by the Supreme Court in *Croson*,[428] stating that the Hillsborough program was carefully crafted to avoid the pitfalls identified by the Supreme Court,[429] and finding that the government had presented sufficient facts to show that the plan was narrowly tailored to address identified discrimination.[430]

Hillsborough initiated a voluntary MBE program in 1978. In 1981, a study of the program revealed that minorities were significantly underrepresented in county contracts, but the county chose to continue with its program. In 1984, the county concluded that, without some affirmative legal obligation placed on contractors, the voluntary program would fail to ensure MBE participation in county contracting projects. Accordingly, the county developed an MBE law, whose objective was to eliminate past discrimination in county construction by ensuring that construction contractors provided equal opportunity employment to MBEs.[431] In addition to various measures designed to promote MBE participation in county construction contracting, the program also established an annual MBE participation goal of 25 percent, with 20 percent of the participation coming from economically disadvantaged MBEs.[432]

A. The material differences between the Hillsborough plan and the one stuck down by *Croson* (the "Richmond Plan") were significant enough to merit further fact finding to determine if the Hillsborough plan was permissible.

Rejecting the finding of the District Court that the Supreme Court's holding in *Croson* required granting summary judgment to plaintiff, the Eleventh Circuit pointed to several significant differences between the Hillsborough plan and the Richmond plan with regard to showing of a compelling interest on the government's part justifying the legislation:

- Whereas the Richmond plan sought to remedy past discrimination in the entire construction industry, the Hillsborough plan specifically addressed discrimination by Hillsborough County.[433]
- Whereas Richmond labeled its program "remedial" without proof of prior discrimination, Hillsborough's law resulted from prolonged studies of the local construction industry that indicated a continuing practice of discrimination.[434]
- Whereas Richmond implemented its program without information about the total number of MBE contractors or the percentage of city construction dollars received by MBE businesses, Hillsborough gathered information about disparities between the number of qualified MBE contractors and the amount of contracts awarded to them.[435]

Given that the evidence was buttressed further by anecdotal evidence documenting MBE subcontractors' individual experiences with discrimination, the Court found that the combined statistical and anecdotal evidence provided "more than enough evidence" to withstand summary judgment.[436]

B. Unlike the Richmond plan, the Hillsborough plan was narrowly tailored to remedy the past discrimination by the county.

The Court concluded that the differences between the Hillsborough and the Richmond plans raised issues of material fact sufficient to preclude the grant of summary judgment on the question of narrow tailoring.[437]

428 The Eleventh Circuit observed that *Croson* "did no more and no less than strike down the specific elements of the Richmond plan. It did not, as Justice Scalia would have had it do, limit a local government's authority to implement affirmative action plans to those instances constituting 'a social emergency rising to the level of imminent danger to life and limb.'" *Cone Corp.*, 908 F.2d at 913.
429 *Id.* at 917.
430 *Id.* at 916-17.
431 *Id.* at 909-11.
432 *Id.* at 910.
433 *Id.* at 914, 915.
434 *Id.*
435 *Id.*
436 *Id.* at 916.
437 *Id.* at 917.

- Whereas Richmond failed to consider race-neutral alternatives, Hillsborough did consider such alternatives. It enacted the MBE law only when the MBE program failed to remedy the discrimination. Furthermore, the Hillsborough program included the race-neutral alternatives suggested by *Croson*, implementing simplified bidding procedures, relaxed bonding requirements, and training and financial aid.[438]
- Whereas Richmond fixed a rigid 30 percent minority participation goal directed towards racial balancing, the Hillsborough plan set a flexible goal of 25 percent MBE participation, which applied only to projects for which there were three or more qualified MBE subcontractors.[439]
- Whereas the Richmond plan grouped all minorities together when setting aside contracts, Hillsborough specified that target groups most disadvantaged by past discrimination would have the most access to set-asides.[440]

GENDER CLASSIFICATIONS

Among all the circuits, the Eleventh Circuit has devoted the most sustained attention to the constitutionality of gender classifications in affirmative action programs.

Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895 (11th Cir. 1997)

A. The use of gender preferences is reviewed under intermediate scrutiny, which is satisfied by "sufficient probative evidence" of discrimination.

The Eleventh Circuit held that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.[441] A gender-based affirmative action program can rest safely on something less than the "strong basis in evidence" required to bear the weight of a race- or ethnicity-conscious program, but must offer something more than simple probative evidence.[442] Accordingly, a proponent of gender classifications in an affirmative action program must present "sufficient probative evidence" of discrimination.[443] This standard is satisfied by a showing of discrimination in the relevant economic sector; the government need not show that it was responsible for the discrimination.[444]

B. Intermediate scrutiny of the use of gender classifications does not require narrow tailoring of the remedy.

A governmental entity need not show that a gender classification in an affirmative action program was used as a "last resort," but must show that the program was "a product of [reasoned] analysis rather than a stereotyped reaction based on habit."[445] Second, a program based on gender classifications need not closely tie its numerical goals to the proportion of qualified women in the market.[446]

C. Disparity statistics that do not account for firm size are not probative evidence of gender discrimination.

The county relied on statistics showing that WBEs were awarded construction contracts in lesser numbers and in fewer dollar amounts than expected based on the number of WBEs bidding for contracts. The Court rejected this evidence on the ground that WBE firms tended to be smaller than non-WBE firms, and when the analysis corrected for the size of firms, most disparities were statistically insignificant.[447]

438 *Id*. at 916 & n. 11.
439 *Id*. at 916-17.
440 *Id*. at 917.
441 *Eng'g Contractors*, 122 F.3d at 908.
442 *Id*. at 909, 910
443 *Id*. at 910.
444 *Id*; *see also* Danskine v. Miami Dade Fire Dep't, 253 F.3d 1288, 1294 (11th Cir. 2001); *Ensley Branch*, 31 F.3d at 1569.
445 *Id*.
446 *Id*. at 929.
447 *Id*. at 916-17.

D. A disparity study must compare sales and receipts from the relevant jurisdiction.

The county pointed to the low proportion of total sales and receipts received by WBEs in comparison to other subcontractors, based on a calculation that compared the ratio of number of contracts to amount of dollars received by WBE firms in contrast to all other firms. The Court approved of the District Court's finding that this comparison produced a skewed result, because it considered all sales and receipts rather than just those flowing from Dade County projects.[448]

E. Statistics showing disparity between actual and expected public contract dollars flowing to WBE firms may not be probative evidence of discrimination, but may show disparity resulting from other causes.

The county pointed to data showing that women were less likely to own construction businesses in Dade County than their human and financial capital, as measured by census data, would predict. The Court questioned the appropriateness of any assumption that this disparity should be attributed to discrimination rather than divergent patterns of interest, and also noted that evidence showing in recent years, the growth of WBE firms outpaced that of non-WBE firms tended to undercut any assumption of discrimination in the construction market.[449]

F. Anecdotal evidence can rarely stand alone to support the enactment of a public contract program using gender classifications.

The county offered anecdotal evidence of discrimination against female contractors and subcontractors and evidence from employees responsible for the county's contracting program describing how discrimination could and did taint the bidding process. The Court concluded that while anecdotal evidence can play an important role in bolstering statistical evidence, "only in the rare case" can anecdotal evidence alone support an affirmative action program, and the statistics in this case were insufficient.[450]

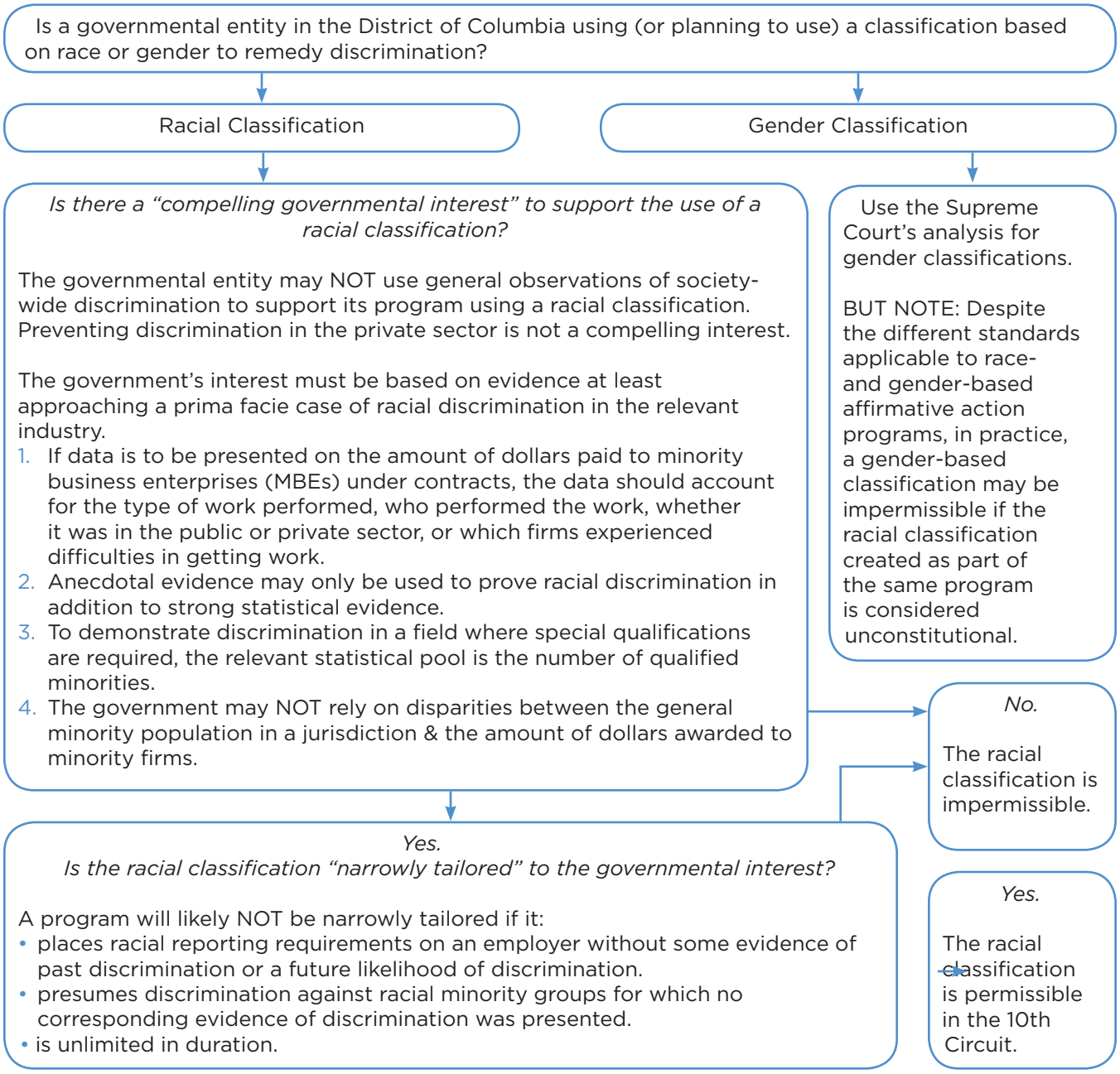
G. The use of gender classifications in the WBE program was substantially related to remedying gender discrimination.

The Court concluded that, had sufficient evidence of sex discrimination been presented, the WBE program would be found to be substantially related to remedying that discrimination.[451] The county's goal of 11 percent WBE participation could withstand scrutiny despite the fact that the availability of WBE bidders ranged from 3.2 percent to 13.3 percent, because the availability of waivers made the WBE target fairly flexible.[452]

448 *Id.* at 920.
449 *Id.* at 921-22.
450 *Id.* at 924-26.
451 *Id.* at 929.
452 *Id.*

DISTRICT OF COLUMBIA CIRCUIT

An Overview of Race and Gender Classification Requirements in Government Contracting



DISTRICT OF COLUMBIA CIRCUIT

In 1992, the U.S. Court of Appeals of the District of Columbia Circuit ("D.C. Circuit") issued *O'Donnell Construction Company v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992), which hewed to common trends among many other Circuit Courts in its application of *Adarand I* and *Croson* to a public contracting program using racial classifications. The Court's 2001 decision in *MD/DC/DE Broadcasters Association v. F.C.C.*, 236 F.3d 13 (D.C. Cir. 2001), did not review a government contracting program using racial or gender classifications, but did apply *Adarand I* and *Croson* and offers important clues as to the Court's review of government benefit programs using racial and gender classifications.

RACIAL CLASSIFICATIONS

MD/DC/DE Broadcasters Association v. F.C.C., 236 F.3d 13 (D.C. Cir. 2001)

In *MD/DC/DE Broadcasters*, the D.C. Circuit struck down Federal Communications Commission ("FCC") regulations requiring licensed broadcasters to undertake affirmative outreach to women and minorities and to report data regarding the race of applicants as a violation of equal protection.

The challenged FCC rule required licensees to make good-faith efforts to disseminate widely any information about job openings and allowed broadcasters to select one of two options in further pursuit of that goal: under option A, a licensee was required to adopt four approved recruitment initiatives in each two-year period, drawing from a list supplied by the FCC.[453] Under option B, the licensee could adopt its own outreach program, but had to report the race and sex of each employee and the source by which the applicant was referred to the station.[454] The FCC stated that it would use the data from this reporting only to monitor industry trends and not to screen renewal applications or assess licensee compliance with regulations.[455] However, when adopting the rule, the FCC stated that if the data regarding race and gender did not confirm that recruitment was reaching the entire community, the FCC would investigate and would expect a broadcaster to modify its program to be more inclusive.[456]

A. The program used racial classifications because it exerted so much pressure on licensees to recruit women and minorities that such recruitment could be considered involuntary, despite the existence of an option for compliance that was facially race-neutral.

The Court found that, while Option A offered race-neutral means by which licensees could fulfill the recruiting measures required by the FCC rule, Option B created pressure to recruit women and minorities.[457] Although compliance with the regulation was framed as a choice, the Court noted that the FCC had a long history of employing pressure on broadcasters to conform to regulations without using official sanctions, and that investigation by the FCC was a powerful threat.[458] The Court reasoned that if the FCC's true goal was to broaden recruiting outreach, it would scrutinize recruiting, not the race and gender of employees, indicating

453 *MD/DC/DE Broadcasters Assoc'n*, 236 F.3d at 17. The list included a wide variety of race-neutral alternatives, such as hosting a job fair, establishing an internship program, participating in scholarship programs, and training personnel for higher positions. Two approved programs on the list explicitly targeted women and minorities: co-sponsoring at least one job fair with organizations whose membership included substantial participation of women and minorities, or listing upper-level jobs in a job bank or newsletter of groups whose membership included substantial numbers of women and minorities. *Id.*
454 *Id.*
455 *Id.*
456 *Id.* at 19.
457 *Id.* at 18.
458 *Id.* at 19.

that the agency was "interested in results, not process, and is determined to get them."[459] The fact that broadcasters had a choice between using the means set forth in Option A and Option B to comply with the rule was not significant to the Court.

B. Any requirement that results in unequal treatment on account of race, even indirectly, constitutes a race-based classification.

The Court rejected the argument that affirmative recruiting outreach did not implicate equal protection because it merely expanded the applicant pool, and that preferential recruiting damaged no one, finding that the program impermissibly led to people being treated differently on account of their race; accordingly, strict scrutiny was required.[460]

- The Court reasoned that the FCC required broadcasters to "redirect their necessarily finite recruiting resources" in order to attract more applications from minority candidates. As a result, "some prospective nonminority applicants who would have learned about job opportunities but for the Commission's directive now will be deprived of an opportunity to compete simply because of their race."[461]
- "[T]hat the most qualified applicant from among those recruited will presumably get the job does not mean that people are being treated equally – that is, without regard to their race – in the qualifying round."[462]

C. Preventing future discrimination in the private sector is probably not a compelling interest.

The government argued that it enacted the rule to further its compelling interest in remedying the effects of past discrimination and preventing future discrimination in the distribution of public benefits.[463] The Court suggested that because the government had no obligation to remedy such future discrimination, the government had failed to establish a compelling interest.[464] However, the Court did not resolve this issue, because it determined that the program was clearly not narrowly tailored.

- "[I]t is far from clear that future employment in the broadcast industry is a public benefit for which the Government is constitutionally responsible."[465]

D. There was no finding that any individual broadcaster discriminated in the past or might be expected to do so in the future.

The Court stated that a "sweeping" rule that did not single out broadcasters for reporting requirements based on some evidence of past discrimination or future likelihood of discrimination was "the antithesis of a rule narrowly tailored to meet a real problem."[466]

E. The reporting requirement signaled an impermissible goal of achieving a certain racial target in recruiting.

The Court reasoned that gathering information regarding the race of each job applicant could be relevant to the prevention of discrimination only if it were assumed that minority groups would respond to non-discriminatory recruitment efforts in a predetermined ratio, such as in proportion to their representation in the local workforce. The goal of achieving a certain racial balance in the workforce violated equal protection.

- "The racial data required by Option B simply are not probative on the question of a licensee's efforts to achieve 'broad outreach,' much less narrowly tailored" to further the goal of non-discrimination in the broadcast industry.[467]

459 *Id.*
460 *Id.* at 20.
461 *Id.* at 20-21.
462 *Id.* at 21.
463 *Id.*
464 *Id.*
465 *Id.*
466 *Id.* at 22.
467 *Id.* The Court's suggestion that gathering racial data triggers strict scrutiny is in conflict with Justice Kennedy's statement in Parents Involved in Com-

F. The use of unconstitutional classifications in Option B was not severable from the rest of the program.

The Court determined that the remaining part of the rule could not function independently of the unconstitutional aspects. Because elimination of Option B would remove the flexibility intended for the rule, Option A could not stand alone.[468] Second, even though sex-based classifications are subject to intermediate scrutiny, the FCC could not sensibly grant greater preferences to white women than to non-white men.

O'Donnell Construction Company v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992)

In this pre-*Adarand I* decision, the D.C. Circuit determined that the owners of a nonminority construction company should receive a preliminary injunction enjoining the enforcement of the set-aside provisions of the District of Columbia Minority Contracting Act (DCMCA) on equal protection grounds.[469]

The challenged version of the DCMCA, which was enacted in 1983, required each agency of the District of Columbia ("the District") to "[a]llocate its construction contracts in order to reach the goal of 35 percent . . . of the dollar volume of all construction contracts to be let to local minority business enterprises."[470] The Act also required the District's Minority Business Opportunity Commission to establish programs to assist MBEs, including "a sheltered market approach to contracts" by which agencies would "set aside contracts and subcontracts for 'limited competition' in bidding among MBEs, to the exclusion of all others."[471] Although the DCMCA did not require agencies to reserve a specific portion of their contracts for the sheltered market, it mandated that each agency "allocate to the sheltered market a sufficient portion of its contracts to enable it to reach the 35 percent goal."[472] MBEs certified by the Commission were permitted to participate in sheltered markets; non-MBEs were not.[473]

The DCMCA defined "'minority' to mean 'Black Americans, Native Americans, Asian Americans, Pacific Islander Americans, and Hispanic Americans, who by virtue of being members of the foregoing groups, are economically and socially disadvantaged because of historical discrimination practiced against these groups by institutions within the United States of America."[474]

A. A program providing participation "goals" for MBEs, rather than participation "quotas," is nevertheless subject to strict scrutiny when the "goal" in effect requires contracts to be set aside for bidding only by MBEs.

In this case, the challenged act stated that it was a "goal" to award 35 percent of the dollar value of all public contracts to MBEs. Although the statute did not use the word "quota" or "requirement," the D.C. Circuit reasoned that the impact of the Act required the use of racial classifications in two ways, and therefore warranted strict scrutiny review.[475]

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munity Schools v. Seattle School District No. 1: "School boards may pursue the goal of bringing together students of diverse backgrounds and races through [various] means, including… tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible." 551 U.S. 701, 789 (2007) (Kennedy, J., concurring).

468 *Id.*

469 O'Donnell Constr. Co. v. Dist. of Columbia, 963 F.2d 420, 422 (D.C. Cir. 1992). At the time of the D.C. Circuit's decision in this case, the Supreme Court's decision in Fullilove v. Klutnick, 448 U.S. 448, was still good law. Although the District of Columbia had argued before the trial court that the Act should be reviewed according to the intermediate scrutiny standard described in *Fullilove* for federal remedial legislation using racial classifications, it abandoned this argument on appeal. *Id.* at 423. The D.C. Circuit in *O'Donnell* nevertheless commented that the strict scrutiny standard set forth in *Croson*—not the intermediate standard described in *Fullilove*—applied because the District of Columbia did not share Congress's power to enact remedial legislation under section 5 of the Fourteenth Amendment, a power which the Supreme Court relied upon in the *Fullilove* decision to determine that a federal set aside program was subject to intermediate, rather than strict, scrutiny. *Id.*

470 *Id.*

471 *Id.*

472 *Id.* Although it was unclear what percentage of the District's contracts were reserved for the sheltered market, the D.C. Circuit determined that this fact was not material to its determination that the set aside violated the promise of equal protection provided by the Fifth Amendment. *Id.* at 423.

473 *Id.* at 422.

474 *Id.*

475 *Id.* at 424.

- The DCMCA contained the directive that each contracting agency of the District of Columbia "*shall*" allocate its construction contracts in order to reach the goal of 35 percent.[476] If any agency of the District of Columbia fell short of the 35 percent participation goal, the DCMCA required the District's Minority Business Opportunity Commission to remedy the agency's failings by reserving a sufficient portion of the agency's contracts to be awarded according to the Commission's programs.[477]
- The DCMCA used racial classifications that were as "rigid" as the rule struck down by the Supreme Court in *Croson* (which allowed for a 30 percent set-aside for MBE's) because the DCMCA required firms to award at least half of any subcontracts to minority firms.[478]

B. A public contracting program that uses racial classifications must be based on "evidence at least approaching a *prima facie* case of racial discrimination in the relevant industry."[479] Only such evidence will demonstrate a compelling governmental interest in remedying past discrimination.

The D.C. Circuit determined that the Fifth Amendment's equal protection principle and the holding of *Croson* required the legislature of the District of Columbia to demonstrate that it had a compelling governmental interest to support the use of racial classifications in the DCMCA.[480] The Court reasoned that to show that the District had such an interest, it had to demonstrate a "strong basis in evidence" that the program was instituted to remedy past racial discrimination and that this showing could be made only by providing "evidence at least approaching a *prima facie* case of racial discrimination in the relevant industry."[481] Such discrimination must be "identified," whether that discrimination is by public or private entities.[482]

- The D.C. Circuit faulted the government for failing to provide "any evidence that agencies of the District of Columbia had been favoring white contractors over non-whites, or that the typical bidding process was somehow rigged to have this effect."[483]
- While only 3.4 percent of construction contracts were awarded to MBEs, 33.5 percent of repairs and improvement contracts, 32.2 percent of architectural contracts, and 24.5 percent of material management contracts went to MBEs, indicating that the 3.4 percent figure was not a result of agency discrimination.[484]
- The D.C. Circuit held that data pertaining to the amount of contracting dollars paid to MBEs that did not specify the types of work performed, who performed the work, whether it was in the public or private center, or which firms experienced difficulties in getting work, was "constitutionally meaningless."[485]
- Anecdotal evidence regarding discrimination by white firms against minority subcontractors could serve only as a supplement to strong statistical evidence, which was lacking.[486]
- "[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."[487]

C. General statements of purpose to remedy historical or societal discrimination do not satisfy the evidentiary requirement.

The DCMCA stated that it sought to "overcome the effects of past discrimination in the allocation of contracts" and that "a persistent pattern of racial discrimination in our society has prevented minority business enterprises from gaining a fair share of contracts and subcontracts for construction supplies, and materials

476 *Id.* at 423 (emphasis in original).
477 *Id.* at 424.
478 *Id.*
479 *Id.*
480 *Id.*
481 *Id.*
482 *Id.*
483 *Id.* (internal quotation marks omitted).
484 *Id.* at 426.
485 *Id.* at 425-26.
486 *Id.* at 427.
487 *Id.*

in both the public and private sector."[488] The Court found that these general expressions of purpose carried no weight in meeting the strong basis in evidence standard because an "observation about society-wide discrimination, regardless of its truth, cannot be relied upon to enact racial preferences."[489]

- The District's report suggested that minority firms were few in number, lacking in expertise, or small in size due to past discrimination, but offered no specific data to support the claim, instead relying on a general history of past discrimination in society.[490]
- The disparity between the general minority population of the District and the amount of contracting dollars awarded to minorities was irrelevant.[491]

D. To support a determination that there is identified racial discrimination in the contracting industry, such evidence must actually show racial discrimination, rather than problems confronting contractors of all backgrounds.

The Circuit Court found that much of the anecdotal evidence of racial discrimination proffered by the government did not demonstrate the existence of identified racial discrimination in the contracting industry, as it indicated only that minority contractors faced barriers that all other contractors face, including bonding requirements and other structural impediments.[492]

E. The participation goal was not narrowly tailored to remedy past discrimination because it was not based on any statistically significant evidence, did not account for discrimination against non-African American groups who benefitted from the set-aside, and did not have a sunset provision.

The D.C. Circuit stated that the District's failure to identify the discrimination with specificity made it impossible to assess whether the remedy was "narrowly tailored" to address the harm.[493] The data pertaining to African-American firms was weak, and there was no data provided regarding discrimination in the construction industry against Hispanic Americans, Asian Americans, Pacific Islander Americans, or Native Americans, all of which were included in the DCMA's definition of "minority."[494] Nor was there any apparent attempt to link the remedy with the harm, as the participation goal was decided not based on evidence of past discrimination, but rather on a rough calculation of the capacity of MBEs to perform public contracts, which had failed to take account of whether those firms were qualified or available to perform such contracts.[495] Last, there was no sunset provision in the amended law.[496]

GENDER CLASSIFICATIONS

MD/DC/DE Broadcasters Association v. F.C.C., 236 F.3d 13 (D.C. Cir. 2001)

The challenge in this case (discussed above) focused on the racial aspects of the program and not the parallel requirements to undertake outreach to women and to report data regarding the sex of applicants. Although the D.C. Circuit acknowledged that the use of gender classifications was subject to intermediate rather than strict scrutiny, the Court nevertheless vacated the recruiting requirements as they related to women as well.[497] The Court reasoned that severing all reverences to minorities while maintaining gender preferences would distort the FCC's program and produce a rule far different than the one contemplated. This case suggests that in practice, gender-based affirmative action may turn on the constitutionality of any companion race-based affirmative action, despite the different standards theoretically applicable to different aspects of the program.

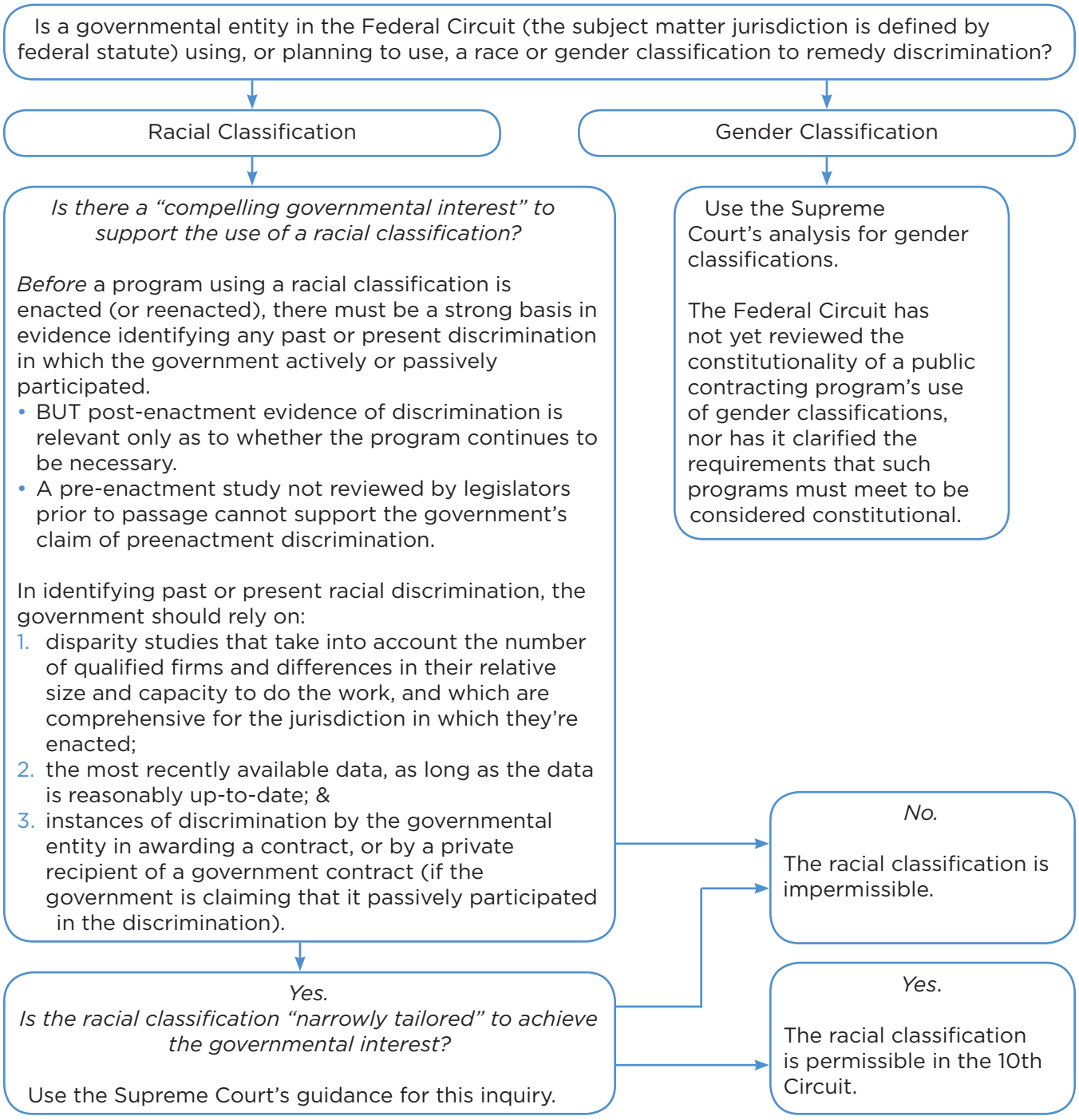
488 *Id.* at 425 (internal quotation marks omitted).
489 *Id.*
490 *Id.* at 427.
491 *Id.*
492 *Id.* The District apparently did not present evidence that MBEs faced greater challenges in these areas than other firms.
493 *Id.*
494 *Id.*
495 *Id.* at 426.
496 *Id.* at 428.
497 *MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 22-23.

- Because the FCC had previously treated women and minorities identically in affirmative action efforts, the Court concluded, "In these circumstances, it is clear that severing all references to minorities [while retaining references to women] would severely distort the [FCC]'s program and produce a rule strikingly different from any the [FCC] has ever considered or promulgated . . . ."[498] The Court reached this conclusion despite the fact that the FCC had intended the regulation to be severable.[499]

498 *Id.* at 23.
499 *Id.* at 22.

FEDERAL CIRCUIT

An Overview of Race and Gender Classification Requirements in Government Contracting



FEDERAL CIRCUIT

Subject Matter Jurisdiction Defined by Federal Statute

In 2008, the Federal Circuit issued *Rothe Development Corporation v. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), in which the Court overturned a federal statute establishing race-based preferences in the awarding of defense contracts. Given that the Federal Circuit's jurisdiction is based wholly on subject matter rather than geographic location,[500] and that the issue of race and gender classification in contracting came to the Court through the unusual channel of the Little Tucker Act,[501] the case is of limited controlling precedential value for future cases in this subject area.[502] The *Rothe* decision is nevertheless important because the Federal Circuit reaches further than all other Courts of Appeals in its rulings discrediting the evidentiary basis used by the government to assert that it enacted the contracting program to further a compelling interest, as required under strict scrutiny review.

RACIAL CLASSIFICATIONS

Rothe Development Corporation v. Department of Defense, 545 F.3d 1023 (Fed. Cir. 2008)

In a series of three decisions in *Rothe Dev. Corp v. U.S. Dep't of Def.*, 262 F.3d 1306 (Fed. Cir. 2001) ("*Rothe III*"), *Rothe Dev. Corp v. U.S. Dep't of Def.*, 413 F.3d 1327 (Fed Cir. 2005) ("*Rothe V*"), and *Rothe Dev. Corp v. U.S. Dep't of Def.*, 545 F.3d 1023 (Fed. Cir. 2008) ("*Rothe VII*"), the Federal Circuit reviewed an equal protection challenge to a federal program, 10 U.S.C. § 2323 ("Section 1207"), which (1) set a "goal" to award 5 percent of federal defense contracting dollars each fiscal year to certain entities, including small businesses owned and controlled by "socially and economically disadvantaged individuals" (such business referred to as "SDBs"); (2) adopted the Small Business Act's presumption that black Americans, Asian Americans, Hispanic Americans, and Native Americans are socially disadvantaged individuals;[503] and (3) provided that the Department of Defense would give specified forms of assistance to the listed entities, including making advance payments to them and awarding them contracts at prices up to 10 percent above fair market cost, when practicable and necessary to achieve the statute's 5 percent goal.[504] The statute was first enacted in 1986 for a three-year period, was reenacted in 1989, was amended in 1998, and was reenacted in 1999, 2002, and 2006.[505]

Rothe Development Corporation ("Rothe"), a contracting firm owned by a Caucasian woman, challenged Section 1207 both on its face and as applied by the Department of Defense and the Department of the Air Force (together "DOD").[506] After the suit was filed in 1998, it experienced a long and complex procedural

500 The Court's appellate jurisdiction is generally set forth in 28 U.S.C. § 1295 (2000), and affords the Court jurisdiction to consider appeals from determinations of veterans' claims, patent and trademark claims, international trade claims, and claims under various particular Acts, including the Little Tucker Act, 28 U.S.C. § 1346 (1997), which was the basis for jurisdiction in this case.

501 Pursuant to the Little Tucker Act, the federal government has waived its sovereign immunity with respect to claims based on the Constitution, certain federal statutes, certain regulations, and certain federal contracts that seek damages less than $10,000; these claims are reviewable by the Federal Circuit and the Court of Federal Claims. 28 U.S.C. § 1346.

502 Since it was issued, the decision has not been cited by any court other than the District Court below. A search of Federal Circuit cases reveals that 126 decisions include references to the Little Tucker Act and to the term "contract." Of these, only two cases concerned the issue of how government contracts are awarded: *Rothe* and Levine v. Johnson, 78 F.3d 603 (Fed. Cir. 1996).

503 *See* Section 8(d) of the Small Business Act ("SBA"), 15 U.S.C. § 637(d)(3)(C) (2006).

504 *Rothe VII*, 545 F.3d 1026.

505 *Id.* at 1027-28.

506 *Id.*

history in which the District Court rendered judgment in the case three times and the Federal Circuit issued decisions reviewing these judgments three times.[507] In its consideration of the first two appeals, the Federal Circuit remanded the case without reaching the constitutional question.[508] In its review of the third judgment of the District Court, the Federal Circuit held that Section 1207, on its face as reenacted in 2006, violated the right to equal protection because Congress did not have a "strong basis in evidence" in 2006 to conclude that the DOD was a passive participant in racial discrimination in relevant markets across the country and that therefore remedial measures using racial classifications were necessary.[509]

In its decisions in *Rothe*, the Federal Circuit made several significant rulings regarding the use of post-enactment evidence, when disparity studies become so outdated so as no longer to constitute strong evidence, how a disparity study must calculate the capacity of minority-owned firms to perform contracting work, and how geographically comprehensive studies must be in order to justify a federal remedial statute.

Rothe III

In the first appeal of *Rothe*, the Federal Circuit vacated the District Court's 1999 grant of summary judgment to the DOD, holding that the District Court improperly applied a deferential legal standard to federal racial classifications and impermissibly relied on post-authorization evidence to support Section 1207's constitutionality as reauthorized in 1992, and directed the District Court to apply strict scrutiny on remand in accordance with *Croson* and *Adarand III*.[510]

A. Because a legislature must have a "strong basis in evidence" before enacting a program using racial classifications, only pre-enactment evidence may be considered when assessing the facial constitutionality of such a program, although post-enactment evidence may be considered for an as-applied challenge.

Rejecting the conclusion of other courts that legislatures need only have "some" evidence before them when enacting remedial racial classifications, the Federal Circuit held that "there is no difference in the evidentiary burden that must be faced during litigation (i.e., a "strong basis in evidence") and the evidence that a legislature must have before it when it enacts a racial classification."[511] Accordingly, if the pre-authorization evidence is insufficient to maintain the program when it is challenged, the program must be invalidated, regardless of the extent of post-authorization evidence; this is essential in order to ensure that the program is remedial in nature.[512] "[T]he reviewing court must assess what 'actually' motivated the legislature, not what 'may have motivated it.'"[513] The Court noted two permissible uses of post-authorization evidence: (1) evidence gathered post-enactment but pre-reenactment may be considered to determine whether the program is constitutional as reenacted; and (2) post-enactment evidence may be considered in determining whether a racial classification is constitutional as applied.[514]

- "It is axiomatic that a court cannot 'smoke out' illegitimate uses of race in governmental pronouncements with evidence not available to the governmental body prior to promulgation."[515]

Rothe V

In the second appeal of *Rothe*, the Federal Circuit found that the District Court's 2004 opinion had improperly ruled on the constitutionality of the 2002 reauthorization without permitting the DOD to present evidence on the question, and accordingly remanded the case for development of the record.[516] In addition, the Court

507 *Id.*
508 *Id.*
509 *Id.* at 1026-27.
510 *Id.* at 1031.
511 *Rothe III*, 262 F.3d at 1326 (citing Shaw v. Hunt, 517 U.S. 899, 910, 135 L. Ed. 2d 207, 116 S. Ct. 1894 (1996)).
512 *Id.* at 1327-28.
513 *Id.* at 1327 (citing *Shaw*, 517 U.S. at 908 n.4).
514 *Id.* at 1325.
515 *Id.* at 1327.
516 *Rothe V*, 413 F.3d at 1339.

confirmed that the District Court could not rely on any evidence that was not before Congress in 2002 and directed the District Court to consider whether certain data relied upon by the government was so outdated that it did not provide a strong basis in evidence for the 2002 reauthorization of Section 1207.[517]

Rothe VII

In the third appeal of *Rothe*, the Federal Circuit held that Section 1207 as reenacted in 2006 was facially unconstitutional because "Congress did not have a 'strong bases in evidence' before it in 2006, upon which to conclude that DOD was a passive participant in racial discrimination in relevant markets across the country and that therefore race-conscious remedial measures were necessary."[518]

A. A public contracting program presuming that members of certain racial minority groups are "socially disadvantaged" and therefore eligible for preferences is subject to strict scrutiny review.

The Court applied strict scrutiny, finding that Section 1207 "incorporates an explicit racial classification – the presumption that members of certain minority groups are 'socially disadvantaged' for purposes of obtaining SDB status and the benefits that flow from that status."[519] Pursuant to the strict scrutiny standard, the Court required the government to show that its program was narrowly tailored to serve a compelling government interest.[520] Remedying the effects of past or present racial discrimination is a compelling interest, whereas alleviating the effects of societal discrimination is not.[521] "Therefore, before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have strong basis in evidence upon which to conclude that remedial action is necessary."[522] Thus, although the party challenging the program using racial classifications bears the ultimate burden of persuading the court that it is unconstitutional, the government first bears a burden to produce strong evidence supporting the legislature's decision to employ race-conscious action.[523]

B. A disparity study may be relevant evidence of a compelling governmental interest that would justify the use of a race-based classification.

The Federal Circuit noted Justice O'Connor's statement in *Croson* that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality's prime contractors, an inference of discriminatory exclusion could arise."[524]

C. Staleness: A governmental entity may rely on the most recently available data so long as that data is reasonably up-to-date to support a disparity study.

The Federal Circuit rejected the plaintiff's argument that data more than five years old is stale per se.[525] The Court found that "Congress should be able to rely on the most recently available data as long as the data is reasonably up-to-date," leaving the question of whether the evidence is stale up to the District Court to resolve as a factual question.[526] Because the disparity studies analyzed data pertaining to contracts awarded as recently as four to seven years prior to the District Court opinion, and because Rothe did not point to more recent data, the Court concluded that the studies were not stale.[527]

517 *Id.* at 1338.
518 *Rothe VII*, 545 U.S. at 1026-27. The Court applied the law of the Fifth Circuit, on the ground that the facial challenge did not implicate matters within its exclusive jurisdiction. *Id.* at 1035.
519 *Id.* at 1035 (citing *Parents Involved*, 551 U.S. at 720).
520 *Id.*
521 *Id.* at 1036.
522 *Id.*
523 *Id.*
524 *Id.* at 1037-38 (citing *Croson*, 488 U.S. at 509).
525 *Id.* at 1038 (plaintiff pointed to a study by the United States Commission on Civil Rights, which made the five-year recommendation).
526 *Id.* at 1039.
527 *Id.*

D. Studies mentioned in speeches on the floor of the House, but not debated or reviewed by members of Congress or witnesses and not the subject of findings by Congress, were likely not "before Congress" prior to the enactment of the racial classification.

Referring to its prior holding that post-enactment evidence could not be used to satisfy the government's evidentiary burden in response to a facial challenge, the Federal Circuit stated that it was "hesitant" to conclude that the "mere mention" of a statistical study on the floor of the House was sufficient to put it "before Congress" for purposes of satisfying Congress's obligation to amass a strong basis in evidence for the use of race-based classification.[528] Acknowledging that the studies were completed before Congress's debate, the Court noted that there was no indication that the studies were reviewed by Congress, and because Congress made no findings regarding the studies, the Court could not defer to Congress's findings.[529] However, the Court did not resolve the issue, because it found on other grounds that the evidence was insufficient.

E. The disparity studies offered in this case properly accounted for the number of firms qualified to do the work but did not account for important differences in relative size or capacity to do the work.

The six disparity studies before the Court sought to calculate a ratio between the expected contract amount of a given race or gender group based on the group's availability and the actual contract amount received by that group; each found significant disparities.[530] Rothe objected to the availability/benchmark analysis of which contractors were qualified, willing, and able to perform the contracts at issue on the ground that the studies erroneously included any minority-owned firm deemed willing and able without regard to whether the firm was qualified.[531] The Federal Circuit concluded that this failure did not undercut the results, because "the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence in city contract records and bidder lists."[532] However, the Court was "troubled" by the failure of five of the studies to account for differences in firm size, as "qualified firms may have substantially different capacities."[533] The Court acknowledged that some of the analyses had addressed capacity, but faulted the studies for failing to account for the relative capacities of businesses to bid for more than one contract at a time.[534] As a result of this defect and considering the low geographic coverage of the studies, the Court concluded that the studies had low probative value and were insufficient to form a strong basis in evidence required to uphold the statute.[535]

F. Disparity studies covering one state, two counties, and three cities had too narrow a geographic reach to justify national remedial legislation.

The Court stated that, while Congress may create national legislation to remedy discrimination without identifying discrimination in all 50 states, "evidence of a few isolated instances of discrimination would be insufficient to uphold a nationwide program."[536] Even if the studies were methodologically sound, the Court stated, it would hesitate to conclude that they showed a nationwide practice of discrimination, in contrast to the District Court's finding that the studies represented a "diverse cross-section of jurisdictions" constituting evidence of discrimination.[537] The Court indicated that a report relied upon by the Ninth and Tenth Circuits, which analyzed over 50 disparity studies, did not suffer from the same failing.[538]

528 *Id.* at 1039-40.
529 *Id.* at 1040.
530 *Id.* at 1041.
531 *Id.* at 1042.
532 *Id.*
533 *Id.* at 1042-43.
534 *Id.* at 1044.
535 *Id.* at 1045.
536 *Id.*
537 *Id.* at 1045-46.
538 *Id.* at 1046.

G. The size of the DOD's purchasing activities was not sufficient to establish the DOD's passive participation in private discriminatory activity.

The Court noted that the DOD failed to cite any instance of alleged discrimination by the DOD in awarding a contract or by a private contractor that was a recipient of a DOD contract.[539] The only evidence cited by the District Court to establish a link between DOD spending and discrimination was the fact that the DOD is "one of the largest buyers of goods and services in the world," which the Court found to be insufficient to establish passive participation on the part of the DOD in discrimination.[540]

GENDER CLASSIFICATIONS

The Federal Circuit has not reviewed the constitutionality of a public contracting program's use of gender classifications. Nor has it otherwise explained the requirements that such programs must meet to withstand scrutiny under constitutional equal protection provisions.

539 *Id.* at 1048.
540 *Id.*

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