



2023 Regional Transportation Commission Disparity Study

FINAL REPORT

Final Report

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2023 Regional Transportation Commission Disparity Study

Prepared for

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CHAPTER ES.

Executive Summary

BBC Research & Consulting (BBC) conducted a *disparity study* to evaluate whether person of color (POC-); woman-; veteran-; and lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientation (LGBTQ+)-owned businesses face any barriers in the Regional Transportation Commission of Southern Nevada (RTC)'s construction, professional services, and non-professional services and supplies contracts and procurements. As part of the disparity study, we examined whether there are any *disparities*, or differences, between:

- The percentage of contract and procurement dollars RTC awarded to POC-, woman-, veteran-, and LGBTQ+-owned businesses during the *study period*, which was July 1, 2017 through June 30, 2022 (i.e., *utilization*); and
- The percentage of contract and procurement dollars one might expect RTC to award to POC-, woman-, veteran-, and LGBTQ+-owned businesses based on their availability to perform specific types and sizes of the agency's prime contracts and subcontracts (i.e., *availability*).

Information from the disparity study will help RTC better understand outcomes for POC-, woman-, veteran-, and LGBTQ+-owned businesses in its contracting and procurement and help RTC address any substantial disparities between the participation and availability of those businesses for RTC work. Moreover, if RTC determines that it is appropriate to continue using *race- and gender-conscious* measures as part of its contracting and procurement processes to address any substantial disparities for POC- and woman-owned businesses (e.g., awarding individual projects with the use of contract goals), then the organization can rely on information from the disparity study to help ensure its use of such measures adheres to the *strict scrutiny* and *intermediate scrutiny* standards of constitutional review, respectively.

A. Disparity Study Results

BBC analyzed approximately \$222.3 million worth of contracts and procurements RTC awarded during the study period to measure the participation and availability of POC-, woman-, veteran-, and LGBTQ+-owned businesses for RTC work to assess whether any disparities exist between those measures. We summarize key results from those analyses below and identify sections of the report that provide more details about the methodology and results of each analysis.

1. Availability analysis (Chapter 5 and Appendix D of the report). BBC conducted a custom census availability analysis to estimate the availability of POC-, woman-, veteran-, and LGBTQ+-owned businesses for RTC work while accounting for the specific characteristics of relevant businesses that exist in Clark County and the specific characteristics of the relevant prime contracts and subcontracts RTC awards. Figure ES-1 presents the availability of each relevant group of POC- and woman-owned businesses for relevant RTC contracts and procurements overall. The availability of those businesses is 36.3 percent. The business groups that exhibit the greatest availability for RTC work are white woman-

owned businesses (11.6%), Hispanic American-owned businesses (7.4%), and Asian Pacific American-owned businesses (6.9%).¹

BBC also examined the overall availability of Middle Eastern and North African (MENA) American-, veteran-, and LGBTQ+-owned businesses for RTC work, the results for which are not shown in Figure ES-1.² The analysis indicated that the availability of MENA American-owned businesses for RTC work is 1.7 percent, the availability of veteran-owned businesses is 23.6 percent, the availability of LGBTQ+-owned businesses is 2.6 percent.

Figure ES-1.
Availability estimates
for RTC work

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

Source:

BBC availability analysis.

Business group	Availability
White woman-owned	11.6 %
Asian Pacific American-owned	6.9 %
Black American-owned	5.9 %
Hispanic American-owned	7.4 %
Native American-owned	4.3 %
Subcontinent Asian American-owned	0.3 %
Total POC-owned	24.7 %
Total POC- and woman-owned	36.3 %

2. Utilization analysis (Chapter 6 of the report). BBC also calculated the participation of POC-, woman-, veteran-, and LGBTQ+-owned businesses in relevant contracts and procurements RTC awarded during the study period. As shown in Figure ES-2, during the study period, RTC awarded 20.3 percent of its relevant contract and procurement dollars to POC- and woman-owned businesses. The groups that exhibited the greatest levels of participation in that work were Hispanic American-owned businesses (14.1%), white woman-owned businesses (3.3%), and Black American-owned businesses (2.1%).

BBC also examined the overall participation of MENA American-, veteran-, and LGBTQ+-owned businesses for RTC work, the results for which are not shown in Figure ES-2. RTC awarded 0.2 percent of relevant contract and procurement dollars to MENA American-owned businesses; 0.1 percent to veteran-owned businesses; and 0.0 percent to LGBTQ+-owned businesses.³

¹ The overall availability estimates presented in ES-1 are based on all relevant contracts and procurements RTC awarded during the study period, regardless of funding source. Availability estimates for United States Department of Transportation (USDOT)-funded contracts and procurements are presented in Chapter 5, and information related to the agency's next triennial Federal Disadvantaged Business Enterprise (DBE) goal is presented below and in Chapter 10.

² The MENA American category includes persons whose origins are from Algeria, Bahrain, Comoros, Djibouti, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestinian Authority, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, United Arab Emirates, or Yemen.

³ Businesses could be both POC-, woman-, or MENA American-owned and veteran- or LGBTQ+-owned. Thus, the percentages corresponding to the participation of veteran- and LGBTQ+-owned businesses should not be added to the percentages shown for POC-, woman-, or MENA American-owned businesses due to potential double counting.

Figure ES-2.
Utilization analysis results
for RTC work

Note:
 Numbers rounded to nearest tenth of 1 percent
 and thus may not sum exactly to totals.

Source:
 BBC utilization analysis.

Business group	Utilization
White woman-owned	3.3 %
Asian Pacific American-owned	0.6 %
Black American-owned	2.1 %
Hispanic American-owned	14.1 %
Native American-owned	0.1 %
Subcontinent Asian American-owned	0.0 %
Total POC-owned	16.9 %
Total POC- and woman-owned	20.3 %

3. Disparity analysis (Chapter 7 and Appendix E). The crux of the disparity study was to assess whether any disparities exist between the participation of POC-, woman-, veteran-, and LGBTQ+-owned businesses in RTC work and the availability of those businesses for that work. A disparity index of 100 indicates *parity* between actual participation and availability. That is, the participation of a particular business group is in line with its availability. A disparity index of less than 100 indicates a *disparity* between participation and availability. That is, the group is considered to have been underutilized relative to its availability. Finally, a disparity index of less than 80 indicates a *substantial disparity* between participation and availability. A *substantial disparity* for a particular racial/ethnic or gender group is interpreted by courts as an inference of discrimination against that group in the marketplace and often serves as evidence that the organization of interest could consider using race- or gender-conscious measures to address barriers for that group (for details, see Chapter 2).

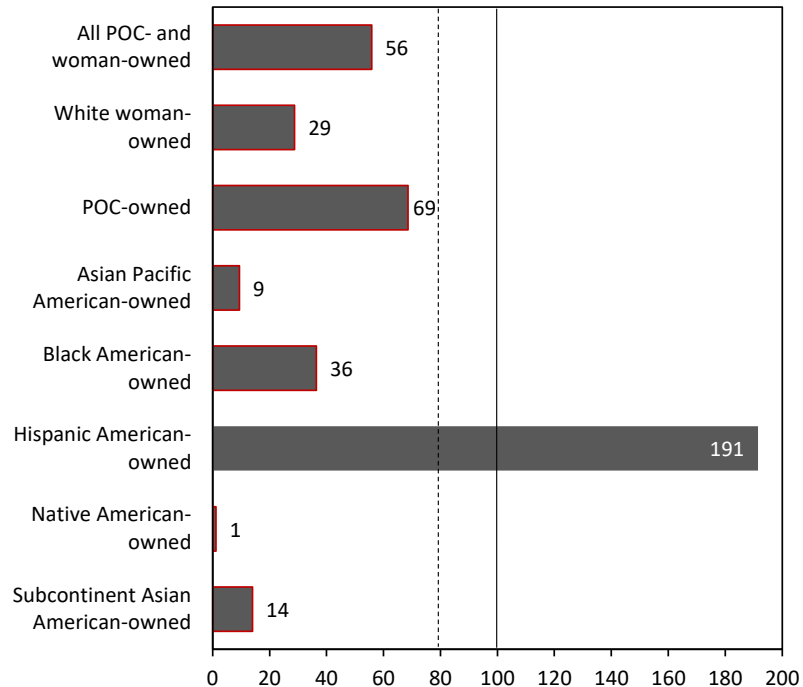
a. Overall. Figure ES-3 presents disparity indices for POC- and woman-owned businesses for all relevant prime contracts and subcontracts RTC awarded during the study period considered together. As shown in Figure ES-3, POC- and woman-owned businesses considered together exhibited a disparity index of 56 for all relevant contracts and procurements RTC awarded during the study period, indicating a disparity where RTC awarded POC- and woman-owned businesses \$0.56 for every dollar one might expect the agency to award to those businesses based on their availability for that work. All POC- and woman-owned business groups, with the exception of Hispanic American-owned businesses, exhibited substantial disparities for RTC work: white woman-owned businesses (disparity index of 29), Asian Pacific American-owned businesses (disparity index of 9), Black American-owned businesses (disparity index of 36), Native American-owned businesses (disparity index of 1), and Subcontinent Asian American-owned businesses (disparity index of 14).

BBC also assessed whether MENA American-, veteran-, and LGBTQ+-owned businesses exhibited a disparity between their participation and availability for RTC work, the results for which are not shown in Figure 7-1. MENA American-owned businesses (disparity index of 12), veteran-owned businesses (disparity index of 1), and LGBTQ+-owned businesses (disparity index of 0) all exhibited substantial disparities for all relevant RTC contracts and procurements considered together.

Figure ES-3.
Overall disparity analysis
results for RTC work

Note:
 Substantial disparities
 highlighted with red borders.

Source:
 BBC disparity analysis.



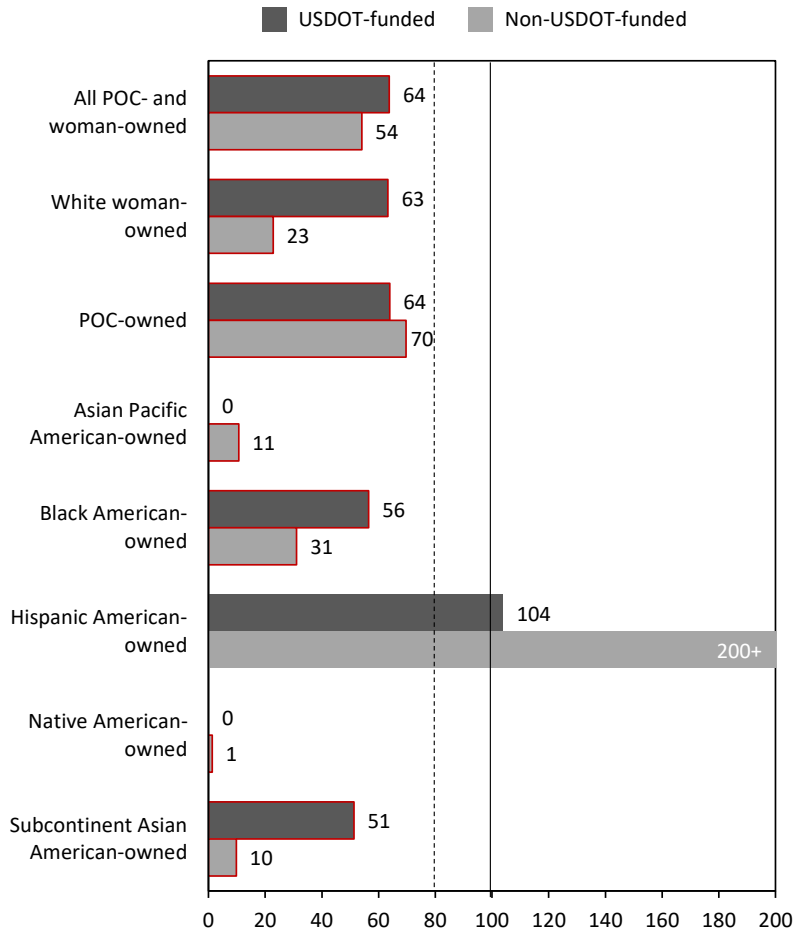
b. Funding source. The Federal DBE Program applies specifically to RTC’s United States Department of Transportation (USDOT)-funded projects.⁴ As part of the program, the agency uses various race- and gender-neutral measures as well as race- and gender-conscious DBE contract goals to encourage the participation of POC- and woman-owned businesses in the USDOT-funded projects it awards. Comparing disparity analysis results separately for USDOT- and non USDOT-funded projects may be indicative of the efficacy of RTC’s implementation of the Federal DBE Program as well as its use of race- and gender-conscious measures to encourage the participation of POC- and woman-owned businesses in its work relative to their availability for it. As shown in Figure ES-4, POC- and woman-owned businesses considered together exhibited substantial disparities for both USDOT-funded work (disparity index of 64) and non USDOT-funded work (disparity index of 54). Disparity analysis results for individual business groups differed between funding source:

- White woman-owned businesses (USDOT disparity index = 63; non USDOT disparity index = 23), Asian Pacific American-owned businesses (USDOT disparity index = 0; non USDOT disparity index = 11), Black American-owned businesses (USDOT disparity index = 56; non USDOT disparity index = 31), Native American-owned businesses (USDOT disparity index = 0; non USDOT disparity index = 1), and Subcontinent Asian American-owned businesses (USDOT disparity index = 51; non USDOT disparity index = 10) exhibited substantial disparities for both USDOT-funded contracts and non USDOT-funded contracts.
- Hispanic American-owned businesses (USDOT disparity index = 63; non USDOT disparity index = 23) did not exhibit substantial disparities for either funding source.

⁴ BBC considered a project to be USDOT-funded if it included at least \$1 of USDOT funding.

Figure ES-4.
Disparity analysis results by
funding source

Note:
 Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.
 Source:
 BBC disparity analysis.



d. Summary. Figure ES-5 presents a visualization of the various sets of RTC contracts and procurements for which relevant POC- and woman-owned business groups exhibited substantial disparities, as indicated by black circles. Most relevant POC- and woman-owned business groups showed substantial disparities for most—if not all—the project sets BBC examined as part of the disparity study. Substantial disparities indicate inferences of discrimination against relevant POC- and woman-owned business groups in the Clark County marketplace and as part of RTC’s contracting and procurement.

Figure ES-5.
Substantial disparities observed for RTC work

Contract set	Business group							
	All POC and white woman	All POC	White woman	Asian Pacific American	Black American	Hispanic American	Native American	Subcontinent Asian American
All work	●	●	●	●	●		●	●
Construction	●	●		●	●		●	●
Professional services	●	●	●	●	●	●	●	●
Non-prof. svcs. and goods	●		●	●	●		●	
Prime contracts	●	●	●	●	●		●	●
Subcontracts			●	●	●		●	●
USDOT-funded	●	●	●	●	●		●	●
Non USDOT-funded	●	●	●	●	●		●	●
Goals	●	●	●	●	●		●	●
No goals	●	●	●	●	●		●	●

Notes: ● indicates substantial disparity

Source: BBC disparity analysis.

B. Marketplace Conditions

BBC conducted extensive quantitative analyses to assess whether POCs, women, and POC- and woman-owned businesses face any barriers in the construction, professional services, and non-professional services and supplies industries in Clark County. The study team also examined the potential effects any such barriers have on the formation and success of businesses as well as their participation in and availability for contracts and procurements RTC awards. We examined local marketplace conditions in four primary areas:

- **Human capital**, to assess whether POCs and women face barriers related to education, employment, and gaining experience;
- **Financial capital**, to assess whether POCs and women face barriers related to wages, homeownership, personal wealth, and financing;
- **Business ownership**, to assess whether POCs and women own businesses at rates comparable to that of white men; and
- **Business success**, to assess whether POC- and woman-owned businesses have outcomes similar to those of businesses owned by white men.

For more details, see Chapter 3 and Appendix C of the report.

BBC’s analyses of marketplace conditions in Clark County indicate that POCs and women face various barriers in industries relevant to RTC’ contracting and procurement. Existing research and primary research we conducted indicate that disparities exist in acquiring human capital, accruing financial capital, owning businesses, and operating successful businesses. In many cases, there is evidence those disparities exist even after accounting for various personal and business factors. There is also evidence that many disparities are due—at least, in part—to race- or gender-based discrimination. Barriers in the marketplace likely have important effects on the ability of POCs and women to start businesses in relevant industries—construction, professional services, and goods and other services—and to operate

those businesses successfully. Any difficulties those individuals face in starting and operating businesses may reduce their availability for public work and the degree to which they are able to successfully compete for such projects.

C. Overall DBE Goal

In accordance with 49 Code of Federal Regulations (CFR) Part 26 and USDOT requirements, every three years, RTC must establish an overall goal for the participation of DBEs in the USDOT-funded projects it awards. USDOT requires agencies to set their overall DBE goals using a two-step process: establishing a *base figure* and considering whether a *step-2 adjustment* to the base figure is warranted. The disparity study provides information regarding both steps of the required goal-setting process for RTC to consider as it sets its next overall DBE goal.

1. Base figure. In accordance with USDOT requirements, BBC assessed the availability of potential DBEs—that is, POC- and woman-owned businesses that are currently DBE-certified or appear they could be DBE-certified according to size limits specified in the Federal DBE Program—for the USDOT-funded projects RTC awarded during the study period. That analysis indicated that the availability of potential DBEs for RTC’s USDOT-funded work is 27.1 percent, which RTC could consider as its base figure for its next overall DBE goal.

2. Step-2 adjustment. After establishing a base figure, RTC must consider additional information to determine whether any adjustment is needed to the base figure to ensure the agency’s new overall DBE goal is precise and reflects current conditions in the local marketplace for POCs, women, and POC- and woman-owned businesses. USDOT suggests agencies consider the following information in assessing whether to make step-2 adjustments to their base figures:

- Current capacity of DBEs to perform agency work;
- Information related to employment, self-employment, education, training, and unions;
- Disparities in the ability of DBEs to access financing, bonding, or insurance; and
- Other relevant factors.⁵

BBC assessed information related to each of the above factors, which we summarize below:

- **Current capacity of DBEs to perform agency work.** USDOT’s “Tips for Goal-Setting” suggests that agencies should examine data on past DBE participation in their FTA-funded projects in recent years. Results from the utilization analysis indicate that RTC awarded 17.6 percent of its FTA-funded contract and procurement dollars to certified DBEs during the study period, which supports a downward adjustment to the agency’s base figure. Based on past participation of DBEs, RTC might consider a downward adjustment to the base figure for its FTA-funded projects.
- **Information related to employment, self-employment, education, training, and unions.** BBC’s analyses of barriers in the local marketplace indicate barriers that certain POC groups and women face related to human capital, financial capital, business ownership, and business success. Such barriers may decrease the availability of POC- and woman-owned businesses for the USDOT-

⁵ 49 CFR Section 26.45.

funded projects RTC awards. For example, BBC used regression analyses to investigate whether race/ethnicity and gender are related to business ownership in relevant industries among workers in the Clark County marketplace, independent of various other personal characteristics, including familial status, education, and age. (Chapter 3 and Appendix C provide details about our regression analyses.) Based on the results of those analyses, RTC might consider an upward adjustment of its base figure for USDOT-funded contracts to account for marketplace barriers.

- **Any disparities in the ability of DBEs to get financing, bonding, or insurance.** BBC's analysis of access to financing, bonding, and insurance also revealed quantitative and qualitative evidence that POCs, women, and POC- and woman-owned businesses in the region do not have the same access to those business inputs as non-Hispanic white men and businesses owned by non-Hispanic white men. Any barriers to obtaining financing, bonding, or insurance might limit opportunities for POCs and women to successfully form and operate businesses in the *relevant geographic market area*. Any barriers that POC- and woman-owned businesses face in obtaining financing, bonding, or insurance would also place those businesses at a disadvantage in competing for RTC's USDOT-funded projects. Thus, those results also support an upward adjustment to RTC's base figure.
- **Anticipated future contracts.** If an agency expects that the relative distributions of USDOT-funded contract dollars by industry will change substantially in the future, the agency might consider an adjustment to its base figure. RTC anticipates awarding large FTA-funded transit services contracts in FFY's 2026 through 2028. Those contracts would be substantially different in terms of type and size from the federally funded contracts the agency awarded during the study period. Based on that information, RTC might consider adjusting the industry components of the base figure to reflect the FTA-funded transit contracts it anticipates awarding in the future. RTC anticipates awarding approximately \$175 million annually in contracts for fixed route services and \$60 million annually in contracts for paratransit services, respectively, in FFYs 2026 through 2028 and that approximately two percent of those dollars will be associated with subcontracting opportunities. Based on that information, BBC calculated how the industry components of the agency's base figure might change in FFYs 2026 through 2028. Based on adjusted industry weights, the agency might be expected to award 1.8 percent of its FTA-funded prime contract and subcontract dollars to potential DBEs based on their availability for that work. If the agency adjusts its base figure based on anticipated future contracts, it might take the average of its 27.1 percent base figure and the adjusted availability of 1.8 percent, yielding an adjusted overall DBE goal of 14.5 percent.

The agency should consider the above information carefully as part of setting its next triennial DBE goal for federal fiscal years 2026 through 2028. RTC is not required to make a step-2 adjustment, but it must explain its decision to make or not make an adjustment in goal documentation it submits to USDOT.

D. Guidance

BBC observed substantial disparities between the participation and availability of POC- and woman-owned businesses for the contracts and procurements RTC awarded during the study period. We present guidance on how RTC can use that information and other information from the disparity study to further encourage the participation of those businesses in its work and address the disparities we observed effectively and in a legally defensible manner, including potentially using race- and gender-conscious measures to do so. In considering the guidance we provide, RTC should be mindful of the legal requirements surrounding the use of race- and gender-conscious measures in particular, including state and federal regulations as well as relevant case law. The organization should consult closely with its

legal counsel in developing any new policies or programs related to POC- and woman-owned businesses to ensure they are consistent with the requirements of the strict scrutiny and intermediate scrutiny standards of constitutional review, respectively. We present key recommendations below and present additional recommendations and more information relevant to those recommendations in Chapter 9 of the report.

1. Vendor selection. Comments from in-depth interviews indicate that RTC's contract and evaluation requirements often favor larger companies and inhibit the ability of small businesses to win work with the organization. In addition, results from the utilization analysis indicated that eight percent of all POC- and woman-owned businesses that participated in RTC projects during the study period were awarded over 75 percent of all the dollars associated with that work. RTC should consider reviewing its evaluation criteria to ensure they are not unduly restrictive for small or newly established businesses. In addition, RTC should consider expanding its vendor pool through targeted advertising and outreach and revising evaluation criteria and policies to encourage the use of vendors with which the organization or prime contractors have never worked.

2. Prompt payment. As part of in-depth interviews and surveys, several businesses, including many POC- and woman-owned businesses, reported difficulties with receiving payment in a timely manner on government contracts, particularly when they work as subcontractors and suppliers. Many businesses also commented that having capital on hand is crucial to business success and often a challenge for small businesses. RTC should consider reviewing and strengthening its current prompt payment policies to ensure timely payment to prime contractors and from prime contractors to subcontractors or suppliers. RTC should consider making efforts to further enforce those requirements, such as imposing internal late fee penalties for delayed payments to prime contractors and requiring prime contractors to remit late fees for delayed payments to subcontractors. To track those payments, RTC could consider creating electronic systems to track and confirm subcontractor payments to all subcontractors, regardless of certification status.

3. Subcontractor commitments. Qualitative evidence suggests that prime contractors sometimes reduce or eliminate subcontract work once they are awarded RTC projects, despite making specific commitments to subcontractors as part of the bid process. RTC should consider requiring contractors to provide copies of all subcontracts or subcontractor commitments, especially those with subcontractors that are DBEs and small businesses, to ensure that all subcontracts (including lower-tier subcontracts) are performed in accordance with applicable DBE Program provisions. Agency review of these subcontracts would also help ensure that subcontractor participation is consistent with the subcontractor participation stated in a prime contractor's proposal. In addition, RTC could consider establishing points of contact between subcontractors and RTC to address any underutilization or subcontractor substitutions to help ensure POC- and woman-owned businesses receive the work committed to them at the time of bid. Other measures RTC could consider include inviting subcontractors to contract negotiation meetings to discuss their expected portions of contracts and notifying the entire project team when projects have been awarded. Overall, RTC may consider taking steps to improve communication lines between the prime contractor, subcontractor, and the owner of a project.

4. Outreach. RTC could consider providing additional details about the agency's business opportunities, resources available to small businesses, and the community and economic benefits of its

supplier diversity programs to vendors in the Southern Nevada marketplace. For example, general information about the supplier diversity programs could include a brief summary explaining the DBE program, definitions of businesses eligible to participate in the program, and links to partner agencies that provide services to assist small, local, and diverse businesses. Additionally, RTC could post any informational documents distributed or presented at outreach events on the organization's website to give businesses access to that information, even if they did not attend the event. Those types of documents and presentations might include information about upcoming projects, solicitation requirements, and who to contact at an agency for more information.

5. Data collection. RTC does not collect comprehensive information on subcontractors that participate in its projects. The agency should consider collecting comprehensive subcontract data—that is, for all subcontractors regardless of the races or genders of their owners or certification status—on all projects, including:

- Associated prime contract or purchase order numbers;
- Subcontractor names, addresses, phone numbers, and email addresses;
- Types of work involved in the subcontract; and
- Award and paid-to-date amounts.

RTC should consider collecting those data at the time of award and requiring prime contractors to submit data on the payments they make to subcontractors as part of monthly invoicing. Doing so will improve the agency's monitoring of the participation of small businesses, including many POC- and woman-owned businesses—regardless of certification—in its work and could also help the agency identify future subcontracting opportunities for those businesses. Collecting comprehensive subcontract data might require upgrading to a different data management system that allows RTC to collect and maintain that information efficiently and effectively.

CHAPTER 1.

Introduction

The Regional Transportation Commission of Southern Nevada (RTC) oversees public transportation, traffic management, transportation planning, and roadway design and construction projects in the Southern Nevada region. As a recipient of United States Department of Transportation (USDOT) funds via the Federal Transit Administration (FTA), RTC implements the Federal Disadvantaged Business Enterprise (DBE) Program, which is designed to address potential discrimination against DBEs in the award and administration of USDOT-funded contracts and procurements.¹

RTC retained BBC Research & Consulting (BBC) to conduct a *disparity study* to evaluate whether person of color (POC)-; woman-; veteran-; and lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientation (LGBTQ+)-owned businesses face any barriers in competing for or obtaining agency work. We examined USDOT-funded and non USDOT-funded projects covering work in construction, professional services, and non-professional services and supplies. As part of the study, we examined whether there are any *disparities*, or differences, between:

- The percentage of contract and procurement dollars RTC awarded to POC-, woman-, veteran-, and LGBTQ+-owned businesses during the *study period*, which was July 1, 2017 through June 30, 2022 (i.e., *utilization*); and
- The percentage of contract and procurement dollars one might expect RTC to award to POC-, woman-, veteran-, and LGBTQ+-owned businesses based on their availability to perform specific types and sizes of the agency's prime contracts and subcontracts (i.e., *availability*).

The disparity study also provides other quantitative and qualitative information related to:

- The legal framework surrounding RTC's contracting and procurement practices, policies, and statutes; other business programs; and its implementation of the Federal DBE Program;
- Conditions in the marketplace for POCs; women; veterans; members of the LGBTQ+ community; and POC-, woman-, veteran-, and LGBTQ+-owned businesses; and
- Contracting practices and business assistance programs RTC has in place or could consider implementing in the future to better encourage the participation of POC-, woman-, veteran-, and LGBTQ+-owned businesses.

There are several ways in which information from the disparity study could be useful to RTC:

- The study provides information about whether POC-, woman-, veteran-, or LGBTQ+-owned businesses face any barriers in competing for or obtaining RTC work.

¹ BBC Research & Consulting defines a USDOT-funded contract or procurement as any contract or procurement that includes at least \$1 of USDOT funding.

- The study identifies barriers POCs; women; veterans; members of the LGBTQ+ community; and POC-, woman-, veteran-, and LGBTQ+-owned businesses face in the marketplace that might affect their ability to compete for or obtain RTC work.
- The study provides an evaluation of the effectiveness of RTC's implementation of the Federal DBE Program in encouraging POC- and woman-owned business participation in the agency's contracts and procurements.
- The study provides insights into how the agency could refine its contracting processes and program measures to better encourage the participation of POC-, woman-, veteran-, and LGBTQ+-owned businesses in its work and help address any barriers those businesses face in the marketplace.

BBC introduces the 2023 Regional Transportation Commission of Southern Nevada Disparity Study in three parts:

- A. Background;
- B. Study Scope; and
- C. Study Team Members.

A. Background

The Federal DBE Program is designed to encourage the participation of POC- and woman-owned businesses in USDOT-funded projects. As a recipient of USDOT funds, RTC must implement the Federal DBE Program and comply with program regulations for projects that include those funds.

1. Overall DBE goal. As part of the Federal DBE Program, RTC is required to set an overall aspirational goal for the participation of DBEs in its USDOT-funded work every three years. If DBE participation in a particular year is less than its overall DBE goal, then the agency must analyze the reasons for the difference and establish specific measures that enable it to meet the goal in the next year. The Federal DBE Program specifies the steps an agency must follow to establish its overall DBE goal. To begin, the agency must develop a base figure for its goal based on demonstrable evidence of the availability of *potential DBEs* to participate in its USDOT-funded projects. Then, the agency must consider conditions in its *relevant geographic market area (RGMA)* and other factors to determine whether an adjustment to its base figure is necessary to ensure its overall DBE goal accurately reflects current contracting conditions for POC- and woman-owned businesses in the marketplace and as part of the agency's contracting process (referred to as a *step-2 adjustment*). RTC is not required to make an adjustment to its base figure, but it is required to consider relevant factors and explain its adjustment decision to USDOT.

2. Program measures. The Federal DBE Program requires RTC to project the portions of its overall DBE goal it will meet through the use of *race- and gender-neutral* and *race- and gender-conscious* measures. Race- and gender-neutral measures are designed to encourage the participation of all businesses—or all small businesses—in an agency's work, regardless of the race or gender of business owners. If an agency cannot meet its goal solely through the use of race- and gender-neutral measures, then it must consider also using race- and gender-conscious measures. Race- and gender-conscious measures are designed to encourage the participation of POC- and woman-owned businesses,

specifically, in an agency’s work (e.g., using condition-of-award DBE goals to award individual contracts or procurements).

If an agency determines that race- or gender-conscious measures—such as DBE contract goals—are appropriate for its implementation of the Federal DBE Program, then it must also determine which race or gender groups are eligible for participation in those measures. Eligibility for such measures is limited to only those race or gender groups for which compelling evidence of discrimination exists in the local marketplace. USDOT provides a waiver provision if an agency determines that its implementation of the Federal DBE Program should only include certain race or gender groups in the race- or gender-conscious measures that it uses.

3. DBE certification. To be eligible for DBE certification, business owners must sign an affidavit affirming they are part of a “socially and economically disadvantaged” group as defined by 49 Code of Federal Regulations (CFR) Part 26. The groups USDOT presumes to be disadvantaged as part of the Federal DBE Program include Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, Subcontinent Asian Americans, and women of any race. Business owners who identify as members of those groups must establish 51 percent “real and substantial ownership,” in their businesses, and they must also possess the power and expertise to control the daily operations and management of their businesses.

B. Study Scope

BBC conducted the disparity study based on all construction, professional services, and non-professional services and supplies contracts and procurements RTC awarded between July 1, 2017 and June 30, 2022, including both USDOT-funded and non USDOT-funded projects.

1. Definitions of POC- and woman-owned businesses. To interpret the core analyses presented in the disparity study, it is useful to understand how BBC defined POC-, woman-, veteran-, and LGBTQ+-owned businesses; certified DBEs; potential DBEs; and LSBs and LDBs in its analyses.

a. POC-owned businesses. BBC defined a POC-owned business as a business with at least 51 percent ownership and control by individuals who identified with one of the following race groups, which are presumed to be disadvantaged as part of the Federal DBE Program: Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, or Subcontinent Asian Americans. We considered businesses to be POC-owned based on the known races of their business owners, regardless of whether they were DBE-certified or held any other types of certification. Our definition of POC-owned businesses included businesses owned by men of color and women of color. For example, we grouped results for businesses owned by Black American men with results for businesses owned by Black American women to assess outcomes for Black American-owned businesses in general.

b. Woman-owned businesses. BBC defined a woman-owned business as a business with at least 51 percent ownership and control by white women. As described above, we classified businesses owned by women of color along with businesses owned by men of color according to their corresponding race groups.

c. Veteran-owned businesses. BBC defined a veteran-owned business as a business with at least 51 percent ownership and control by veterans of the United States military.

d. LGBTQ+-owned businesses. BBC defined a LGBTQ+-owned business as a business with at least 51 percent ownership and control by individuals who identify as lesbian, gay, bisexual, transgender, queer, or other gender or sexual orientation.

e. DBEs. DBEs are POC- and woman-owned businesses specifically certified as such by Harry Reid International Airport or the Nevada Department of Transportation as part of the Nevada Unified Certification Program. A determination of DBE eligibility includes assessing business' gross revenues and business owners' personal net worth.

f. Potential DBEs. BBC considered businesses to be potential DBEs if they were POC- or woman-owned businesses that were DBE-certified at the time of the study or appeared they could be DBE-certified based on revenue requirements specified in 49 CFR Part 26 (regardless of actual certification). We examined the availability of potential DBEs to help RTC calculate a base figure for its next overall DBE goal.

2. Analyses in the disparity study. The crux of the disparity study was to assess whether any disparities exist between the participation and availability of POC-, woman-, veteran-, or LGBTQ+-owned businesses for the contracts and procurements RTC awards, including both USDOT-funded and non USDOT-funded projects. Those analyses focused on construction, professional services, and non-professional services and supplies prime contracts and subcontracts the agency awarded between July 1, 2017 and June 30, 2022. The study also includes various analyses related to outcomes for POCs; women; veterans; members of the LGBTQ+ community; and POC-, woman-, veteran-, and LGBTQ+-owned businesses throughout the marketplace. BBC presents disparity study analyses in the report as follows:

a. Legal framework and analysis. The study team conducted a detailed analysis of relevant laws, legal decisions, and other information to guide the methodology for the study and inform our recommendations as well as RTC's implementation of the Federal DBE Program. BBC presents the legal framework and analysis for the study in **Chapter 2** and **Appendix B**.

b. Marketplace conditions. The study team conducted extensive quantitative analyses of conditions and potential barriers in the marketplace for POCs; women; veterans; members of the LGBTQ+ community; and POC-, woman-, veteran-, and LGBTQ+-owned businesses. In addition, we collected qualitative evidence about potential barriers POC-, woman-, veteran-, and LGBTQ+-owned businesses face in the marketplace through in-depth interviews, focus groups, public meetings, and other engagement sessions. BBC presents quantitative information about marketplace conditions in **Chapter 3** and **Appendix C**.

c. Data collection. BBC examined contract, procurement, and vendor data from multiple sources to complete the utilization and availability analyses. We present the study team's contract, procurement, and vendor data collection process in **Chapter 4**.

d. Availability analysis. BBC analyzed the percentage of contract and procurement dollars one might expect RTC to award to POC-, woman-, veteran-, and LGBTQ+-owned businesses based on their availability to perform specific types and sizes of agency work. That analysis was based on agency data and surveys we conducted with more than 800 businesses in the local marketplace that work in

industries related to the types of contracts and procurements the agency awards. We present results from the availability analysis in **Chapter 5** and **Appendix D**.

e. Utilization analysis. BBC analyzed contract and procurement dollars RTC awarded to POC-, woman-, veteran-, and LGBTQ+-owned businesses during the study period, including information about associated subcontracts. We present results from the utilization analysis in **Chapter 6**.

f. Disparity analysis. The study team examined whether there were any disparities between the participation and availability of POC-, woman-, veteran-, and LGBTQ+-owned businesses on contracts and procurements RTC awarded during the study period. We also assessed whether any observed disparities were statistically significant and explored potential explanations for those disparities. BBC presents results from the disparity analysis in **Chapter 7** and **Appendix E**.

g. Program measures. BBC reviewed measures RTC uses to encourage the participation of POC-, woman-, veteran-, and LGBTQ+-owned businesses in its contracts and procurements as well as its implementation of the Federal DBE Program. We present that information in **Chapter 9B**

g. Overall DBE goal. Based on the availability analysis and other research, BBC provided RTC with information to help set its next overall DBE goal for its FTA-funded projects, including establishing a base figure and considering a step-2 adjustment. Guidance around RTC's overall DBE goal is presented in Chapter 10.

i. Recommendations. The study team provided guidance related to additional program options and changes to current contracting practices the agency could consider, including information related to its next overall DBE goal for USDOT-funded work. BBC presents our recommendations in **Chapter 11**.

C. Study Team Members

The BBC study team was made up of five firms that, collectively, possess decades of experience related to conducting disparity studies in connection with small business and disadvantaged business programs.

1. BBC (prime consultant). BBC is a Denver-based disparity study and economic research firm that had overall responsibility for the study and performed all the quantitative and qualitative analyses.

2. Exstare Federal Services (Exstare). Exstare is a Black American woman-owned disparity study and management consulting firm based in Alexandria, Virginia. Exstare provided guidance and recommendations related to program development and implementation.

3. MYS Firm (MYS). MYS is a Black American woman-owned project management and community programming consulting firm based in Henderson, Nevada. MYS conducted in-depth interviews with business owners and other key stakeholders and assisted with providing guidance and recommendations related to program development and implementation.

4. Davis Research. Davis Research is a survey firm based in Calabasas, California. The firm conducted telephone and online surveys with thousands of businesses in the marketplace to gather information to serve as the basis for the utilization and availability analyses.

5. Holland & Knight. Holland & Knight is a law firm with offices throughout the country. Holland & Knight conducted the legal analysis that provided the basis for the study.

Chapter 2.

Legal Analysis

As a recipient of United States Department of Transportation (USDOT) funds, the Regional Transportation Commission of Southern Nevada (RTC) implements the Federal Disadvantaged Business Enterprise (DBE) Program, which is designed to encourage the participation of person of color (POC)- and woman-owned businesses in an agency's USDOT-funded work.¹ As part of the Federal DBE Program, an agency is required to set an overall goal for DBE participation in its USDOT-funded projects every three years. Regulations that govern an agency's implementation of the Federal DBE Program require that the agency meets the maximum feasible portion of its overall DBE goal through the use of *race- and gender-neutral measures*. If an agency cannot meet its overall DBE goal solely through race- and gender-neutral means, then it is permitted to use *race- and gender-conscious measures*. Race- and gender-neutral measures are measures designed to encourage the participation of small businesses in an organization's contracting regardless of the race or gender of businesses' owners. In contrast, race- and gender-conscious measures are measures designed to encourage the participation of POC- and woman-owned businesses, specifically, in an organization's contracting (e.g., participation goals for POC- and woman-owned businesses on individual contracts or procurements).

It is instructive to review information related to the legal standards governing the use of both race- and gender-neutral and race- and gender-conscious measures. This chapter reviews the legal standards related to the use of these measures in three parts:

- A. Legal Standards for Different Types of Measures;
- B. Seminal Court Decisions; and
- C. Addressing Legal Requirements.

Appendix B presents additional details about the above topics.

A. Legal Standards for Different Types of Measures

There are different legal standards for determining the constitutionality of POC- and woman-owned business programs, depending on whether they rely solely on race- and gender-neutral measures or if they also include race- and gender-conscious measures.

1. Programs that rely solely on race- and gender-neutral measures. Organizations that implement POC- and woman-owned business programs that rely solely on race- and gender-neutral measures must show a *rational basis* for their programs. Courts typically apply the rational basis test to programs that do not potentially jeopardize any fundamental rights or discriminate on the basis of race, gender, sexual orientation, or other suspect factors. Showing a rational basis requires organizations to

¹ BBC Research & Consulting defines a USDOT-funded contract or procurement as any contract or procurement that includes at least \$1 of USDOT funding.

demonstrate that their contracting and procurement programs are rationally related to legitimate government interests (e.g., increasing the participation of local small businesses in its work). It is the least rigorous standard for evaluating the constitutionality of business programs.

2. Programs that include race- and gender-conscious measures. Contracting programs that include race- and gender-conscious measures must meet the *strict scrutiny* and *intermediate* standards of constitutional review, respectively.

a. Strict scrutiny. The strict scrutiny standard presents the highest threshold for evaluating the legality of contracting programs that could impinge on the rights of others, short of prohibiting them altogether. Under the strict scrutiny standard, organizations must show a *compelling governmental* interest in using race-conscious measures and ensure that the use of such measures is *narrowly tailored*.

i. Compelling governmental interest. Organizations using race-conscious measures have the initial burden of showing evidence of discrimination within their own *relevant geographic market areas (RGMA)*—including statistical and qualitative evidence—that supports the use of such measures.² Although organizations can draw on national statistics relevant to marketplace conditions within their own regions, they cannot rely solely on such information to demonstrate a compelling governmental interest for their programs. They must also present evidence tailored specifically to the marketplaces in which they operate.

It is not necessary for organizations themselves to have discriminated against POC-owned businesses for them to demonstrate a compelling governmental interest and take remedial action. They could take action if evidence indicates they are *passive participants* in race-based discrimination that exists in their RGMA.³ Passive participation in discrimination refers to government organizations perpetuating discrimination in their contract and procurement processes simply by operating in a marketplace where such discrimination exists.

ii. Narrow tailoring. In addition to demonstrating a compelling governmental interest, organizations must also demonstrate that their use of race-conscious measures is narrowly tailored to meet their objectives. There are a number of factors that a court considers when determining whether the use of such measures is narrowly tailored:

- The necessity of such measures and the efficacy of alternative race-neutral measures;
- The degree to which the use of such measures is limited to those groups that actually suffer discrimination in the local marketplace;
- The degree to which the use of such measures is flexible and limited in duration, including the availability of waivers and sunset provisions;
- The relationship of any numerical goals to the relevant business marketplace; and

² See e.g., *Concrete Works, Inc. v. City and County of Denver* (“Concrete Works I”), 36 F.3d 1513, 1520 (10th Cir. 1994).

³ See e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989); *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1048 (Federal Cir. 2008).

- The impact of such measures on the rights of third parties.

b. Intermediate scrutiny. The intermediate scrutiny standard is less rigorous than strict scrutiny but more rigorous than the rational basis standard. Certain courts apply the intermediate scrutiny standard to gender-conscious programs although many courts apply the strict scrutiny standard to both race- and gender-conscious programs. In order for a program to pass intermediate scrutiny, it must:

- Serve an important government objective, and
- Be substantially related to achieving the objective.

The United States Supreme Court first accepted intermediate scrutiny for programs that discriminate based on gender or sex in 1976, and other courts have also applied it to assessing the constitutionality of programs based on gender or sex.⁴

B. Seminal Court Decisions

Two Supreme Court cases established the *strict scrutiny* standard for evaluating the constitutionality of contracting programs that use race-conscious measures:

- *City of Richmond v. J.A. Croson Company (Croson)*;⁵ and
- *Adarand Constructors, Inc. v. Peña (Adarand)*.⁶

Many subsequent decisions in federal district or appellate courts have refined the requirements for the use of race- and gender-conscious measures as part of POC- and woman-owned business programs, including several cases in the Ninth Circuit, the jurisdiction in which RTC operates. BBC briefly summarizes the United States Supreme Court's decisions in *Croson* and *Adarand* as well as the Ninth Circuit Court of Appeals' decisions in three other cases related to POC- and woman-owned business programs:

- *Western States Paving Co. v. Washington State Department of Transportation (Western States)*;⁷
- *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al. (AGC, San Diego)*;⁸ and
- *Mountain West Holding Co., Inc. v. State of Montana, Montana DOT, et al. (Mountain West Holding)*.⁹

⁴ *Craig v. Boren*, 429 U.S. 190 (1976).

⁵ *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁷ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

⁸ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187 (9th Cir. 2013).

⁹ *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (not for publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003,

1. *Croson and Adarand.* The United States Supreme Court’s landmark decisions in *Croson* and *Adarand* are the most important court decisions to date in connection with the use of race-conscious measures in contracting and procurement and disparity study methodology. In *Croson*, the Supreme Court struck down the City of Richmond’s race-based subcontracting program as unconstitutional, and in doing so, established various requirements to which government agencies must adhere when using race-conscious contracting measures as part of their contracting and procurement:

- Agencies’ use of race-conscious measures must meet the strict scrutiny standard of constitutional review—that is, in remedying any identified discrimination, they must establish a compelling government interest to do so and must ensure the use of such measures is narrowly tailored.
- In assessing availability, agencies must account for various characteristics of the prime contracts and subcontracts they award and the degree to which businesses are *ready, willing, and able* to perform that work.
- If agencies show statistical disparities between the percentage of dollars they awarded to POC-owned businesses and the percentage of dollars those businesses might be available to perform, then *inferences of discrimination* could exist, justifying the use of narrowly tailored, race-conscious measures.

The Supreme Court’s decision in *Adarand* expanded its decision in *Croson* to include federal government programs—such as the Federal DBE Program—that potentially include race-conscious measures, most importantly requiring that those programs must also meet the strict scrutiny standard as part of federal programs.

2. *Western States.* *Western States* represented the first time the Ninth Circuit Court of Appeals considered the constitutionality of a state department of transportation’s implementation of the Federal DBE Program. In *Western States*, the court struck down the Washington State Department of Transportation’s (WSDOT’s) implementation of the Federal DBE Program, because it included the use of race-conscious measures that did not satisfy the narrow tailoring requirement of the strict scrutiny standard. Specifically, the court held that:

- WSDOT did not present compelling evidence of race-based discrimination in the Washington transportation contracting industry, and agencies must demonstrate evidence of such discrimination for their use of race-conscious measures to be considered narrowly tailored and serving a remedial purpose.
- Even when evidence of discrimination exists within agencies’ RGMAs, the use of race-conscious measures is narrowly tailored only when it is limited to those business groups that have been shown to actually suffer from discrimination in their marketplaces.
- Agencies can rely on statistical disparities between the participation and availability of POC- and woman-owned businesses on work they awarded to show discrimination against particular

dismissing in part, reversing in part and remanding the U. S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014). The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

business groups in the marketplace, particularly if that work was awarded using only race- and gender-neutral measures.

- In assessing availability, agencies must account for various characteristics—such as capacity, firm size, and contract size—of the projects they award and the businesses located in their RGMAs.
- Sufficient amounts of both statistical and qualitative evidence are necessary to demonstrate the need for race- and gender-conscious measures.

3. AGC, San Diego. *AGC, San Diego* represents the only other time the Ninth Circuit Court of Appeals has considered the constitutionality of a state department of transportation's implementation of the Federal DBE Program. In contrast to its decision in *Western States*, the court upheld the California Department of Transportation's (Caltrans') use of race- and gender-conscious measures and its implementation of the Federal DBE Program as constitutional, ruling that it met both the compelling government interest and narrow tailoring requirements of the strict scrutiny standard. Caltrans' implementation of the Federal DBE Program and its defense of its program was based in large part on a 2007 disparity study BBC conducted.

4. Mountain West Holding. In *Mountain West Holding*, the Ninth Circuit Court of Appeals gave an unpublished opinion regarding the Montana Department of Transportation's (MDT's) implementation of the Federal DBE Program and Mountain West Holding Co.'s claim that MDT unconstitutionally gave preference to POC- and woman-owned businesses through its use of DBE contract goals. The court found Mountain West Holding Co.'s claims to be moot, because by the time of the case, MDT was no longer using race- or gender-conscious DBE contract goals to award any work. However, the court found MDT's implementation of the Federal DBE Program may have relied on dubious information, including:

- MDT's interpretation of the decrease of DBE participation in its USDOT-funded projects when the agency stopped using DBE contract goals as evidence of barriers against POC- and woman-owned businesses in its work;
- The agency relying on qualitative evidence in the absence of compelling, statistical evidence to demonstrate barriers against POC- and woman-owned businesses in its marketplace; and
- Numerous disputes of fact as to whether MDT's 2009 disparity study provided evidence in support of using race- and gender-conscious measures.

As a result of those findings, the court reversed and remanded for the district court to conduct further proceedings, including a trial or the resumption of pretrial litigation. However, the case was voluntarily dismissed by stipulation of both parties.

C. Addressing Legal Requirements

Many organizations have used information from disparity studies to:

- Determine whether their contracting practices are affected by race- or gender-based discrimination;
- Design efforts to encourage the participation of POC- and woman-owned businesses in their work;
- Ensure their use of any race- or gender-conscious measures meets the strict scrutiny and intermediate scrutiny standards, respectively.

Various aspects of the disparity study specifically address requirements the United States Supreme Court and other federal courts have established around POC- and woman-owned business programs and race- and gender-conscious measures:

- The disparity study includes extensive econometric analyses and analyses of qualitative evidence to assess whether any discrimination exists for POCs, women, and POC- and woman-owned businesses in the RGMA and whether RTC is actively or passively participating in that discrimination.
- The study accounts for various characteristics of the prime contracts and subcontracts RTC awards, such as work type, role, size, and location—as well as the specific characteristics of businesses working in the RGMA—such as primary lines of work, roles, bid capacities, and interest in government work—resulting in precise estimates of the degree to which POC- and woman-owned businesses are *ready, willing, and able* to perform that work.
- The study includes assessments of whether POC- and woman-owned businesses exhibit substantial statistical disparities between their participation in and availability for RTC’s contracts and procurements, indicating whether any inferences of discrimination exist for individual race or gender groups.
- The study includes specific recommendations to help ensure RTC’s potential use of any race- or gender-conscious measures is narrowly tailored to meet the organization’s equity objectives, including recommendations related to:
 - Identifying which race/ethnic or gender groups exhibit substantial barriers;
 - Maximizing the use of race- and gender-neutral measures to address any barriers;
 - Implementing race- and gender-conscious measures that are flexible, rationally related to marketplace conditions, and not overly burdensome on third parties; and
 - Setting overall aspirational goals for the participation of POC- and woman-owned businesses in RTC work that are consistent with federal regulations and case law.

CHAPTER 3.

Marketplace Conditions

Historically, there have been many legal, economic, and social obstacles that have impeded persons of color (POCs) and women from starting and operating successful businesses. Barriers including slavery, racial oppression, segregation, displacement, labor market discrimination, and discriminatory government policies have produced substantial disparities for POCs and women, the effects of which still impact them today. Those barriers have limited opportunities for POCs in terms of education, workplace experience, and building wealth.^{1, 2, 3, 4, 5} Similarly, many women have been restricted to either being homemakers or taking gender-specific jobs with low pay and little chance for advancement. They have also faced barriers related to education, workplace experience, and building wealth.^{6, 7, 8} POCs and women in Clark County, Nevada have faced barriers similar to the ones nationwide. Black Americans and Hispanic Americans lived in impoverished, racially segregated neighborhoods that offered poor living conditions.⁹ They also attended racially segregated schools with few POC teachers and were barred from using the same lunch counters and movie theater seating as white Americans.¹⁰ Disparate treatment also extended into the labor market. Hispanic Americans and Black Americans were concentrated in low-wage work in the extraction, agriculture, and railroad industries with few advancement opportunities. They were even barred from working in casinos until the 1970s.

In the middle of the 20th century, many reforms opened up new opportunities for POCs and women nationwide. For example, *Brown v. Board of Education*, *The Equal Pay Act*, *The Civil Rights Act*, and *The Women's Educational Equity Act* outlawed many forms of discrimination. Workplaces adopted personnel policies and implemented programs to diversify their staffs.¹¹ Those reforms increased diversity in workplaces and reduced educational and employment disparities for POCs and women.^{12, 13, 14, 15} However, despite those improvements, POCs and women continue to face barriers—such as incarceration, residential segregation, and disproportionate family responsibilities—that have made it more difficult for them to start and operate businesses successfully.^{16, 17, 18, 19}

Federal courts have considered barriers POCs, women, and POC- and woman-owned businesses face in a marketplace as evidence for race- and gender-based discrimination in that marketplace.^{20, 21, 22} The United States Supreme Court and other federal courts have held that analyses of conditions in a marketplace for POCs, women, and POC- and woman-owned businesses are instructive in determining whether agencies' implementations of POC- and woman-owned business programs are appropriate and justified. Those analyses help agencies determine whether they are *passively participating* in any race- or gender-based discrimination that makes it more difficult for POC- or woman-owned businesses to successfully compete for government contracts and procurements. Passive participation in discrimination refers to agencies unintentionally perpetuating race- or gender-based discrimination simply by operating within marketplaces where such discrimination exists. Many courts have held that passive participation in any race- or gender-based discrimination can help to establish a *compelling governmental interest* for agencies to take remedial action to address such discrimination.^{23, 24, 25}

BBC Research & Consulting (BBC) conducted analyses to assess whether POCs, women, and POC- and woman-owned businesses face any barriers in the Clark County construction, professional services, and

goods and other services industries. We also examined the potential effects any such barriers have on the formation and success of businesses as well as their participation in and availability for contracts and procurements the Regional Transportation Commission of Southern Nevada (RTC) awards. We examined local marketplace conditions in four primary areas:

- **Human capital**, to assess whether POCs and women face barriers related to education, employment, and gaining experience;
- **Financial capital**, to assess whether POCs and women face barriers related to wages, homeownership, personal wealth, and financing;
- **Business ownership**, to assess whether POCs and women own businesses at rates comparable to that of white men; and
- **Business success**, to assess whether POC- and woman-owned businesses have outcomes similar to those of businesses owned by white men.

A. Human Capital

Human capital is the collection of personal knowledge, behavior, experience, and characteristics that make up an individual's ability to perform and succeed in particular labor markets. Factors such as education, business experience, and managerial experience have been shown to be related to business success.^{26, 27, 28, 29} Any barriers in those areas may make it more difficult for POCs and women to work in relevant industries and prevent some of them from starting and operating businesses successfully.

1. Education. Barriers associated with educational attainment may preclude entry or advancement in certain industries, because many occupations require at least a high school diploma, and some occupations—such as in professional services—require at least a four-year college degree. In addition, education is a strong predictor of both income and personal wealth, which are both shown to be related to business formation and success.^{30, 31, 32} Nationally, POCs lag behind white Americans in terms of both educational attainment and the quality of education they receive.^{33, 34, 35} POCs are more likely than white Americans to attend schools that do not provide access to core classes in science and math.³⁶ In addition, Black American students are more likely than white Americans to be expelled or suspended from high school.³⁷ For those and other reasons, POCs are far less likely than white Americans to attend college, enroll at moderately or highly selective four-year college institutions, and earn college degrees.³⁸

Educational outcomes for POCs in Clark County are similar to those for POCs nationwide. BBC's analyses of the Clark County labor force indicate that people who identify with certain POC groups are less likely than white Americans to earn college degrees. Figure 3-1 presents the percentage of workers in Clark County who have earned four-year college degrees. As shown in Figure 3-1, Black American (24%), Hispanic American (13%), and Native American (24%) workers are substantially less likely than white American workers (36%) to have four-year college degrees. We also conducted regression analyses to assess whether race- or gender-related barriers in obtaining college degrees exist even after accounting for various personal factors, such as age and family status. Those analyses indicated that, even after accounting for such factors, Black Americans, Hispanic Americans, and Native Americans are less likely to obtain college degrees compared to white Americans (see Appendix C, Figure C-2 for more details).

2. Employment and management experience. An important precursor to business ownership and success is acquiring direct experience in relevant industries. Any barriers that limit POCs and women from acquiring that experience could prevent them from starting and operating businesses in the future.

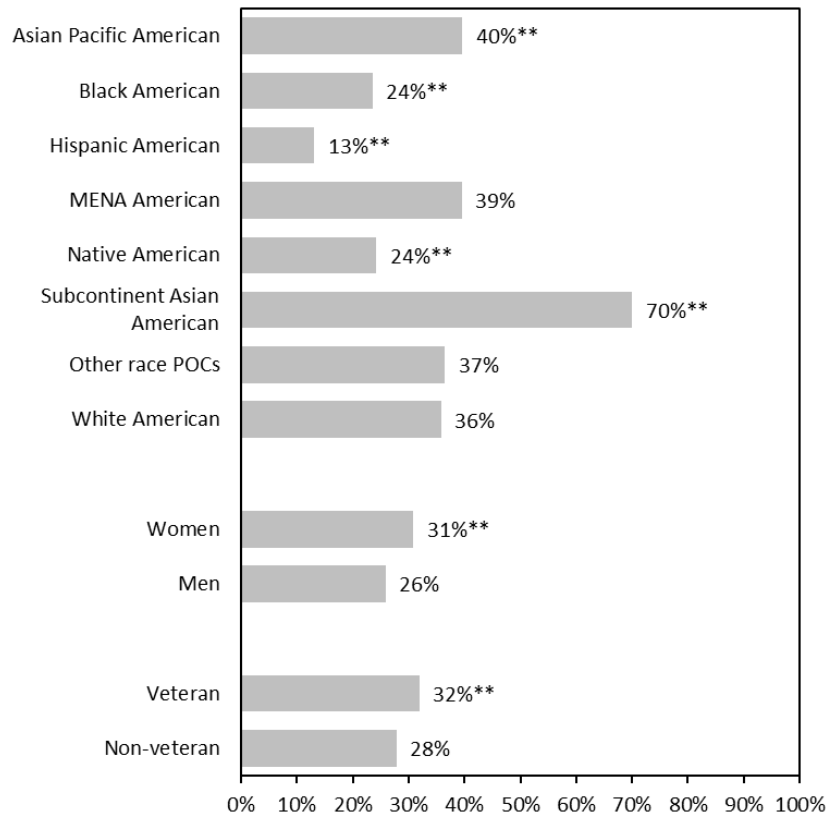
Figure 3-1.
Percentage of all workers 25 and older with at least a four-year degree, Clark County, 2017-2021

Note:

** Denotes that the difference in proportions between the POC group and white Americans (or between women and men) is statistically significant at the 95% confidence level.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.



a. Employment. On a national level, prior industry experience has been shown to be an important indicator for business ownership and success. However, POCs and women are often unable to acquire that experience. They are sometimes discriminated against in hiring decisions, which impedes their entry into the labor market.^{39, 40, 41} When employed, they are often relegated to peripheral positions in the labor market and to industries that already exhibit high concentrations of POCs and women.^{42, 43, 44, 45, 46, 47} In addition, Black Americans, Hispanic Americans, and Native Americans are incarcerated at greater rates than white Americans in Nevada and nationwide, which contributes to many labor difficulties, including difficulties finding jobs and slow wage growth.^{48, 49, 50, 51, 52, 53, 54} BBC assessed the representation of POC and woman workers in the Clark County construction, professional services, and goods and other services industries compared to their representation in all Clark County industries considered together. We present the results of that analysis in Figure 3-2. Compared to their representation in all industries considered together:

- Smaller percentages of Asian Pacific Americans (2.6%), Black Americans (5.6%), Middle Eastern and North African (MENA) Americans (0.3%), and Subcontinent Asian Americans (0.3%) work in the construction industry. A smaller percentage of women (10%) also work in construction.
- Smaller percentages of Hispanic Americans (16.3%) work in the professional services industry. In addition, a smaller percentage of women (34.6%) work in the professional services industry.

- A smaller percentage of Asian Pacific Americans (5.7%), MENA Americans (0.2%), and Subcontinent Asian Americans (0.1%) work in the goods and other services industry. In addition, a smaller percentage of women (37.8%) work in the goods and other services industry.

Figure 3-2.
Demographic characteristics of workers in study-related industries and all industries, Clark County, 2017-2021

Group	All Industries (n=49,422)	Construction (n=3,305)	Professional Services (n=1,940)	Goods and Other Services (n=1,351)
Race/ethnicity				
Asian Pacific American	11.6 %	2.6 % **	10.8 %	5.7 % **
Black American	12.4 %	5.6 % **	12.8 %	15.9 % **
Hispanic American	31.7 %	52.2 % **	16.3 % **	42.4 % **
MENA American	1.0 %	0.3 % **	1.5 %	0.2 % **
Native American	1.5 %	1.2 %	1.2 %	1.3 %
Subcontinent Asian American	0.8 %	0.3 % **	2.1 % **	0.1 % **
Other race POCs	0.9 %	0.7 %	1.5 %	0.9 %
Total minority	59.9 %	62.7 %	46.1 %	66.5 %
White American	40.1 %	37.3 % **	53.9 % **	33.5 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Gender				
Women	46.1 %	10.0 % **	34.6 % **	37.8 % **
Men	53.9 %	90.0 % **	65.4 % **	62.2 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Veteran Status				
Veteran	5.8 %	5.5 %	9.4 % **	9.4 % **
Non-veteran	94.2 %	94.5 %	90.6 % **	90.6 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %

Note: ** Denotes that the difference in proportions between workers in each study-related industry and workers in all industries is statistically significant at the 95% confidence level.

Source: BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

BBC also examined the relationships between race and gender and unemployment. Figure 3-3 presents unemployment rates among POCs and women compared to those of white Americans and men, respectively. Compared to white American workers (7%), Black American (13%), MENA (11%), Native American (10%), and other race POC American (11%) workers are substantially more likely to be unemployed in Clark County. We also conducted regression analyses to assess whether there are relationships between race and gender and unemployment even after accounting for various personal factors such as age, education, and family status. Those analyses indicated that, even after accounting for such factors, Black Americans, MENA Americans, and Native Americans are more likely to be unemployed compared to white Americans. In addition, women are more likely to be unemployed compared to men (see Appendix C, Figure C-5 for more details).

b. Management experience. Managerial experience is an important predictor of business ownership and success, but discrimination remains an obstacle to greater diversity in management positions.^{55, 56, 57, 58} Nationally, POCs and women are far less likely than white men to work in management positions.^{59,}

^{60, 61} Similar outcomes exist for POCs and women in Clark County. BBC examined the representation of POCs and women in management positions in the Clark County construction, professional services, goods and other services, and transit services industries.

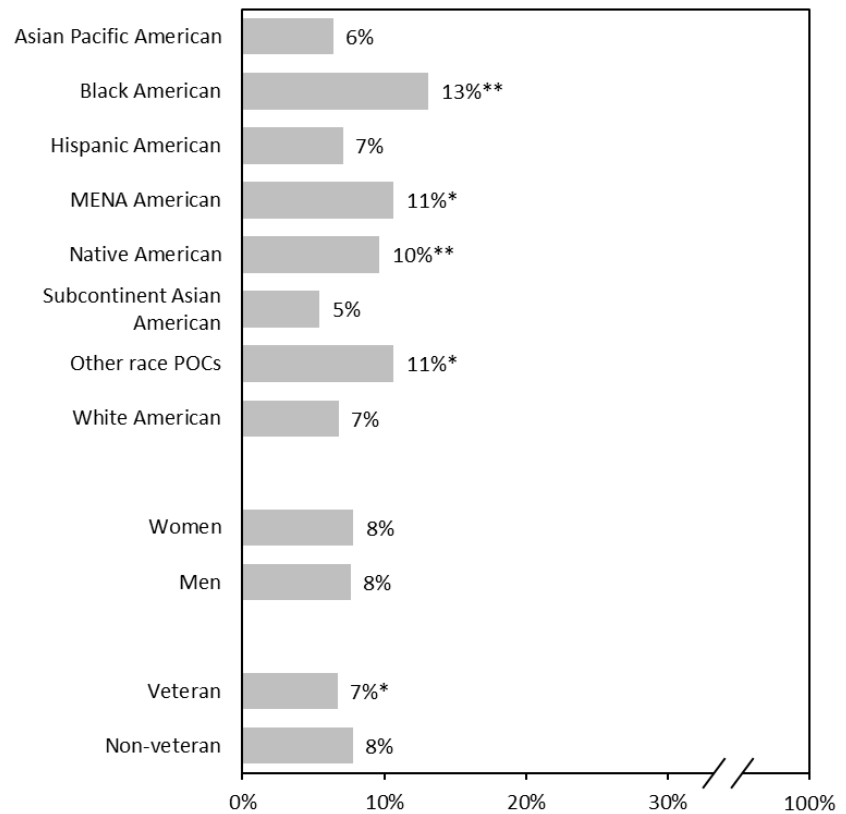
Figure 3-3.
Unemployment rates, Clark County, 2017-2021

Note:

*, ** Denotes that the difference in proportions between the POC group and White Americans (or between women and men) is statistically significant at the 90% and 95% confidence levels, respectively.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.



As shown in Figure 3-4:

- Smaller percentages of Asian Pacific Americans (3.6%), Black Americans (7.0%), Hispanic Americans (3.6%), and Native Americans (3.5%) than white Americans (12.9%) work as managers or supervisors in the Clark County construction industry. A smaller percentage of women (4.3%) than men (7.7%) work as managers or supervisors in the Clark County construction industry.
- Smaller percentages of Black Americans (1.9%) and Hispanic Americans (1.6%) than white Americans (4.5%) work as managers or supervisors in the Clark County professional services industry. A smaller percentage of women (1.8%) than men (5.4%) work as managers or supervisors in the Clark County professional services industry.
- Smaller percentages of Black Americans (0.7%) than white Americans (2.9%) work as managers or supervisors in the Clark County goods and other services industry.

B. Financial Capital

In addition to human capital, financial capital has been shown to be an important indicator of business formation and success.^{62, 63, 64} Individuals can acquire capital through many sources, including wages, personal wealth, homeownership, and loans. If barriers exist in financial markets, POCs and women may have difficulty acquiring the capital necessary to start, operate, or expand businesses.

1. Wages and income. Wage and income gaps between POCs and white Americans and between women and men exist nationwide, even when researchers have accounted for various personal factors.^{65, 66, 67, 68} For example, nationally, on average, Black Americans and Hispanic Americans have household incomes less than two-thirds and three-fourths, respectively, those of white Americans.⁶⁹ Women have also faced wage and income gaps relative to men. Nationally, the median hourly wage of women is only 84 percent that of men, even after accounting for various personal factors.⁷⁰ Such disparities make it difficult for POCs and women to use wages as a source of business capital.

Figure 3-4.
Percentage of non-owner workers who worked as a manager or supervisor in each study-related industry, Clark County, 2017-2021

Note:

*, ** Denotes that the difference in proportions between the POC group and white Americans (or between women and men) is statistically significant at the 90% and 95% confidence level, respectively.

† Denotes significant differences in proportions not reported due to small sample size.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

Group	Construction	Professional Services	Goods and Other Services
Race/ethnicity			
Asian Pacific American	3.6 % **	4.3 %	0.9 %
Black American	7.0 % *	1.9 % *	0.7 % **
Hispanic American	3.6 % **	1.6 % **	2.6 %
MENA American	0.0 % †	0.0 % †	0.0 % †
Native American	3.5 % **	7.3 %	0.0 % †
Subcontinent Asian American	16.7 % †	0.0 %	0.0 % †
Other race POCs	20.2 % †	42.9 % †	0.0 % †
White American	12.9 %	4.5 %	2.9 %
Gender			
Women	4.3 % **	1.8 % **	1.8 %
Men	7.7 %	5.4 %	2.4 %
Veteran Status			
Veteran	13.2 % **	5.6 %	0.5 % **
Non-veteran	7.0 %	3.9 %	2.4 %
All individuals	7.3 %	4.1 %	2.2 %

BBC observed wage disparities in Clark County consistent with those observed nationally. Figure 3-5 presents mean annual wages for Clark County workers by race and gender. Asian Pacific American (\$54,067), Black American (\$47,948), Hispanic American (\$42,996), Native American (\$52,489), and other race POC workers (\$59,741) earn less than white Americans (\$70,262). In addition, women (\$49,446) earn less than men (\$63,060). We also conducted regression analyses to assess whether wage gaps for POCs and women exist even after accounting for various personal factors such as age and family status. Those analyses indicated that, even after accounting for such factors, Asian Pacific American, Black Americans, Hispanic Americans, and Native Americans earn less than white Americans, and women earn less than men (see Appendix C, Figure C-11 for more details).

2. Personal wealth. Another source of business capital is personal wealth, and there are substantial disparities between POCs and white Americans and between women and men in personal wealth, even after accounting for various personal characteristics.^{71, 72, 73, 74} For example, in 2019, Black Americans and Hispanic Americans across the country exhibited average household net worth that was 14 percent and 17 percent, respectively, that of white Americans.⁷⁵ In addition, approximately 22 percent of Black Americans and 18 percent of Hispanic Americans in the United States are living in poverty compared to less than 10 percent of white Americans. In Nevada, 26 percent of Black Americans and 16 percent of Hispanic Americans are living in poverty compared to 11 percent of white Americans.⁷⁶ In addition, the median wealth of non-married women nationally is approximately one-third that of non-married men.⁷⁷

3. Homeownership. Home equity has also been shown to be a key source of business capital, but POCs appear to face substantial barriers nationwide in owning homes, and those disparities appear to be at least partly due to discrimination.^{78, 79, 80} Research indicates that POCs continue to be given less information on prospective homes and have their purchase offers rejected because of their races.^{81, 82} In addition, POC homeowners tend to own homes worth less than those of white Americans and tend to accrue less equity.^{83, 84, 85} Differences in home values and equity can be attributed—at least, in part—to the depressed property values that tend to exist in racially segregated neighborhoods.^{86, 87, 88}

Figure 3-5.
Mean annual wages, Clark County, 2017-2021

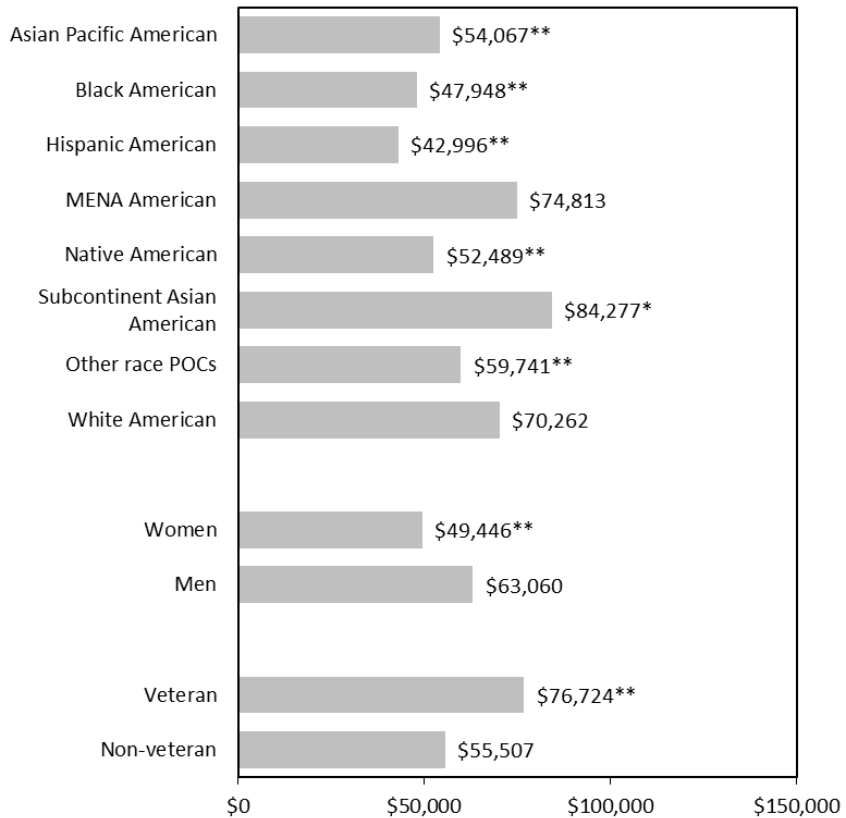
Note:

The sample universe is all non-institutionalized, employed individuals aged 25-64 that are not in school, the military, or self-employed.

*, ** Denotes statistically significant differences from white Americans (for POC groups), from men (for women), and from non-veterans (for veterans) at the 90% and 95% confidence level, respectively.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



POCs appear to face homeownership barriers in Clark County similar to those observed nationally. As shown in Figure 3-6, Black Americans (31%), Hispanic Americans (47%), Native Americans (47%), and other race POCs (51%) own homes at rates that are less than that of white Americans (64%).

Figure 3-6.
Home ownership rates, Clark County, 2017-2021

Note:

The sample universe is all households.

** Denotes statistically significant differences from white Americans at the 95% confidence level.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

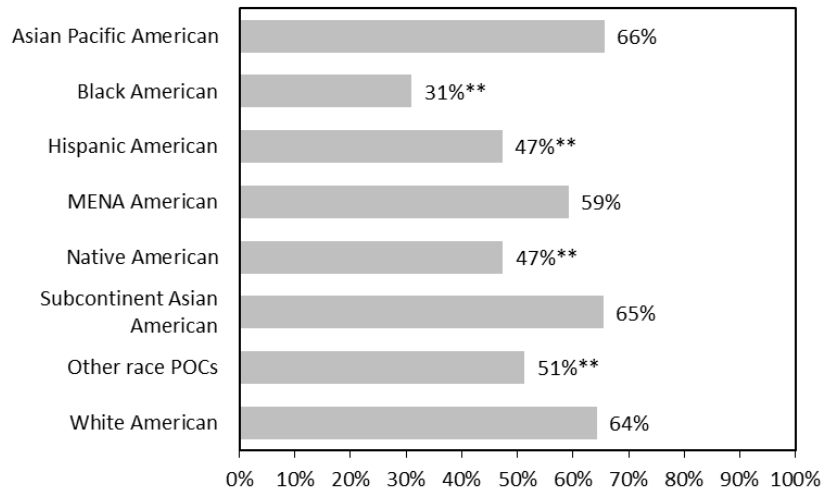


Figure 3-7 presents median home values among POC homeowners in Clark County. Those data indicate that Black American (\$290,000), Hispanic American (\$260,000), and Native American (\$290,000) homeowners own homes that, on average, are worth less than those of white Americans (\$310,000).

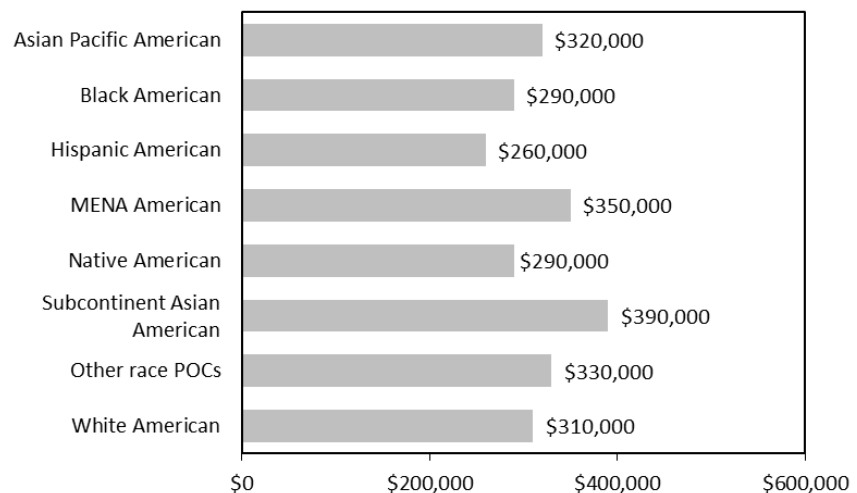
Figure 3-7.
Median home values, Clark County, 2017-2021

Note:

The sample universe is all owner-occupied housing units.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



4. Access to financing. POCs and women face many barriers in trying to access credit and financing, both for home and business capital. Researchers have often attributed those barriers to various forms of race- and gender-based discrimination that exist in credit markets.^{89, 90, 91, 92, 93, 94} BBC assessed difficulties POCs and women face in home and business credit markets.

a. Home credit. POCs and women continue to face barriers when trying to access credit to purchase homes. Examples of such barriers include discriminatory treatment of POCs and women during pre-application processes and less favorable loan terms when POC and woman borrowers are approved for home loans.^{95, 96} Disparities in home loan denial rates and in mortgage costs may prevent POCs and women from accessing the wealth-building potential of homeownership.^{97, 98, 99, 100, 101} To examine how POCs fare in the home credit market relative to white Americans in Clark County, we analyzed home loan denial rates for high-income households by race in the county. As shown in Figure 3-8, Asian Americans, Black Americans, Hispanic Americans, Native Americans, and Native Hawaiian or Pacific Islander Americans in Clark County are denied home loans at greater rates than white Americans (7%).

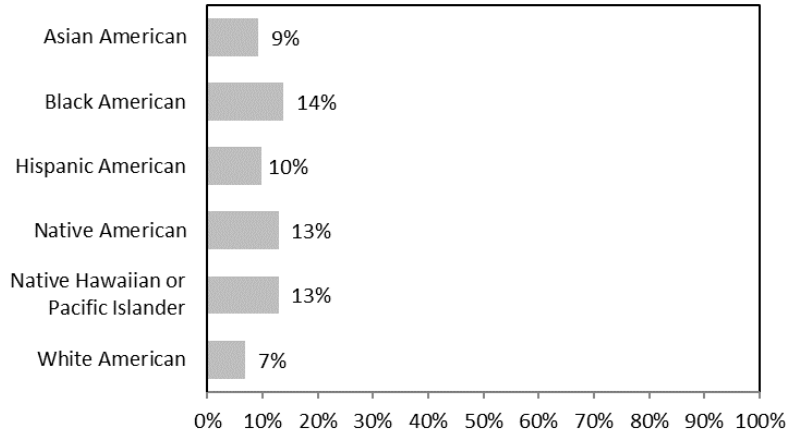
Figure 3-8.
Denial rates of conventional
purchase loans for high-income
households, Clark County, 2022

Note:

High-income borrowers are those households with 120% or more of the HUD/FFIEC area median family income (MFI). The MFI data are calculated by the FFIEC.

Source:

FFIEC HMDA data 2022. The raw data extract was obtained from the Federal Financial Institutions Examination Council's HMDA data tool: <https://ffiec.cfpb.gov/data-browser/>.

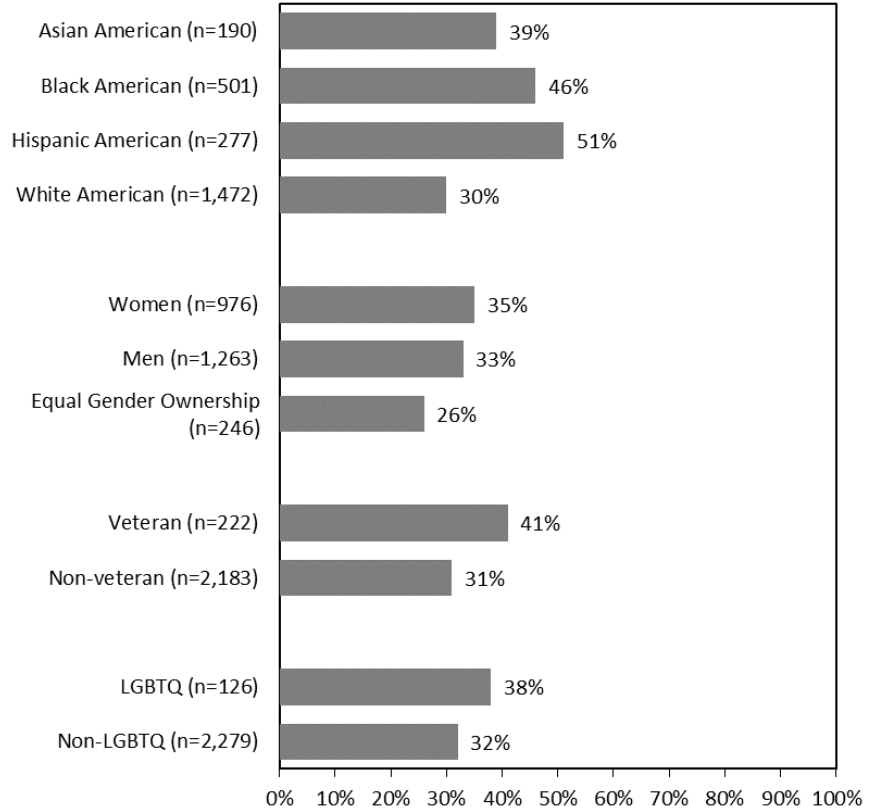


b. Business credit. POC- and woman-owned businesses also face difficulties accessing business credit. For example, during pre-application meetings, POC-owned businesses are given less information about loan, are subjected to more information requests, and are offered less support than businesses owned by white Americans.¹⁰² In addition, POC- and woman-owned businesses are more likely to forego submitting business loan applications because of fears of denial.^{103, 104, 105} They are also more likely to be denied business credit when they do seek loans and are less likely to receive all the financing they originally sought if their loans are approved.^{106, 107, 108, 109, 110, 111} Finally, POC and women business owners face worse loan outcomes even after accounting for creditworthiness.^{112, 113, 114} Without equal access to capital, POC- and woman-owned businesses must operate with less capital than businesses owned by white Americans and men, respectively, and must rely more on personal finances.^{115, 116, 117, 118}

BBC analyzed denial rates for loans, lines of credit, and cash advances for POCs and women relative to white Americans and men, respectively, at a national level. As shown in Figure 3-9, relevant groups of POC-owned businesses are denied loans at greater rates than businesses owned by white Americans. In addition, woman-owned businesses are denied loans at greater rates than businesses owned by men.

Figure 3-9.
Loan, line of credit, and
cash advance denial rates,
United States, 2021

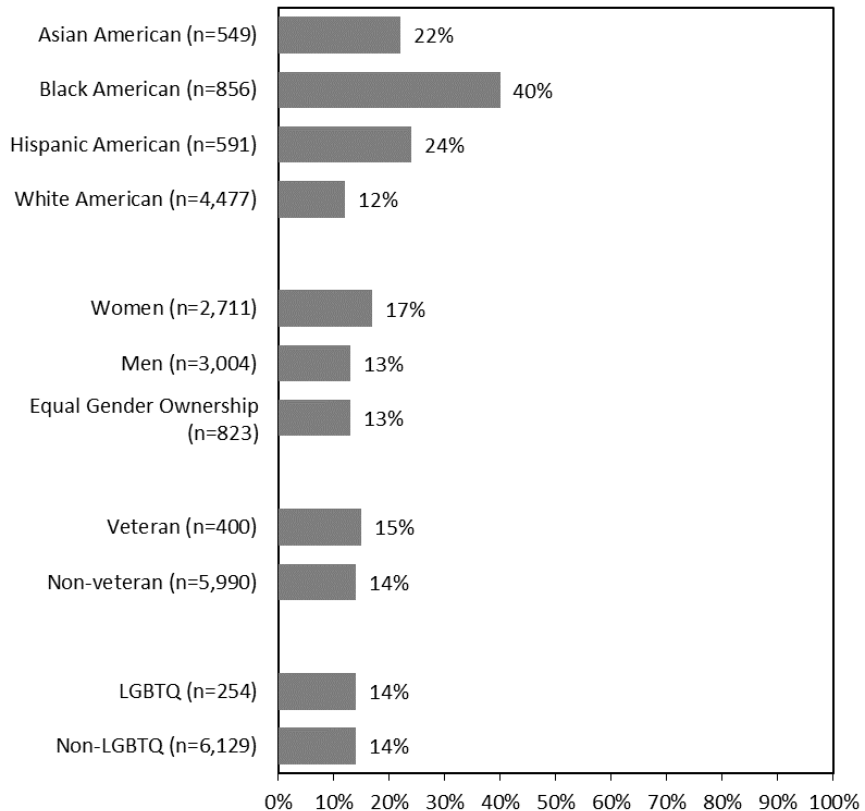
Source:
 BBC from 2021 Small Business Credit
 Survey.



We also analyzed the degree to which POC- and woman-owned businesses do not apply for loans due to a fear of denial. Figure 3-10 presents the rates at which those businesses forego loan applications due to fears of denial relative to businesses owned by white Americans and men. Nationally, POC-owned businesses are more likely than businesses owned by white Americans and woman-owned businesses are more likely than businesses owned by men to not apply for loans due to a fear of denial.

Figure 3-10.
Businesses that did not apply
for loans due to fear of
denial, United States, 2021

Source:
 BBC from 2021 Small Business Credit Survey.



C. Business Ownership

Nationally, there has been substantial growth in the number of POC- and woman-owned businesses recently. For example, from 2017 to 2020, the number of woman-owned businesses with employees increased by 9 percent, Black American-owned businesses increased by 14 percent, and Hispanic American-owned businesses increased by 17 percent.^{119, 120} However, important barriers in starting and operating businesses remain. Black Americans, Hispanic Americans, and women are still less likely to start businesses than white American men.^{121, 122, 123, 124, 125} In addition, POCs and women have not been able to penetrate all industries equally. They disproportionately own businesses in industries that require less human and financial capital to be successful and that already include large concentrations of POCs and women.^{126, 127, 128} BBC examined rates of self-employment (i.e., business ownership) in Clark County for each relevant industry by race and gender. As shown in Figure 3-11:

- Black Americans (7.5%) and Hispanic Americans (9.5%) own construction businesses at rates less than that of white Americans (12.2%), and women (7.8%) own construction businesses at a rate less than that of men (11.0%).
- Asian Pacific Americans (11.7%), Black Americans (7.4%), Hispanic Americans (16.0%), and Native Americans (2.7%) own professional services businesses at rates less than that of white Americans (22.7%), and women (14.7%) own such businesses at a rate less than that of men (20.6%).
- Black Americans (7.6%) own goods and other services businesses at a rate less than that of white Americans (17.5%).

Figure 3-11.
Self-employment rates in study-related industries, Clark County, 2017-2021

Group	Construction	Professional Services	Goods and Other Services
Race/ethnicity			
Asian Pacific American	17.9 %	11.7 % **	10.5 %
Black American	7.5 % **	7.4 % **	7.6 % **
Hispanic American	9.5 % *	16.0 % **	16.2 %
Native American	9.3 %	2.7 % **	14.0 % †
MENA American	14.4 % †	57.2 % **	10.7 % †
Subcontinent Asian American	18.9 % †	14.0 %	0.0 % †
Other race POC	14.7 % †	22.2 % †	16.3 % †
White American	12.2 %	22.7 %	17.5 %
Gender			
Women	7.8 % **	14.7 % **	20.6 % **
Men	11.0 %	20.6 %	11.5 %
Veteran Status			
Veteran	11.6 %	15.6 %	4.6 % **
Non-veteran	10.6 %	18.9 %	16.0 %
All individuals	10.7 %	18.6 %	14.9 %

Note: *, ** Denotes that the difference in proportions between the POC group and white Americans, or between women and men is statistically significant at the 90% and 95% confidence level, respectively.

† Denotes significant differences in proportions not reported due to small sample size.

Source: BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

BBC also conducted regression analyses to determine whether differences in business ownership rates in Clark County exist based on race and gender even after statistically controlling for various personal factors such as income, education, and familial status. Even after accounting for various personal factors:

- Women are less likely to own construction businesses than men.
- Asian Pacific Americans and Black Americans are less likely to own professional services businesses relative to white Americans. Women are also less likely to own professional services businesses than men.

D. Business Success

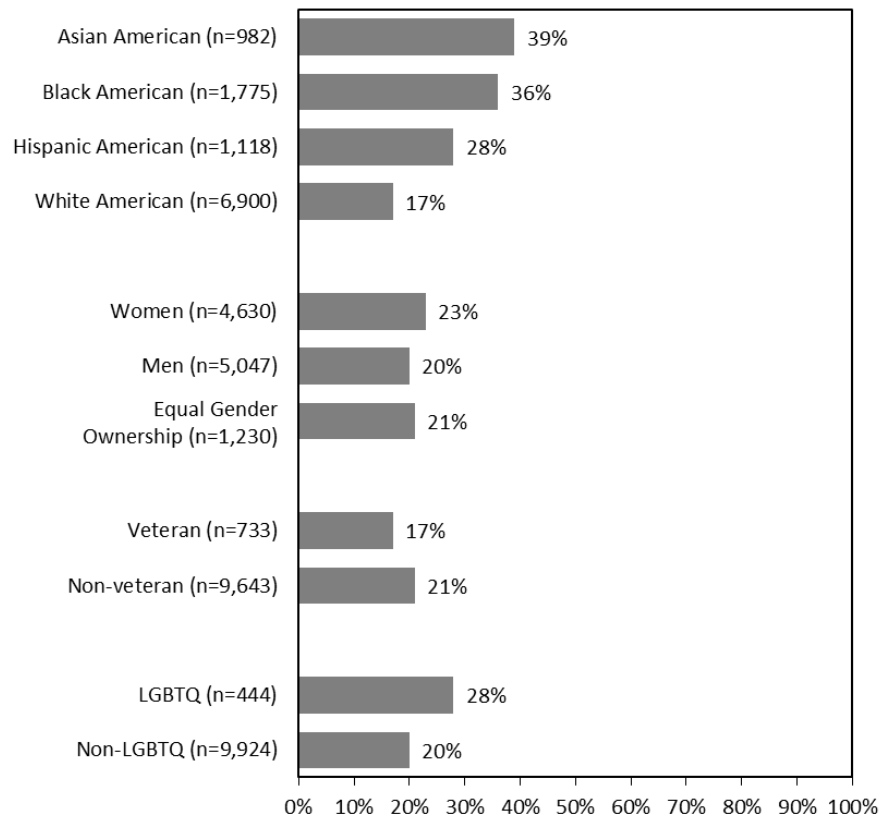
Research indicates that, nationally, POC- and woman-owned businesses fare worse than businesses owned by white American men. For example, POC- and woman-owned businesses are more likely to experience financial challenges relative to those owned by white Americans and men, respectively.^{129, 130} In addition, POC- and woman-owned businesses have been shown to be less successful than those owned by white Americans and men, respectively, based on a number of different indicators such as profits and business size.^{131, 132, 133, 134} BBC examined data on business financial conditions, business receipts, and business owner earnings to further explore business success.

1. Financial condition. BBC examined the reported *financial condition* of businesses in the United States by the race and gender of their owners. Financial condition refers to a business' increase or

decrease in revenue and number of employees in the past 12 months as well as anticipated increase in revenue and number of employees over the next 12 months, as reported in the Small Business Credit Survey. Financial condition also assesses financial challenges a business may have experienced in the past 12 months including weak sales, difficulty paying expenses, uneven cash flow, and credit availability. As shown in Figure 3-12, Asian American- (39%), Black American- (36%), and Hispanic American-owned businesses (28%) are more likely than white American-owned businesses (17%) to report being in poor financial condition. In addition, woman-owned businesses (23%) are more likely to report being in poor financial condition than businesses owned by men (20%).

Figure 3-12.
Businesses in poor financial condition in the United States, 2021

Source:
BBC from
2021 Small Business Credit Survey.



2. Business receipts. BBC also examined data on business receipts to assess whether POC- and woman-owned businesses in Clark County earn as much as those owned by white Americans and men, respectively. Figure 3-13 indicates that Asian American-, Black American-, Hispanic American-, and Native Hawaiian and other Pacific Islander-owned businesses have mean annual business receipts less than those owned by white Americans (\$2.6 million). In addition, woman-owned businesses (\$1.1 million) have mean annual business receipts less than those owned by men (\$2.8 million).

3. Business owner earnings. BBC also analyzed the earnings of business owners to assess whether owners who are POCs and women in Clark County earn as much as business owners who are white Americans and men, respectively. As shown in Figure 3-14:

- Black American (\$39,667), Hispanic American (\$34,988), and Native American (\$24,013) business owners earned less on average than white American business owners (\$59,666); and
- Woman business owners (\$33,233) earned less on average than male business owners (\$65,170).

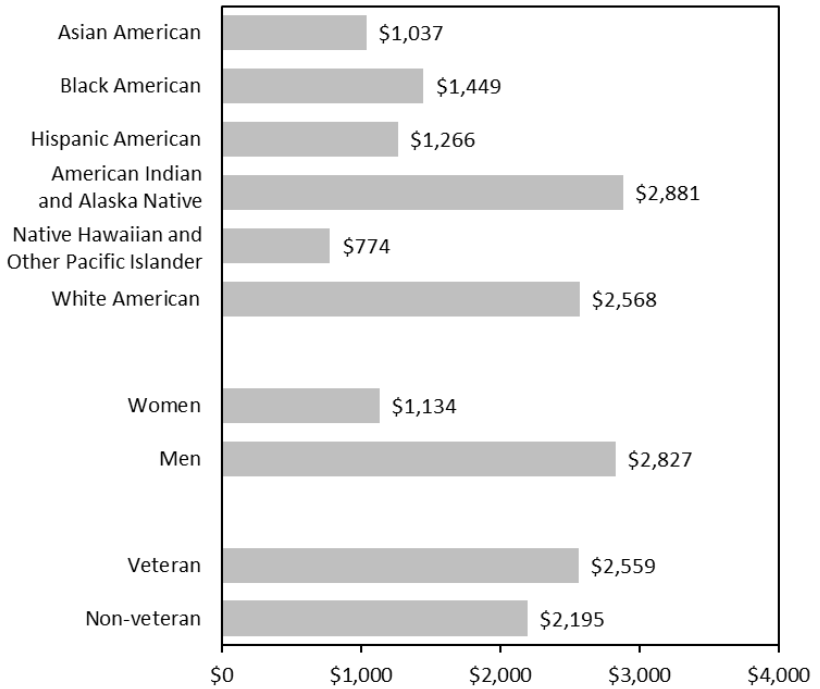
Figure 3-13.
Mean annual business receipts
(in thousands), Clark County

Note:

Includes employer firms. Does not include publicly-traded companies or other firms not classifiable by race and gender.

Source:

BBC from 2017 Annual Business Survey.



BBC also conducted regression analyses to determine whether race- and gender-based differences in business owner earnings in Clark County exist even after statistically controlling for various personal factors such as age, education, and family status. The results of those analyses indicated that, compared to male business owners, woman business owners earn substantially less.

Figure 3-14.
Mean annual business owner
earnings, Clark County, 2017-
2021

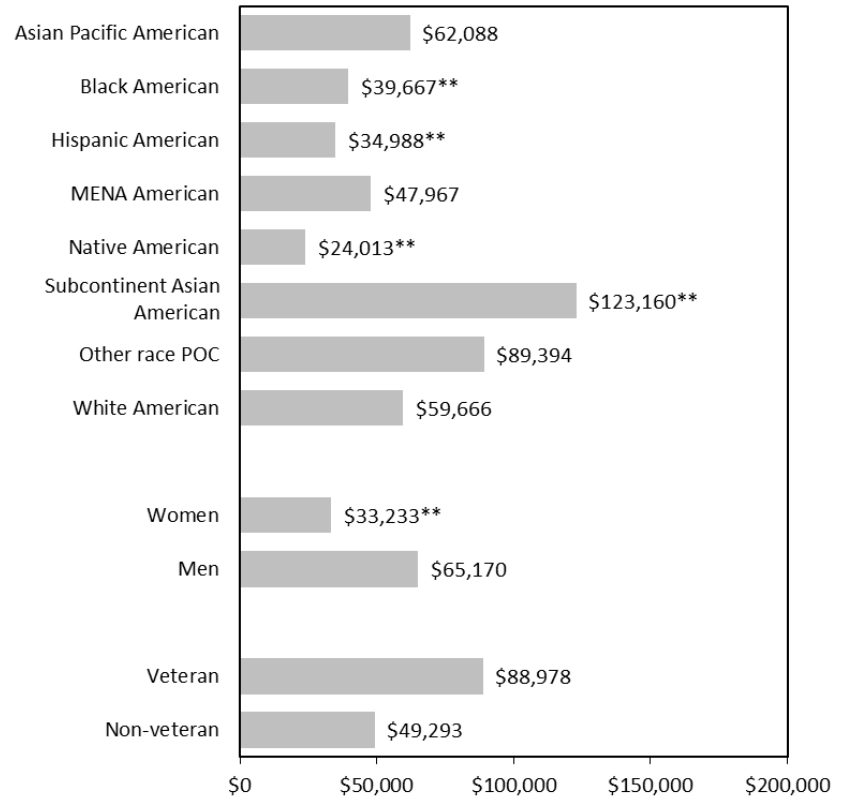
Note:

The sample universe is business owners age 16 and older who reported positive earnings. All amounts in 2021 dollars.

** Denotes statistically significant differences from white Americans (for POC groups) and from men (for women) at the 95% confidence level.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



E. Summary

BBC's analyses of marketplace conditions indicate that POCs and women face barriers in industries relevant to RTC's contracting and procurement. Both existing and primary research we conducted indicate that disparities exist in acquiring human capital, accruing financial capital, owning businesses, and operating successful businesses. In many cases, there is evidence those disparities exist even after accounting for various personal factors. There is also evidence many disparities are due—at least, in part—to race- and gender-based discrimination. Barriers in the marketplace likely have important effects on the ability of POCs and women to start businesses in relevant industries—construction, professional services, and goods and other services—and to operate those businesses successfully. Any difficulties those individuals face in starting or operating businesses may reduce their availability for government work and the degree to which they are able to successfully perform such work.

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- ²⁰ *Adarand VII*, 228 F.3d at 1167–76; see also *Western States Paving*, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”); *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 2015 WL 1396376, appeal pending.
- ²¹ *Adarand VII*, 228 F.3d. at 1168-70; *Western States Paving*, 407 F.3d at 992; see *DynaLantic*, 885 F.Supp.2d 237; *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 2015 WL 1396376, appeal pending; *Geyer Signal*, 2014 WL 130909297 at *14].
- ²² *Adarand VII* at 1170-72; see *DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal*, 2014 WL 1309092 at *14.
- ²³ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).
- ²⁴ *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994).
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CHAPTER 4.

Data Collection and Analysis

Chapter 4 provides an overview of the contracts and procurements BBC Research & Consulting (BBC) analyzed as part of the 2023 Regional Transportation Commission of Southern Nevada (RTC) Disparity Study and the processes we used to collect relevant prime contract, subcontract, and vendor data from RTC. Chapter 4 is organized in five parts:

- A. Contract and procurement data;
- B. Vendor data;
- C. Relevant geographic market area (RGMA);
- D. Subindustry classifications; and
- E. Review process.

A. Contract and Procurement Data

BBC collected data related to the construction, professional services, and non-professional services and supplies contracts and procurements RTC awarded during the study period from the MS Govern and B2GNow systems. Those data served as the basis for key disparity study analyses, including the utilization, availability, and disparity analyses. BBC collected the most comprehensive data available on the prime contracts and subcontracts RTC awarded between July 1, 2017, and June 30, 2022 (the study period). We sought those data regardless of the race/ethnicity and gender of the owners of the businesses that performed the work or their statuses as persons of color (POC)-; woman-; veteran-; or lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientations (LGBTQ+)-owned businesses.

1. Prime contract data. RTC provided BBC with the following information about each relevant prime contract it awarded during the study period:

- Contract or purchase order number;
- Prime contractor name;
- Prime contractor identification number;
- Description of work;
- Award date;
- Award amount (including change orders and amendments);
- Amount paid-to-date (as of December 31, 2022);
- Funding source [United States Department of Transportation (USDOT)-funded or non USDOT-funded]; and
- Goal status (i.e., whether DBE goals were used to award the project).

RTC advised BBC on how to interpret the data it provided, including how to best identify unique bid opportunities and how to aggregate related award or payment amounts, where appropriate.

2. Subcontract data. RTC does not collect comprehensive data on the subcontracts associated with the projects it awards. To gather that information, BBC conducted surveys with prime contractors to collect data on the subcontracts associated with the projects the agency awarded to them during the study period and that we deemed to likely have included subcontract opportunities. We made that determination based on the work types involved in each project and project sizes, primarily including relatively large construction and professional services projects. We requested the following information from prime contractors about each subcontract associated with each relevant project RTC awarded to them:

- Associated prime contract number;
- Award amount for the project;
- Amount paid-to-date for the project (as of December 31, 2022);
- Commitment amount for each subcontract;
- Amount they paid on each subcontract (as of December 31, 2022);
- Description of work;
- Subcontractor name; and
- Subcontractor contact information.

BBC requested subcontract data associated with 157 prime contracts RTC awarded during the study period. Through our survey and numerous follow-up efforts, we collected information on subcontractor utilization for more than 75 percent of the associated contracting dollars for those projects.

3. Prime contract and subcontract amounts. For each contract element included in our analyses, BBC examined the dollars RTC awarded to each prime contractor and the dollars prime contractors committed to any subcontractors. If a contract did not include any subcontracts, we attributed the contract's or procurement's entire award amount to the prime contractor. If a contract or procurement included subcontracts, we calculated the prime contract amount as the total award amount less the sum of dollars committed to all subcontractors.

4. Contracts and procurements included in study analyses. Figure 4-1 presents the number of contract elements and associated dollars BBC included in our analyses.

Figure 4-1.
Contracts and procurements and associated dollars included in the disparity study

Contract type	Number	Dollars
Construction	380	\$50,145,915
Professional services	232	\$51,763,132
Non-professional services and supplies	315	\$120,389,667
Total	927	\$222,298,713

Note:

Numbers rounded to nearest dollar and thus may not sum exactly to totals.

Source:

BBC from RTC data.

B. Vendor Data

BBC also compiled information on the businesses that participated in relevant prime contracts and subcontracts RTC awarded during the study period, including:

- Business name;
- Physical addresses and phone numbers;
- Ownership status (i.e., whether each business was POC-, woman-, veteran-, or LGBTQ+-owned);
- Ethnicity of ownership (if POC-owned);
- Minority-owned business enterprise (MBE), woman-owned business enterprise (WBE), veteran-owned business enterprise (VBE), and LGBTQ+-owned business enterprise (LGBTBE) certification status;
- Primary lines of work;
- Business size; and
- Year of establishment.

BBC validated business information, including ownership and industry characteristics, by relying on a variety of sources for that information, including:

- RTC contract and vendor data;
- Surveys the study team conducted with business owners and managers;
- The Nevada Unified Certification Program directory;
- Dun & Bradstreet (D&B) business listings and other business information sources; and
- Business websites and other secondary research.

If these sources found conflicting information regarding a firm’s ownership or industry, the project team investigated those conflicts and reconciled them by assessing the relative validity of the conflicting sources.

C. Relevant Geographic Market Area (RGMA)

BBC used RTC data to help determine the RGMA—the geographical area in which agencies spend the substantial majority of their contract and procurement dollars—for the disparity study. RTC awarded approximately 86 percent of relevant contract and procurement dollars to businesses located in Clark County, Nevada. As a result, our analyses—including the availability analysis and quantitative analyses of marketplace conditions—focused on that region. In contrast, RTC’s 2017 disparity study included statewide organizations, which resulted in the RGMA for that study encompassing the entire state of Nevada. Demographically, the state of Nevada differs from Clark County, which may impact the overall availability of POC- and woman-owned businesses between the two studies.

D. Subindustry Classifications

For each prime contract and subcontract included in our analyses, BBC determined the “subindustry” that best characterized the vendor’s primary line of work (e.g., concrete work). We determined

subindustries based on RTC contract and vendor data; surveys the study team conducted with prime contractors and subcontractors; business certification lists; D&B business listings; and other sources. Figure 4-2 presents subindustry classifications for the construction, professional services, and non-professional services and supplies contracts and procurements BBC included in our analyses as well as the dollars RTC awarded related to each subindustry during the study period.

BBC combined related subindustries that accounted for relatively small percentages of total contract and procurement dollars into five “other” subindustries: other construction services, other construction materials, other professional services, other goods, and other services. For example, the dollars that RTC awarded to contractors for sign installation and maintenance represented less than 1 percent of total dollars we examined as part of the study. So, we combined sign installation and maintenance with construction services that also accounted for relatively small percentages of total dollars into the “other construction services” subindustry. There were also various contracts and procurements we classified into subindustries that we did not ultimately include in our analyses:

- Purchases and grants RTC made with or awarded to government agencies, utility providers, hospitals, or nonprofit organizations (\$31.2 million);
- Contracts and procurements that reflected “national markets”—that is, subindustries dominated by large national or international businesses—or subindustries where RTC awarded the majority of dollars to businesses located outside the RGMA (\$990.5 million);¹
- Purchases that often include property purchases, leases, or other pass-through dollars (\$3.3million);² or
- Types of work not typically included in disparity studies and that account for relatively small proportions of RTC’s contract and procurement dollars (\$6.2 million).³

E. Review Process

RTC reviewed contract, procurement, and vendor data throughout the study process. BBC consulted with RTC to discuss the data collection process, review information the study team gathered, and present summary results. We incorporated feedback from RTC in the final contract, procurement, and vendor data we used for our analyses.

¹ Examples of such work include computer manufacturing and proprietary software.

² An example of such work is real estate consulting.

³ An example of an industry not typically included in disparity studies is legal services.

Figure 4-2.
Contract and procurement
dollars by subindustry

Note:
 Numbers rounded to nearest dollar and thus
 may not sum exactly to totals.

Source:
 BBC from RTC data.

Industry	Total
Construction	
Building construction	\$19,352,252
Electrical work	\$8,438,156
Plumbing and HVAC	\$6,306,967
Concrete work and materials	\$4,166,695
Highway, street, and bridge construction	\$2,925,789
Electrical equipment and supplies	\$1,326,747
Vertical building trades	\$1,224,346
Painting, striping, marking, and weatherproofing	\$815,286
Excavation, drilling, wrecking, and demolition	\$803,022
Landscape services	\$302,874
Fencing, guardrails, barriers, and signs	\$274,705
Water, sewer, and utility lines	\$186,157
Heavy construction equipment rental	\$167,957
Rebar and reinforcing steel	\$104,494
Other construction services	\$783,230
Other construction materials	\$2,967,239
Total construction	\$50,145,915
Professional services	
Engineering	\$28,937,926
services	\$7,927,297
Construction management	\$6,241,784
Advertising, marketing and public relations	\$4,059,981
IT and data services	\$1,274,435
Business services and consulting	\$1,041,590
Architectural and design services	\$992,531
Testing and inspection	\$208,536
Human resources and job training services	\$104,473
Surveying and mapmaking	\$19,448
Other professional services	\$955,131
Total professional services	\$51,763,132
Non-professional services and supplies	
Security guard services	\$43,955,590
Cleaning and janitorial services	\$25,958,117
Petroleum and petroleum products	\$17,277,874
Communications equipment	\$6,679,025
Security systems	\$2,518,461
Industrial equipment and machinery	\$1,763,766
Cleaning and janitorial supplies	\$1,344,585
Automobiles	\$921,176
Vehicle repair services	\$774,611
Security systems services	\$655,172
Office equipment and supplies	\$642,890
Printing, copying, and mailing	\$616,445
Elevator goods and services	\$113,619
Safety equipment	\$105,668
Uniforms and apparel	\$94,761
Other services	\$13,965,038
Other goods	\$3,002,867
Total non-professional services and supplies	\$120,389,667
GRAND TOTAL	\$222,298,713

CHAPTER 5.

Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of person of color (POC)-; woman-; veteran-; and lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientations (LGBTQ+)-owned businesses “ready, willing, and able” to perform work on the construction, professional services, and non-professional services and supplies contracts and procurements the Regional Transportation Commission of Southern Nevada (RTC) awards.¹ Chapter 5 describes the analysis in five parts:

- A. Purpose of the availability analysis;
- B. Potentially available businesses;
- C. Availability database;
- D. Availability calculations; and
- E. Availability analysis results.

Appendix D provides more information about the availability analysis and the methodology we used to conduct it.

A. Purpose of the Availability Analysis

BBC examined the availability of POC-, woman-, veteran-, and LGBTQ+-owned businesses for RTC’s prime contracts and subcontracts to use as benchmarks against which to compare the actual participation of those businesses in its work (i.e., assessing any disparities). Assessing disparities between the participation and availability of POC-, woman-, veteran-, and LGBTQ+-owned businesses allowed us to determine whether certain business groups were substantially underutilized during the study period, which is crucial in determining whether the use of race- or gender-conscious measures is appropriate and, if so, ensuring their use meets the strict scrutiny and intermediate scrutiny standards of constitutional review, respectively (for details, see Chapter 2). In addition, estimating availability is useful to RTC in setting its next overall Disadvantaged Business Enterprise (DBE) goal for the participation of POC- and woman-owned businesses in the United States Department of Transportation (USDOT)-funded projects it awards as well as setting contract-specific goals for the participation of those businesses in USDOT-funded work, if RTC determines the use of such measures is appropriate.

B. Potentially Available Businesses

BBC’s availability analysis focused on specific areas of work, or “subindustries,” associated with the contracts and procurements RTC awarded between July 1, 2017, and June 30, 2022 (the study period), which serves as a proxy for the work it might award in the future. We began the analysis by identifying the specific subindustries in which RTC spends most of its contracting dollars as well as the geographic area in which most of the businesses with which RTC spends those dollars are located (i.e., the relevant

¹ “Woman-owned businesses” refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

geographic market area, or RGMA). Our analyses showed that RTC awarded approximately 86 percent of relevant contract and procurement dollars to businesses located in Clark County, Nevada, which indicates that the RGMA for the study should be Clark County.

After identifying the RGMA, BBC conducted extensive surveys with more than 700 businesses in the marketplace to develop a representative and unbiased database of businesses located in the RGMA that perform types of work relevant to RTC projects. The objective of the survey process was not to collect information from every relevant business located in the RGMA, but rather, to collect information from an unbiased subset of the relevant business population that appropriately represents the entire relevant business population.

1. Overview of availability surveys. BBC worked with Davis Research to conduct telephone and online surveys with business owners and managers to identify local businesses potentially available for RTC prime contracts and subcontracts. We began the process by compiling a “phone book” of all types of businesses—regardless of ownership characteristics—that perform relevant work and are located in Clark County, based primarily on information from Dun & Bradstreet (D&B) Marketplace. We compiled information about businesses based on 8-digit work specialization codes most related to the contracts and procurements RTC awarded during the study period. We obtained listings on 7,015 local businesses that perform work related to those work specializations. We did not have working phone numbers for 1,230 of those businesses, but we attempted availability surveys with the remaining 5,785 businesses.

2. Survey information. The study team conducted availability surveys with businesses listed in our phone book to collect various pieces of information about each one, including:

- Status as a private sector business (as opposed to a public agency or nonprofit organization);
- Status as a subsidiary or branch of another company;
- Primary lines of work;
- Interest in performing work for government organizations;
- Interest in performing work as a prime contractor or subcontractor;
- Largest prime contract or subcontract the business is able to perform;
- Whether the business is able to work or serve customers in Clark County;
- Business size in terms of revenue and number of employees;
- Race of the owner(s);
- Gender of the owners(s);
- Whether the owners(s) are veterans; and
- Whether the owner(s) identify as LGBTQ+.

C. Availability Database

After conducting availability surveys, BBC compiled an availability database that included information about businesses potentially available for relevant RTC contracts and procurements. We included businesses in the availability database if they reported possessing all the following characteristics:

- Being a private sector business that is active and operational;
- Primary lines of work being relevant to RTC projects;
- Being able to perform work in Clark County; and
- Being interested in working for government organizations.

Figure 5-1 presents the percentage of businesses in the availability database that were POC-, woman-, veteran-, or LGBTQ+-owned. The database included information on 727 businesses with which Davis Research completed availability surveys and provided responses that met the above criteria. As shown in Figure 5-1, 40.2 percent of the businesses in the database were POC- or woman-owned, 10.5 percent were veteran-owned, and 2.3 percent were LGBTQ+-owned. In addition, BBC included Middle Eastern/North African (MENA) American-owned businesses in the analysis but categorized them separately from the other race/ethnic groups, because MENA American-owned businesses are not recognized under the Federal DBE Program as being presumptively disadvantaged.² As shown in Figure 5-1, an additional 2.1 percent of businesses in the database were MENA American-owned businesses. BBC also included veteran-owned businesses and LGBTQ+-owned businesses in our analyses. As shown at the bottom of Figure 5-1, 10.5 percent of the businesses in the database were veteran-owned and 2.3 percent were LGBTQ+-owned businesses.³

Figure 5-1.
Percent of businesses in the availability database by relevant business group

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

Source:

BBC availability analysis.

Business group	Representation
White woman-owned	10.9 %
Asian Pacific American-owned	4.1 %
Black American-owned	8.1 %
Hispanic American-owned	14.0 %
Native American-owned	2.1 %
Subcontinent Asian American-owned	1.0 %
Total POC-owned	29.3 %
Total POC- and woman-owned	40.2 %
MENA American-owned	2.1 %
Veteran-owned	10.5 %
LGBTQ+-owned	2.3 %

The information in Figure 5-1 reflects a simple count of businesses with no analysis of their availability for specific RTC contracts or procurements. It represents only a first step toward analyzing the availability of POC-, woman-, veteran-, and LGBTQ+-owned businesses for RTC work.

² The MENA American category includes persons whose origins are from Algeria, Bahrain, Comoros, Djibouti, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestinian Authority, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, United Arab Emirates, or Yemen.

³ Businesses could be both POC-, woman-, or MENA American-owned and veteran- or LGBTQ+-owned. Thus, the percentages shown in Figure 5-1 corresponding to veteran- and LGBTQ+-owned businesses should not be added to the percentages shown for POC-, woman-, or MENA-owned businesses due to potential double counting.

D. Availability Calculations

BBC used a “custom census” approach—which accounts for specific business and project characteristics such as work type, role, size, capacity, and interest—to estimate the availability of POC-, woman-, veteran-, and LGBTQ+-owned businesses for RTC work. We analyzed information from the availability database to develop dollar-weighted estimates of the degree to which POC-, woman-, veteran-, and LGBTQ+-owned businesses are ready, willing, and able to perform work on the projects RTC awards. Those estimates represent the percentage of project dollars one would expect RTC to award to POC-, woman-, veteran-, and LGBTQ+-owned businesses based on their availability for the specific types and sizes of corresponding contracts and procurements.

BBC only considered a portion of the businesses in the availability database as potentially available for any given RTC prime contract or subcontract. We first identified the characteristics of each prime contract or subcontract (referred to generally as a “contract element”), including type of work, contract size, and contract role, and then took the following steps to estimate the availability of POC-, woman-, veteran-, and LGBTQ+-owned businesses for each one:

1. We identified businesses in the availability database that reported they:
 - Are interested in performing construction, professional services, or non-professional services and supplies work in that particular role, for that type of work, for government organizations;
 - Can perform work or serve customers in Clark County; and
 - Can perform work of that size or larger.
2. We then counted the number of POC-owned businesses, woman-owned businesses, veteran-owned businesses, LGBTQ+-owned businesses, and all other businesses that met the criteria in step 1.
3. We translated the counts of businesses in step 2 into percentages.

We repeated the above steps for each contract element included in the analysis and then multiplied the percent availability of POC-, woman-, veteran-, and LGBTQ+-owned businesses for each contract element by the dollars associated with it. We then added results across all contract elements and divided by the total corresponding dollars. The result was estimates of the percent of relevant project dollars one would expect RTC to award to POC-, woman-, veteran-, and LGBTQ+-owned businesses based on their availability for specific types and sizes of that work. Figure 5-2 provides an example of how we estimated availability for a subcontract associated with a project RTC awarded during the study period.

E. Availability Results

BBC estimated the overall availability of POC-, woman-, veteran-, and LGBTQ+-owned businesses for the construction, professional services, and non-professional services and supplies work RTC awards as well as separately for various subsets of RTC work. For each set of projects, we present availability estimates for all POC- and woman-owned businesses together and separately for each business group relevant to the Federal DBE Program: white woman-owned businesses, Asian Pacific American-owned businesses, Black American-owned businesses, Hispanic American-owned business, Native American-owned businesses, and Subcontinent Asian American-owned businesses.

BBC based availability estimates on the prime contracts and subcontracts RTC awarded between July 1, 2017, and June 30, 2022. A key assumption of the availability analysis is that the work RTC awarded during the study period is representative of the work it will award in the future. If the types and sizes of the projects RTC awards in the future differ substantially from the work it awarded during the study period, then the agency should adjust availability estimates accordingly.

1. Overall. Figure 5-3 presents dollar-weighted estimates of the overall availability of POC- and woman-owned businesses for RTC work. As shown in Figure 5-3, the availability of POC- and woman-owned businesses for all RTC work considered together is 36.3 percent, indicating that one might expect RTC to award approximately 36.3 percent of its contract and procurement dollars to POC- and woman-owned businesses based on their availability for that work. The business groups that exhibit the greatest availability for RTC work are white woman-owned businesses (11.6%), Hispanic American-owned businesses (7.4%), and Asian Pacific American-owned businesses (6.9%).

BBC also examined the overall availability of MENA American-, veteran-, and LGBTQ+-owned businesses for RTC work, the results for which are not shown in Figure 5-3. The analysis indicated that the availability of MENA American-owned businesses for RTC work is 1.7 percent, the availability of veteran-owned businesses is 23.6 percent, the availability of LGBTQ+-owned businesses is 2.6 percent.

Figure 5-3.
Availability estimates for RTC work

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

Source:

BBC availability analysis.

Business group	Availability
White woman-owned	11.6 %
Asian Pacific American-owned	6.9 %
Black American-owned	5.9 %
Hispanic American-owned	7.4 %
Native American-owned	4.3 %
Subcontinent Asian American-owned	0.3 %
Total POC-owned	24.7 %
Total POC- and woman-owned	36.3 %

2. Industry. BBC also examined the availability of POC- and woman-owned businesses separately for RTC construction, professional services, and non-professional services and supplies work to assess whether the availability of those businesses differed by industry. As shown in Figure 5-4, POC- and woman-owned businesses exhibit greater availability for RTC's non-professional services and supplies work (39.9%) than for the agency's construction (30.1%) or professional services work (34.1%). Availability for individual business groups differs across industries:

Figure 5-2.
Example of calculating availability for a RTC subcontract

On a contract RTC awarded during the study period, the prime contractor awarded a subcontract worth \$136,982 for engineering work. To determine the overall availability of POC- and woman-owned businesses for the subcontract, BBC identified businesses in the availability database that:

- Indicated they performed engineering work;
- Reported being able to perform work of equal size or larger;
- Can perform work or serve customers in Clark County; and
- Reported interest in working as a subcontractor on government projects.

We found 54 businesses in the availability database that met those criteria, 19 of which were POC- or woman-owned. Thus, the availability of POC- and woman-owned businesses for the subcontract was 35.2 percent (i.e., $19/54 \times 100 = 35.2$).

- The groups that exhibit the greatest availability for construction work are Hispanic American-owned businesses (13.3%), white woman-owned businesses (6.6%), and Black American-owned businesses (4.5%).
- The groups that exhibit the greatest availability for professional services work are Black American-owned businesses (10.9%), white woman-owned businesses (8.0%), and Hispanic American-owned businesses (7.0%).
- The groups that exhibit the greatest availability for non-professional services and supplies work are white woman-owned businesses (15.3%), Asian Pacific American-owned businesses (8.5%), and Native American-owned businesses (6.8%).

Figure 5-4.
Availability estimates for construction, professional services,
and non-professional services and supplies work

Business group	Industry		
	Construction	Professional services	Non-professional services and supplies
White woman-owned	6.6 %	8.0 %	15.3 %
Asian Pacific American-owned	3.3 %	6.7 %	8.5 %
Black American-owned	4.5 %	10.9 %	4.2 %
Hispanic American-owned	13.3 %	7.0 %	5.1 %
Native American-owned	2.3 %	0.6 %	6.8 %
Subcontinent Asian American-owned	0.2 %	0.9 %	0.0 %
Total POC-owned	23.5 %	26.1 %	24.6 %
Total POC- and woman-owned	30.1 %	34.1 %	39.9 %

Note: Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

Source: BBC availability analysis.

3. Contract role. Many POC- and woman-owned businesses are small businesses and thus often work as subcontractors, so it is instructive to examine availability estimates separately for RTC prime contracts and subcontracts. In addition, prime contracts are usually bigger in size than subcontracts, and project size is typically inversely related to the availability of POC- and woman-owned businesses for agency work (i.e., the larger the project, the less the availability of POC- and woman-owned businesses). As shown in Figure 5-5, the availability of POC- and woman-owned businesses for RTC subcontracts (36.1%) is comparable to that for RTC prime contracts (36.3%). Availability for individual business groups differed between prime contracts and subcontracts:

- The groups that exhibit the greatest levels of availability for prime contracts are white woman-owned businesses (11.3%), Asian Pacific American-owned businesses (7.5%), and Hispanic American-owned businesses (6.8%).
- The groups that exhibit the greatest levels of availability for subcontracts are white woman-owned businesses (13.2%), Hispanic American-owned businesses (9.9%), and Black American-owned businesses (5.4%).

Figure 5-5.
Availability estimates for
RTC prime contracts and
subcontracts

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

Source:

BBC availability analysis.

Business group	Role	
	Prime contracts	Subcontracts
White woman-owned	11.3 %	13.2 %
Asian Pacific American-owned	7.5 %	4.1 %
Black American-owned	5.9 %	5.4 %
Hispanic American-owned	6.8 %	9.9 %
Native American-owned	4.6 %	3.0 %
Subcontinent Asian American-owned	0.2 %	0.4 %
Total POC-owned	25.1 %	23.0 %
Total POC- and woman-owned	36.3 %	36.1 %

4. Prime contract size. BBC examined the availability of POC- and woman-owned businesses separately for *large prime contracts*—that is, construction contracts worth \$2 million or more, professional services contracts worth \$500,000 or more, and non-professional services and supplies contracts worth \$50,000 or more—and *small prime contracts*—that is, construction contracts worth less than \$2 million, professional services contracts worth less than \$500,000, and non-professional services and supplies contracts worth less than \$50,000—that RTC awarded during the study period. That analysis helped assess whether contract size was related to the availability of POC- and woman-owned businesses for RTC work, at least at the prime contract level. As shown in Figure 5-6, the availability of POC- and woman-owned businesses for large prime contracts (36.4%) is comparable to that for small prime contracts (36.0%). Availability for individual business groups differed by contract size:

- The groups that exhibit the greatest levels of availability for small prime contracts are Hispanic American-owned businesses (12.9%), white woman-owned businesses (8.3%), and Black American-owned businesses (7.1%).
- The groups that exhibit the greatest levels of availability for large prime contracts are white woman-owned businesses (11.9%), Asian Pacific American-owned businesses (8.0%), and Black American-owned businesses (5.7%).

Figure 5-6.
Availability estimates for
large and small prime
contracts

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

Source:

BBC availability analysis.

Business group	Size	
	Small	Large
White woman-owned	8.3 %	11.9 %
Asian Pacific American-owned	4.7 %	8.0 %
Black American-owned	7.1 %	5.7 %
Hispanic American-owned	12.9 %	5.6 %
Native American-owned	2.0 %	5.1 %
Subcontinent Asian American-owned	1.0 %	0.1 %
Total POC-owned	27.7 %	24.5 %
Total POC- and woman-owned	36.0 %	36.4 %

5. Funding source. The Federal DBE Program applies specifically to RTC’s USDOT-funded projects.⁴ As part of the program, the agency uses various race- and gender-neutral measures as well as race- and gender-conscious DBE contract goals to encourage the participation of POC- and woman-owned businesses in the USDOT-funded projects it awards (specifically Federal Transit Administration-funded work). RTC used DBE contract goals to award nearly all the USDOT-funded projects it awarded during the study period. It is instructive to examine the availability of POC- and woman-owned businesses separately for RTC’s USDOT-funded work to assess whether the availability of those businesses for those projects is different than their availability for the non USDOT-funded projects it awards. Figure 5-7 presents the availability of POC- and woman-owned businesses separately for RTC’s USDOT- and non USDOT-funded projects. As shown in Figure 5-7, the availability of POC- and woman-owned businesses is greater for non USDOT-funded projects (38.2%) than for USDOT-funded projects (29.7%). Availability for individual business groups differed between funding sources:

- The groups that exhibit the greatest availability for USDOT-funded work are Hispanic American-owned businesses (10.4%), white woman-owned businesses (7.8%), and Black American-owned businesses (5.6%).
- The groups that exhibit the greatest availability for non USDOT-funded work are white woman-owned businesses (12.7%), Asian Pacific American-owned businesses (7.8%), and Hispanic American-owned businesses (6.5%).

Figure 5-7.
Availability estimates for
RTC work by funding source

Note:
 Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

Source:
 BBC availability analysis.

Business group	Funding	
	USDOT	Non USDOT
White woman-owned	7.8 %	12.7 %
Asian Pacific American-owned	3.9 %	7.8 %
Black American-owned	5.6 %	5.9 %
Hispanic American-owned	10.4 %	6.5 %
Native American-owned	1.9 %	5.0 %
Subcontinent Asian American-owned	0.1 %	0.3 %
Total POC-owned	21.9 %	25.5 %
Total POC- and woman-owned	29.7 %	38.2 %

⁴ BBC considered a project to be federally funded if it included at least \$1 of federal funding.

CHAPTER 6.

Utilization Analysis

BBC Research & Consulting (BBC) measured the participation of person of color (POC)-; woman-; veteran-; and lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientations (LGBTQ+)-owned businesses in the construction, professional services, and non-professional services and supplies contracts and procurements the Regional Transportation Commission of Southern Nevada (RTC) awarded between July 1, 2017, and June 30, 2022 (the *study period*).¹ We measured participation in terms of *utilization*—the percentage of contract and procurement dollars RTC awarded to those businesses during the study period. We measured the overall participation of POC-, woman-, veteran-, and LGBTQ+-owned businesses in all relevant contracts and procurements RTC awarded during the study period as well as the overall participation of POC- and woman-owned businesses in various subsets of RTC projects. Chapter 6 presents the analysis in four parts:

- A. Purpose of the utilization analysis;
- B. Utilization analysis results; and
- C. Concentration of dollars.

A. Purpose of the Utilization Analysis

Calculating the percentage of dollars RTC awarded to POC-, woman-, veteran-, and LGBTQ+-owned businesses during the study period is useful in determining whether certain business groups face barriers as it relates to RTC’s contracting and procurement processes. Moreover, assessing whether any business groups are substantially underutilized relative to their availability for RTC work allows the agency to determine whether the use of race- or gender-conscious measures is appropriate and ensure that its use of such measures is tailored to those business groups for which compelling evidence of such barriers exist.

B. Utilization Analysis Results

BBC calculated the overall participation of POC-, woman-, veteran-, and LGBTQ+-owned businesses in all RTC contracts and procurements combined. In addition, BBC included Middle Eastern/North African (MENA) American-owned businesses in the analysis but categorized them separately from the other race/ethnic groups, because MENA American-owned businesses are not recognized under the Federal Disadvantaged Business Enterprise (DBE) Program as being presumptively disadvantaged.² For POC- and woman-owned businesses, we also present utilization analysis results separately for various subsets of the projects RTC awarded during the study period, because that level of information is

¹ “Woman-owned businesses” refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

² The MENA American category includes persons whose origins are from Algeria, Bahrain, Comoros, Djibouti, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestinian Authority, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, United Arab Emirates, or Yemen.

instructive to RTC as it makes decisions about its implementation of the Federal DBE Program. For each subset of projects, we present utilization results for all POC- and woman-owned businesses together and separately for each business group relevant to the Federal DBE Program: white woman-owned businesses, Asian Pacific American-owned businesses, Black American-owned businesses, Hispanic American-owned business, Native American-owned businesses, and Subcontinent Asian American-owned businesses.

1. Overall. Figure 6-1 presents the overall participation of POC- and woman-owned businesses for RTC work. Overall, RTC awarded 20.3 percent of relevant contract and procurement dollars to all POC- and woman-owned businesses considered together. The groups that exhibited the greatest levels of participation in that work were Hispanic American-owned businesses (14.1%), white woman-owned businesses (3.3%), and Black American-owned businesses (2.1%). BBC also examined the overall participation of MENA American-, veteran-, and LGBTQ+-owned businesses for RTC work, the results for which are not shown in Figure 6-1. RTC awarded 0.2 percent of relevant contract and procurement dollars to MENA American-owned businesses; 0.1 percent to veteran-owned businesses; and 0.0 percent to LGBTQ+-owned businesses.³

Figure 6-1.
Utilization analysis
results for RTC work

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

Source:

BBC utilization analysis.

Business group	Utilization
White woman-owned	3.3 %
Asian Pacific American-owned	0.6 %
Black American-owned	2.1 %
Hispanic American-owned	14.1 %
Native American-owned	0.1 %
Subcontinent Asian American-owned	0.0 %
Total POC-owned	16.9 %
Total POC- and woman-owned	20.3 %

2. Industry. BBC also examined the participation of POC- and woman-owned businesses separately for RTC construction, professional services, and non-professional services and supplies work to assess whether the participation of those businesses differed by industry. As shown in Figure 6-2, the participation of POC- and woman-owned businesses considered together was greater for RTC's non-professional services and supplies work (25.6%) and construction work (23.6%) than for the agency's professional services work (4.8%). Participation for relevant business groups differed across industries:

- The groups that exhibited the greatest levels of participation in construction work were Hispanic American-owned businesses (14.3%), white woman-owned businesses (5.3%), and Black American-owned businesses (3.1%).
- The groups that exhibited the greatest levels of participation in professional services work were Asian Pacific American-owned businesses (2.3%), white woman-owned businesses (1.0%), and Black American-owned businesses (0.8%).

³ Businesses could be both POC-, woman-, or MENA American-owned and veteran- or LGBTQ+-owned. Thus, the percentages corresponding to the participation of veteran- and LGBTQ+-owned businesses should not be added to the percentages shown for POC-, woman-, or MENA American-owned businesses due to potential double counting.

- The groups that exhibited the greatest levels of participation in non-professional services and supplies work were Hispanic American-owned businesses (19.7%), white woman-owned businesses (3.5%), and Black American-owned businesses (2.3%).

Figure 6-2.
Utilization analysis results
for construction,
professional services, and
non-professional services
and supplies work

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

Source:

BBC utilization analysis.

Business group	Industry		
	Construction	Professional services	Non-professional services and supplies
White woman-owned	5.3 %	1.0 %	3.5 %
Asian Pacific American-owned	0.5 %	2.3 %	0.0 %
Black American-owned	3.1 %	0.8 %	2.3 %
Hispanic American-owned	14.3 %	0.7 %	19.7 %
Native American-owned	0.2 %	0.0 %	0.0 %
Subcontinent Asian American-owned	0.1 %	0.1 %	0.0 %
Total POC-owned	18.2 %	3.8 %	22.1 %
Total POC- and woman-owned	23.6 %	4.8 %	25.6 %

3. Contract role. Many POC- and woman-owned businesses are small businesses and thus, often work as subcontractors. For that reason, it is useful to examine participation separately for the prime contracts and subcontracts RTC awarded during the study period. As shown in Figure 6-3, the participation of POC- and woman-owned businesses considered together was greater for RTC's subcontracts (43.3%) than for its prime contracts (15.6%). Participation for individual business groups differed between prime contracts and subcontracts:

- The groups that exhibited the greatest levels of participation in prime contracts were Hispanic American-owned businesses (10.0%), white woman-owned businesses (3.0%), and Black American-owned businesses (2.3%).
- The groups that exhibited the greatest levels of participation in subcontracts were Hispanic American-owned businesses (34.2%), white woman-owned businesses (5.0%), and Asian Pacific American-owned businesses (2.5%).

Figure 6-3.
Utilization analysis results for RTC
prime contracts and subcontracts

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

Source:

BBC utilization analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
White woman-owned	3.0 %	5.0 %
Asian Pacific American-owned	0.3 %	2.5 %
Black American-owned	2.3 %	1.5 %
Hispanic American-owned	10.0 %	34.2 %
Native American-owned	0.1 %	0.0 %
Subcontinent Asian American-owned	0.0 %	0.1 %
Total POC-owned	12.6 %	38.4 %
Total POC- and woman-owned	15.6 %	43.3 %

4. Prime contract size. BBC examined the participation of POC- and woman-owned businesses separately for *large prime contracts*—that is, construction contracts worth \$2 million or more, professional services contracts worth \$500,000 or more, and non-professional services and supplies contracts worth \$50,000 or more; and *small prime contracts*— that is, construction contracts worth less than \$2 million, professional services contracts worth less than \$500,000, and non-professional services and supplies contracts worth less than \$50,000—that RTC awarded during the study period. That analysis helped assess whether contract size was related to the participation of POC- and woman-owned businesses for RTC work, at least at the prime contract level. As shown in Figure 6-4, the participation of POC- and woman-owned businesses was greater for small prime contracts (23.0%) than large prime contracts (14.1%). Participation for individual business groups differed by contract size:

- The groups that exhibited the greatest levels of participation in small prime contracts were Hispanic American-owned businesses (12.7%), Black American-owned businesses (4.8%), and white woman-owned businesses (3.4%).
- The groups that exhibited the greatest levels of participation in large prime contracts were Hispanic American-owned businesses (9.5%), white woman-owned businesses (2.9%), and Black American-owned businesses (1.7%).

Figure 6-4.
Utilization analysis results for large and small prime contracts

Note:
 Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

Source:
 BBC utilization analysis.

Business group	Contract size	
	Small	Large
White woman-owned	3.4 %	2.9 %
Asian Pacific American-owned	1.6 %	0.0 %
Black American-owned	4.8 %	1.7 %
Hispanic American-owned	12.7 %	9.5 %
Native American-owned	0.4 %	0.0 %
Subcontinent Asian American-owned	0.2 %	0.0 %
Total POC-owned	19.6 %	11.2 %
Total POC- and woman-owned	23.0 %	14.1 %

5. Funding source. The Federal DBE Program applies specifically to RTC’s United States Department of Transportation (USDOT)-funded projects (specifically Federal Transit Administration-funded work).⁴ As part of the program, the agency uses various race- and gender-neutral measures as well as race- and gender-conscious DBE contract goals to encourage the participation of POC- and woman-owned businesses in the USDOT-funded projects it awards. It is instructive to examine the participation of those businesses separately for RTC’s USDOT-funded work to assess whether the participation of POC- and woman-owned businesses in those projects is different from the non USDOT-funded projects it awards. As shown in Figure 6-5, the participation of POC- and woman-owned businesses considered together for RTC’s USDOT-funded work (18.9%) was slightly less than that of its non USDOT-funded work (20.7%). The groups that exhibited the greatest levels of participation in RTC work were the same across both funding sources: Hispanic American-owned businesses (USDOT = 10.8%; non USDOT = 15.0%), white woman-owned businesses (USDOT = 5.0%; non USDOT = 2.9%) and Black American-owned businesses (USDOT = 3.1%; non USDOT = 1.8%).

Figure 6-5.
Utilization analysis results for RTC work by funding source

Note:
 Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

Source:
 BBC utilization analysis.

Business group	Funding Source	
	USDOT	Non-USDOT
White woman-owned	5.0 %	2.9 %
Asian Pacific American-owned	0.0 %	0.8 %
Black American-owned	3.1 %	1.8 %
Hispanic American-owned	10.8 %	15.0 %
Native American-owned	0.0 %	0.1 %
Subcontinent Asian American-owned	0.1 %	0.0 %
Total POC-owned	14.0 %	17.8 %
Total POC- and woman-owned	18.9 %	20.7 %

C. Concentration of Dollars

BBC analyzed the degree to which relevant contract and procurement dollars RTC awarded to POC- and woman-owned businesses during the study period were spread across different businesses. We used

⁴ BBC considered a project to be federally funded if it included at least \$1 of federal funding.

that analysis as an indication of whether many businesses share in the collective success of their respective groups or whether only a few businesses account for each group’s aggregate participation in RTC work. We assessed that question by calculating:

- The number of businesses within each group to which RTC awarded contract and procurement dollars during the study period; and
- The number of businesses within each group that accounted for 75 percent of the group’s total contracting dollars during the study period after ordering them from most to least awarded dollars.

Figure 6-6 presents those results for each relevant group of POC- and woman-owned businesses. In total, RTC awarded approximately \$45 million to 76 different POC- and woman-owned businesses during the study period. However, only six of those businesses (7.9%) accounted for 77.4 percent of the corresponding contract and procurement dollars. Most notably, although RTC awarded contract and procurement dollars to 27 different Hispanic American-owned businesses, two of them accounted for 81.0 percent of those dollars by themselves. Similarly, although RTC awarded contract and procurement dollars to 29 different white woman-owned businesses, three of them accounted for 77.9 percent of those dollars by themselves. In addition, two Black American-owned business accounted for 75.0 percent of all dollars that went to Black American-owned businesses by themselves. Those results indicate that a small number of POC- and woman-owned businesses accounted for most of the total contract and procurement dollars RTC awarded to those businesses during the study period.

Figure 6-6.
Concentration of contract and procurement dollars RTC awarded to POC- and woman-owned businesses

Source:
 BBC utilization analysis.

Business group	Utilized businesses	Businesses accounting for 75% of contract dollars	
		Number	Percent
White woman-owned	29	3	77.9 %
Asian Pacific American-owned	4	2	81.3 %
Black American-owned	11	2	75.0 %
Hispanic American-owned	27	2	81.0 %
Native American-owned	1	1	100.0 %
Subcontinent Asian American-owned	4	2	98.8 %
Total POC-owned	47	4	79.4 %
Total POC- and woman-owned	76	6	77.4 %

CHAPTER 7.

Disparity Analysis

BBC Research & Consulting (BBC) compared the percentage of contract and procurement dollars the Regional Transportation Commission of Southern Nevada (RTC) awarded to person of color (POC)-; woman-; veteran-; and lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientations (LGBTQ+)-owned businesses during the study period (i.e., utilization or participation) with the percentage of contract and procurement dollars one might expect RTC award to those businesses based on their availability for that work.¹ The analysis focused on construction, professional services, and non-professional services and supplies work RTC awarded between July 1, 2017 to June 30, 2022 (the study period).

A. Overview

BBC expressed utilization and availability as percentages of the total dollars associated with a particular set of projects and then used the following formula to calculate a “disparity index” to help compare utilization and availability for relevant business groups and different sets of projects:

$$\frac{\% \text{ participation}}{\% \text{ availability}} \times 100$$

A disparity index of 100 indicates “parity” between actual participation and availability. That is, the participation of a particular business group is in line with its availability. A disparity index of less than 100 indicates a disparity between participation and availability. That is, the group is considered to have been underutilized relative to its availability. Finally, a disparity index of less than 80 indicates a “substantial disparity” between participation and availability. That is, the group is considered to have been substantially underutilized relative to its availability. Many courts have considered substantial disparities as inferences of discrimination against particular business groups, and they often serve as justification for organizations to use relatively aggressive measures—such as race- and gender-conscious measures—to address corresponding barriers.²

B. Disparity Analysis Results

BBC measured overall disparities between the participation and availability of POC-, woman-, veteran-, and LGBTQ+-owned businesses for all relevant contracts and procurements considered together. In addition, BBC included Middle Eastern/North African (MENA) American-owned businesses in the analysis but categorized them separately from the other race/ethnic groups, because MENA American-owned businesses are not recognized under the Federal Disadvantaged Business Enterprise (DBE)

¹ “Woman-owned businesses” refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

² For example, see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); and *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994).

Program as being presumptively disadvantaged.³ For POC- and woman-owned businesses, we also measured disparities separately for various subsets of contracts and procurements RTC awarded during the study period. We provide detailed disparity analysis results in Appendix E.

1. Overall. Figure 7-1 presents disparity indices for POC- and woman-owned businesses for all relevant prime contracts and subcontracts RTC awarded during the study period. There is a line at the disparity index level of 100, which indicates parity, and a line at the disparity index level of 80, which indicates a substantial disparity. Substantial disparities we observed are highlighted with red borders. As shown in Figure 7-1, POC- and woman-owned businesses considered together exhibited a disparity index of 56 for all relevant contracts and procurements RTC awarded during the study period, indicating a disparity where RTC awarded POC- and woman-owned businesses \$0.56 for every dollar one might expect the agency to award to those businesses based on their availability for RTC work. All POC- and woman-owned business groups, with the exception of Hispanic American-owned businesses, exhibited substantial disparities for RTC work: white woman-owned businesses (disparity index of 29), Asian Pacific American-owned businesses (disparity index of 9), Black American-owned businesses (disparity index of 36), Native American-owned businesses (disparity index of 1), and Subcontinent Asian American-owned businesses (disparity index of 14).

Figure 7-1.
Overall disparity analysis results for RTC work

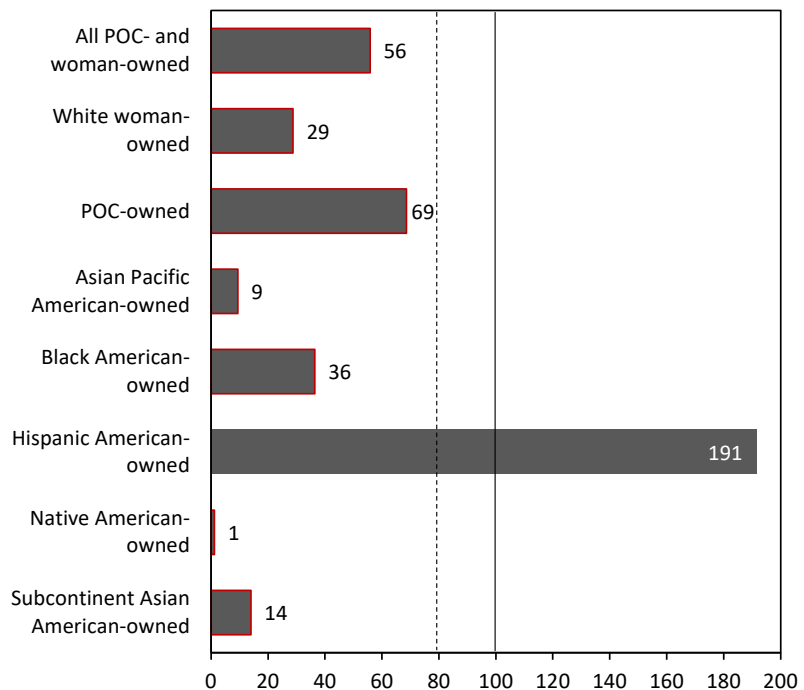
Notes:

For more detail, see Figure E-1 in Appendix E.

Substantial disparities highlighted with red borders.

Source:

BBC disparity analysis.



BBC also assessed whether MENA American-, veteran-, and LGBTQ+-owned businesses exhibited a disparity between their participation and availability for RTC work, the results for which are not shown in Figure 7-1. MENA American-owned businesses (disparity index of 12), veteran-owned businesses

³ The MENA American category includes persons whose origins are from Algeria, Bahrain, Comoros, Djibouti, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestinian Authority, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, United Arab Emirates, or Yemen.

(disparity index of 1), and LGBTQ+-owned businesses (disparity index of 0) all exhibited substantial disparities for all relevant RTC contracts and procurements considered together.

2. Industry. RTC can implement the Federal DBE Program in a manner that is tailored specifically to different industries. For example, if RTC determines that it is appropriate to continue to use race- or gender-conscious measures as part of the Federal DBE Program, it can determine which groups might be eligible to participate in those measures differently for construction, professional services, and non-professional services and supplies projects based on information about which groups face substantial disparities in each industry. BBC examined disparity analysis results separately for the construction, professional services, and non-professional services and supplies work RTC awarded during the study period to determine whether outcomes for POC- and woman-owned businesses differed by industry. As shown in Figure 7-2, POC- and woman-owned businesses considered together exhibited substantial disparities for construction (disparity index of 78), professional services (disparity index of 14), and non-professional services and supplies projects (disparity index of 64). Disparity indices varied by business group and industry:

- Asian Pacific American-owned businesses (disparity index of 15), Black American-owned businesses (disparity index of 69), Native American-owned businesses (disparity index of 10), and Subcontinent Asian American-owned businesses (disparity index of 48) exhibited substantial disparities for construction work. White woman-owned businesses (disparity index of 82) exhibited a disparity for construction work, but that disparity was not substantial.
- White woman-owned businesses (disparity index of 12), Asian Pacific American-owned businesses (disparity index of 35), Black American-owned businesses (disparity index of 7), Hispanic American-owned businesses (disparity index of 9), Native American-owned businesses (disparity index of 0), and Subcontinent Asian American-owned businesses (disparity index of 6) exhibited substantial disparities for professional services work.
- White woman-owned businesses (disparity index of 23), Asian Pacific American-owned businesses (disparity index of 0), Black American-owned businesses (disparity index of 55), and Native American-owned businesses (disparity index of 0) exhibited substantial disparities for non-professional services and supplies work.

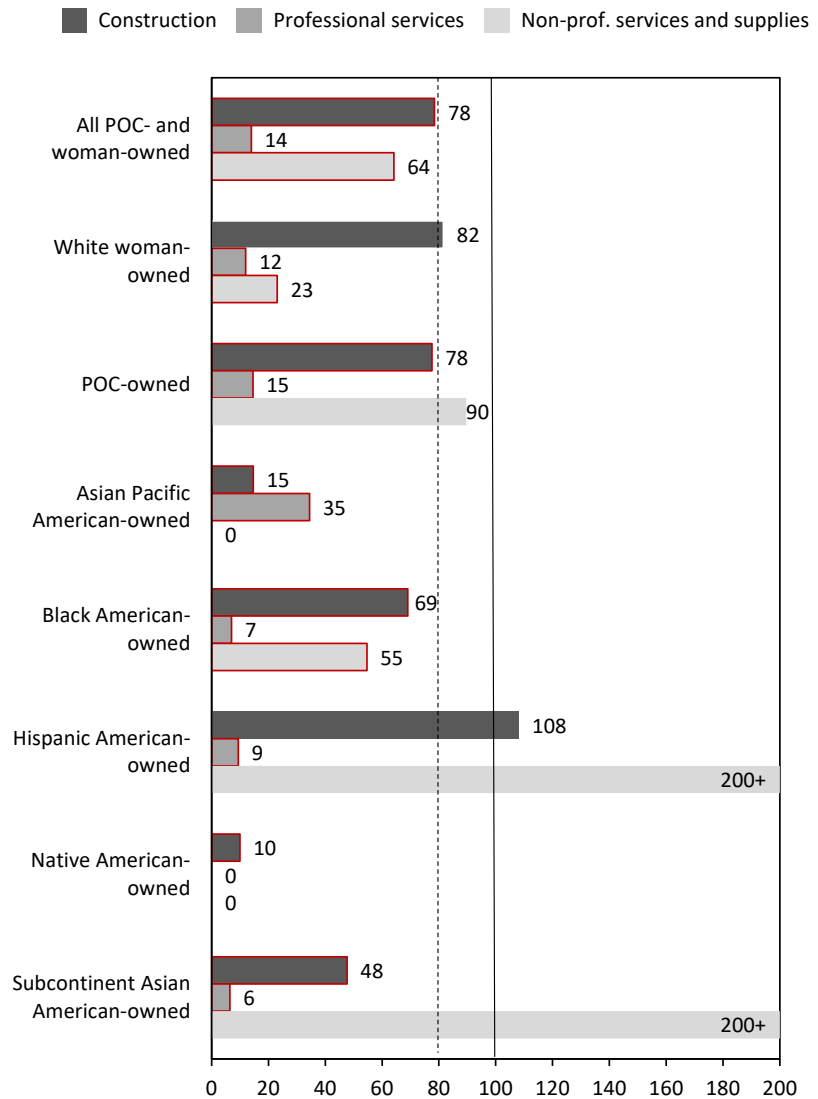
Figure 7-2.
Disparity analysis results
for construction,
professional services, and
non-professional services
and supplies work

Note:

For more detail, see Figures E-4, E-5,
and E-6 in Appendix E.

Source:

BBC disparity analysis.



3. Contract role. Many POC- and woman-owned businesses are small businesses and thus, often work as subcontractors. For that reason, it is instructive to examine disparity analysis results separately for the prime contracts and subcontracts RTC awarded during the study period. As shown in Figure 7-3, POC- and woman-owned businesses considered together exhibited a substantial disparity for prime contracts (disparity index of 43). Disparity indices differed by business group and contract role:

- White woman-owned businesses (disparity index of 27), Asian Pacific American-owned businesses (disparity index of 4), Black American-owned businesses (disparity index of 38), Native American-owned businesses (disparity index of 1), and Subcontinent Asian American-owned businesses (disparity index of 12) exhibited substantial disparities for prime contracts.
- White woman-owned businesses (disparity index of 38), Asian Pacific American-owned businesses (disparity index of 61), Black American-owned businesses (disparity index of 28), Native American-owned businesses (disparity index of 0), and Subcontinent Asian American-owned businesses (disparity index of 19) exhibited substantial disparities for subcontracts.

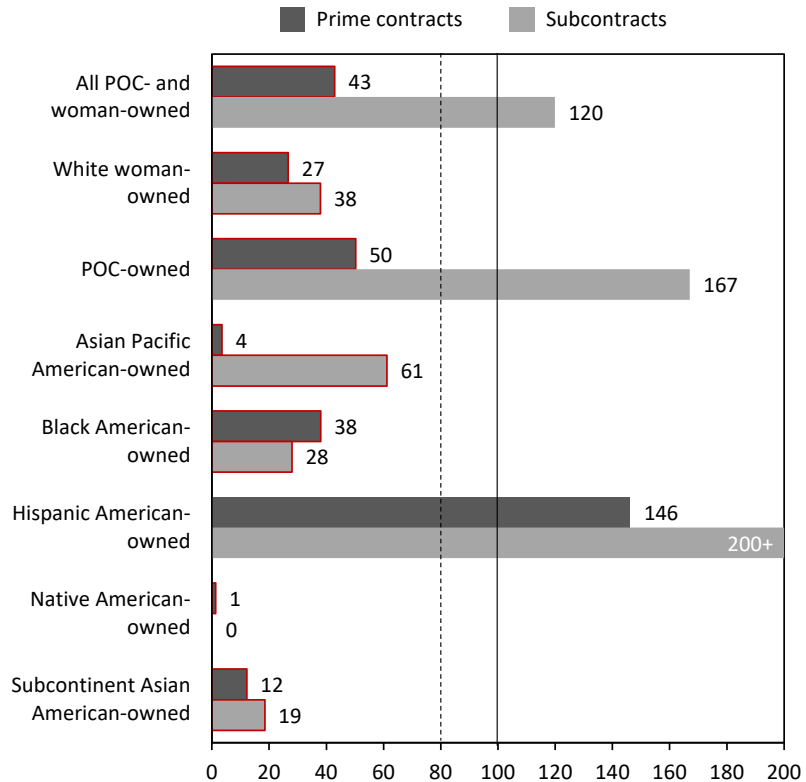
Figure 7-3.
Disparity analysis results
for RTC prime contracts
and subcontracts

Note:

For more detail, see Figures E-7 and E-8 in Appendix E.

Source:

BBC disparity analysis.



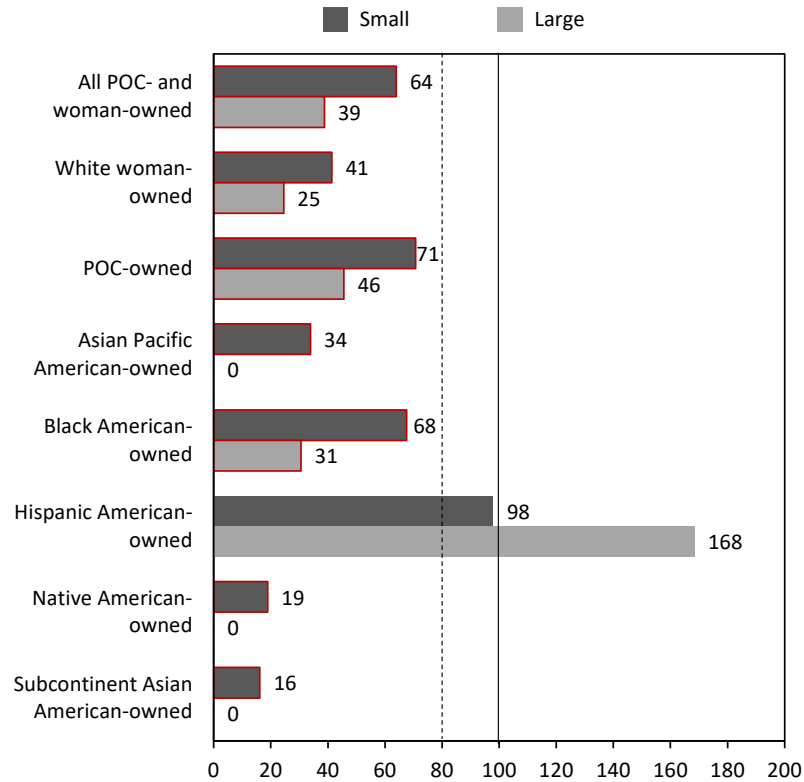
4. Prime contract size. BBC examined disparity analysis results for POC- and woman-owned businesses separately for *large prime contracts*—that is, construction contracts worth \$2 million or more, professional services contracts worth \$500,000 or more, and non-professional services and supplies contracts worth \$50,000 or more; and *small prime contracts*—that is, construction contracts worth less than \$2 million, professional services contracts worth less than \$500,000, and non-professional services and supplies contracts worth less than \$50,000—RTC awarded during the study period to examine whether contract size was related to outcomes for POC- and woman-owned businesses for that work, at least at the prime contract level. As shown in Figure 7-4, POC- and woman-owned businesses considered together exhibited substantial disparities on both small prime contracts (disparity index of 64) and large prime contracts (disparity index of 39). Disparity analysis results differed by group and contract size:

- White woman-owned businesses (disparity index of 41), Asian Pacific American-owned businesses (disparity index of 34), Black American-owned businesses (disparity index of 68), Native American-owned businesses (disparity index of 19), and Subcontinent Asian American-owned businesses (disparity index of 16) exhibited substantial disparities for small prime contracts.
- White woman-owned businesses (disparity index of 25), Asian Pacific American-owned businesses (disparity index of 0), Black American-owned businesses (disparity index of 31), Native American-owned businesses (disparity index of 0), and Subcontinent Asian American-owned businesses (disparity index of 0) exhibited substantial disparities for large prime contracts.

Figure 7-4.
Disparity analysis
results for large and
small prime contracts

Note:
 For more detail, see Figures E-9 and E-10 in Appendix E.

Source:
 BBC disparity analysis.



5. Funding source. The Federal DBE Program applies specifically to RTC’s United States Department of Transportation (USDOT)-funded projects (specifically to its Federal Transit Administration-funded projects).⁴ As part of the program, the agency uses various race- and gender-neutral measures as well as race- and gender-conscious DBE contract goals to encourage the participation of POC- and woman-owned businesses in the USDOT-funded projects it awards. It is instructive to assess disparities separately for RTC’s USDOT- and non USDOT-funded work to assess whether outcomes for POC- and woman-owned businesses differ by funding source. As shown in Figure 7-5, POC- and woman-owned businesses considered together exhibited substantial disparities on both USDOT-funded contracts (disparity index of 64) and non USDOT-funded contracts (disparity index of 54). Disparity analysis results for individual business groups differed between funding source:

- White woman-owned businesses (USDOT disparity index = 63; non USDOT disparity index = 23), Asian Pacific American-owned businesses (USDOT disparity index = 0; non USDOT disparity index = 11), Black American-owned businesses (USDOT disparity index = 56; non USDOT disparity index = 31), Native American-owned businesses (USDOT disparity index = 0; non USDOT disparity index = 1), and Subcontinent Asian American-owned businesses (USDOT disparity index = 51; non USDOT disparity index = 10) exhibited substantial disparities for both USDOT-funded contracts and non USDOT-funded contracts.

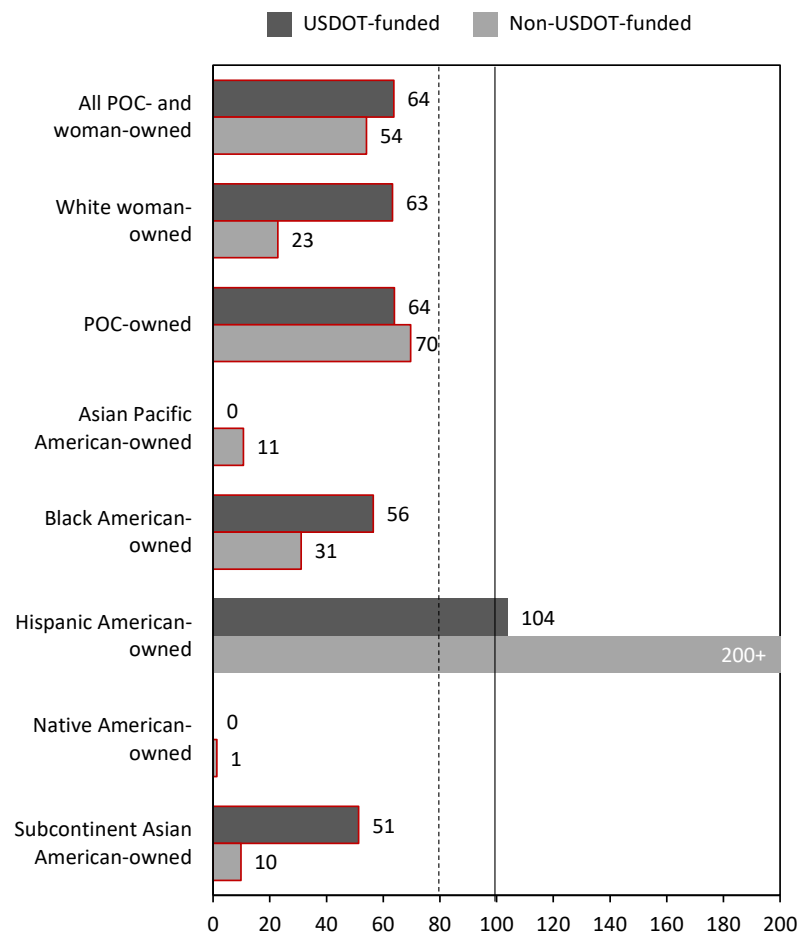
⁴ BBC considered a project to be federally funded if it included at least one dollar of federal funding.

- Hispanic American-owned businesses (USDOT disparity index = 63; non USDOT disparity index = 23) did not exhibit substantial disparities for either funding source.

Figure 7-5.
Disparity analysis results for
RTC work by funding source

Note:
 For more detail, see Figures E-11 and E-12
 in Appendix E.

Source:
 BBC disparity analysis.



C. Statistical Significance

Statistical significance tests allow researchers to assess the probability that any observed quantitative differences were due to *real* differences rather than to chance. In other words, a statistically significant difference is one that can be considered as statistically reliable. BBC used Monte Carlo analysis, which relies on repeated, random simulations of the data to assess the statistical significance of key disparity analysis results.

1. Overview of Monte Carlo. BBC used Monte Carlo simulations to randomly select businesses to “win” individual contract elements included in disparity study analyses. For each contract element, the availability analysis provided information on businesses potentially available to perform that contract element based on type of work, contractor role, contract size, and other factors. Then, we randomly chose a business from the pool of available businesses to win the contract element. The chance of a business from a particular business group winning the contract element was equal to the number of businesses from that group available for it divided by the number of all businesses available for it.

BBC conducted Monte Carlo simulations for all contract elements included in the disparity study. The output of the simulation for all the contract elements represented simulated participation of POC- and woman-owned businesses for all relevant RTC projects. The entire Monte Carlo simulation was then repeated 1 million times. The combined output from all 1 million simulations resulted in a probability distribution of the overall participation of POC- and woman-owned businesses if contracts and procurements were awarded randomly based only on the estimated availability of relevant businesses working in the local marketplace.

The output of Monte Carlo simulations represents the number of simulations out of 1 million that produced participation equal to or less than the actual, observed participation of POC- and woman-owned businesses in RTC work, after accounting for statistical outliers. If that number was less than or equal to 25,000 (i.e., 2.5% of the total number of simulations, or $p = .025$), then we considered the disparity index to be statistically significant at $\alpha = .05$, using two-tailed tests.

2. Results. BBC ran Monte Carlo simulations on all relevant RTC contracts and procurements considered together to assess whether the substantial disparities relevant business groups exhibited for that work were statistically significant. As shown in Figure 7-6, results from the Monte Carlo analysis indicated the disparity we observed for POC- and woman-owned businesses considered together on all RTC contracts and procurements was statistically significant at the 95 percent confidence level. In addition, the disparities we observed for white woman-, Black American-, and Subcontinent Asian American-owned businesses were statistically significant at the 95 percent confidence level and the disparities we observed for Asian Pacific American- and Native American-owned businesses were significant at the 99 percent confidence level.⁵

Figure 7-6.
Statistical significance of disparities for RTC work

Note:

A double asterisk indicates statistical significance at a 99 percent confidence level, a single asterisk indicates statistical significance at a 95 percent confidence level, and a plus sign indicates statistical significance at a 90 percent confidence level.

Source:

BBC disparity analysis

Business Group	Disparity index	Probability that disparity is due to chance (<i>p</i> value)
POC-owned and woman-owned	56	0.02 *
White woman-owned	29	0.02 *
POC-owned	69	0.16
Asian Pacific American-owned	9	0.00 **
Black American-owned	36	0.03 *
Hispanic American-owned	191	N/A
Native American-owned	1	0.00 **
Subcontinent Asian American-owned	14	0.02 *

⁵ BBC did not observe a disparity for Hispanic American owned-businesses for all relevant RTC projects considered together. As a result, we could not assess statistical significance for those businesses.

CHAPTER 8.

Contracting Policies and Program Measures

Chapter 8 provides an overview of the policies and regulations guiding the Regional Transportation Commission of Southern Nevada's (RTC's) contracting and procurement processes and the programs RTC uses to encourage the participation of disadvantaged business enterprises (DBEs) as well as person of color (POC)-; woman-; veteran-; and lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientation (LGBTQ+)-owned businesses in its United States Department of Transportation (USDOT)-funded contracts and procurements.¹ The chapter is organized in two parts:

- A. Contracting Policies; and
- B. Business Programs.

A. Contracting Policies

The Purchasing and Contracts (Purchasing) Division of the Finance Department for RTC is responsible for awarding and administering all contracts and procurements the agency awards. The Purchasing Division is required to follow Nevada Revised Statutes (NRS) for the procurement of construction services, professional services, and goods and non-professional services. In general, all contracts and procurements are made with purchase orders and methods vary by anticipated contract value, funding source, and the type of good or service to be procured. These methods include informal quote procedures and competitive sealed purchases.

RTC is a direct recipient of federal funding via USDOT's Federal Transit Authority (FTA). RTC uses those dollars to fund, either partially or in total, various contracts and procurements it awards.² Federally funded contracts and procurements are subject to unique procurement procedures imposed by FTA and RTC itself. Figure 8-1 outlines applicable procurement types, thresholds, and processes for federally funded contracts and procurements.

1. Informal quote procedures. For federally funded construction services less than or equal to \$25,000, professional services exempted from competitive bidding less than or equal to \$100,000³, and goods and non-professional services less than or equal to \$100,000, the Purchasing Division may use informal quote procedures to solicit the good or service.

¹ "Woman-owned businesses" refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding racial/ethnic groups.

² BBC Research & Consulting defines a USDOT-funded contract as any contract or procurement that includes at least \$1 of USDOT funding.

³ Competitive bidding exemptions are defined in NRS 332.115.1.

Figure 8-1.
RTC contracting policies for federally funded contracts and procurements

Procurement Type	Dollar Threshold	Process
Informal Quotes		
Construction	<\$2,000	Micro-purchase - no required process
	≥\$2,000 - \$25,000	Two quotes

Professional services; Goods and non-professional services	≤ \$10,000	Micro-purchase - no required process
	≥\$10,000 - \$100,000	Two quotes
Competitive Sealed Purchases		
Construction	≥ \$25,001	Competitive Bidding

Professional services; Goods and non-professional services	≥ \$100,000	Competitive Bidding

Note: A procurement is considered to be federally funded if it has \$1 of federal funding.

Source: RTC procurement policies.

Informal quote procedures differ for federally funded contracts and procurements under certain dollar thresholds. Although RTC is encouraged to use competitive procedures whenever possible, for federally funded construction contracts and procurements worth less than \$2,000 (micro-purchase threshold), the agency is not required to obtain competitive quotes. Federally funded construction contracts and procurements worth between \$2,000 and \$25,000 fall under the FTA’s simplified acquisition threshold. For these contracts, RTC can choose whether to apply simplified acquisition procedures; if RTC chooses to apply these procedures, the agency is required to receive at least two quotes before awarding the contract or procurement.

Informal quote procedures for federally funded professional services and goods and non-professional services contracts and procurement are similar; however, the micro-purchase threshold is less than \$10,000 and the FTA’s simplified acquisition threshold is between \$10,000 and \$100,000. Regardless of the price, federally funded solicitations under the informal quote threshold must include associated federal requirements, such as those related to any applicable federal certifications, the participation of certified DBE subcontractors or suppliers, and DBE good faith efforts (GFE). In addition, once quotes are received and the lowest responsive and responsible bidder has been identified, the Purchasing Division must perform a cost or price analysis to ensure that the price is fair and reasonable before awarding the contract or procurement.

For all procurements, regardless of funding source, worth more than \$50,000, NRS 332.045 requires that the solicitation be advertised in a locally circulated newspaper or on its online procurement platform, the Nevada Government eMarketplace (NGEM), for at least seven days before closing.

2. Competitive sealed purchases. For federally funded construction services worth more than \$25,000, professional services exempted from competitive bidding worth more than \$100,000, and goods and non-professional services worth more than \$100,000, the Purchasing Division uses competitive sealed purchases to solicit the good or service. Competitive sealed purchase requirements vary between construction, professional services, and goods and non-professional services contracts and procurements.

For all competitively procured goods or services, should an award be protested, the protesting party must provide a bond of 25 percent of the contract or \$250,000, whichever is less. Should the protest be rejected, the Purchasing Division can claim a portion of the bond to pay for any expenses incurred during the investigation of the award.⁴ For all federally funded contracts and procurements worth more than the simplified acquisition threshold, the Purchasing Division must complete a cost or price analysis to ensure that the price is fair and reasonable before awarding the contract or procurement.

a. Construction. The Purchasing Division follows NRS 338 and its internal procurement regulations for awarding federally funded construction projects worth more than \$25,000 (as well as all construction projects worth over \$100,000, regardless of funding source), which sets forth the following requirements:

- The Purchasing Division must advertise the invitation to bid (ITB) for at least three weeks prior to the bid submission date;
- The ITB must provide information on the prevailing wage requirements applicable to the solicitation;
- A list of all attendees at the pre-bid conference must be made available to all interested parties;
- Bids must be accompanied by a bid bond worth 5 percent of the total bid;
- Bidders must be prequalified pursuant to the requirements detailed in NRS 338.1379, either by the Purchasing Division or the Nevada Department of Transportation;
- Subcontractors that will perform more than 5 percent of the project overall must be listed in the bid packet; and
- The Purchasing Division must open the bids it receives publicly and award it to the lowest responsible bidder.⁵

Once awarded, the awarded vendor must furnish a payment bond and performance bond. Performance bonds must be worth 100 percent of the total value of the contract. Payment bonds for federally funded contracts must be at least 50 percent of the contract value if the contract is worth less than \$1 million, 40 percent of the contract value if the contract is worth between \$1 and \$5 million, or \$2.5 million if the contract is worth more than \$5 million. Subcontractors that perform more than \$50,000 of work or 1 percent of the total contract value, whichever is greater, must also furnish a bond in a value established by the Purchasing Division.⁶ In addition to providing bonds, the awarded vendor must also provide a list of all first-tier subcontractors that will perform work worth more than \$250,000 on the contract; if no first-tier subcontractor will perform more work worth more than \$250,000, all first-tier subcontractors that will perform more than 1 percent of the base bid or \$50,000, whichever is greater, must be listed.⁷

⁴ NRS 332.068

⁵ NRS 332.065 sets forth the requirements to be considered the lowest responsive bidder for competitively solicited bids.

⁶ NRS 339.025.2

⁷ NRS 338.141

b. Professional services. For professional services worth more than \$100,000, formal request for proposals (RFP) or request for qualifications (RFQ) processes must be used. At minimum, RFPs/RFQs must be advertised for seven days in a newspaper of general circulation and should be distributed to the NGEM supplier database. A list of all attendees at the pre-proposal conference must be made available to all interested parties.

Evaluation criteria must be included in the solicitation and, should the anticipated cost of the project exceed \$5 million or RTC's Chief Executive Officer (CEO) finds the project to be sensitive or controversial, the evaluation criteria must be approved by RTC's Board of Directors. Price must always be included as an evaluation criterion, except for the solicitation of architectural or engineering (A/E) services. The proposal with the lowest price receives full points in that evaluation criterion, and all other proposals are awarded points for price based on their relative price compared to the lowest proposer. However, contracts are awarded to the proposer with the highest number of overall points, regardless of price.

For procurements anticipated to be worth more than \$5 million or which have been deemed sensitive or controversial by the CEO, the Purchasing Division may create a short list of qualified firms to be approved by the Board prior to issuing a Best and Final Offer (BAFO) solicitation or an interview. If BAFO processes are used, the evaluation of the BAFO and the previously issued RFP are combined and reviewed by the evaluation committee to award the procurement.

RFQs are used to procure services that are exempt from competitive bidding procedures, to create lists of rotating qualified firms for A/E services, or to procure design/build projects. When using qualified lists to procure non-A/E services or for design/build contracts, pricing is used as an evaluation factor. Should the Purchasing Division find it appropriate, interviews can be used as an evaluation factor for awarding contracts and procurements to firms from the list of qualified firms.

c. Goods and non-professional services. Goods and non-professional services contracts and procurements worth more than \$100,000 must also be solicited using formal competitive bid processes as outlined by NRS 332. The ITB must be advertised in the NGEM supplier database and in a local newspaper of general circulation for at least seven days. The Purchasing Division must open bids publicly and award the contract or procurement to the lowest responsible bidder. Preferences are given to recycled materials, should the value and cost of the recycled material be equivalent to non-recycled materials.

B. Business Programs

As part of implementing the Federal DBE Program, RTC uses a combination of "race- and gender-neutral" and "race- and gender-conscious" measures to encourage the participation of POC- and woman-owned businesses in the federally funded contracts and procurements it awards. Race- and gender-neutral measures are measures designed to encourage the participation of all businesses—or, all small businesses—in an organization's work, regardless of the race/ethnicity or gender of business owners. In contrast, race- and gender-conscious measures are measures designed to specifically encourage the participation of POC- and woman-owned businesses in an organization's contracting (e.g., using POC-owned business participation goals to award individual contracts).

To meet the narrow tailoring requirement of the strict scrutiny standard of constitutional review—which is the constitutional standard applicable to race- and gender-conscious programs—agencies that implement the Federal DBE Program must meet the maximum feasible portion of their overall DBE goals through the use of race- and gender-neutral measures.⁸ If they cannot meet their overall DBE goals through the use of race- and gender-neutral measures alone, then they must consider also using race- and gender-conscious measures. When submitting documentation related to their overall DBE goals to USDOT, agencies must project the portion of their goals they expect to meet through race- and gender-neutral measures and the portions they expect to meet through race- and gender-conscious measures.

BBC reviewed the measures RTC uses to encourage the participation of POC-, woman-, veteran-, and LGBTQ+-owned businesses in its work. We reviewed RTC’s programs in four parts:

1. Overall DBE goal;
2. DBE certification;
3. Race- and gender-neutral measures; and
4. Race- and gender-conscious measures.

1. Overall DBE goal. Every three years, RTC is required to set an overall aspirational goal for the participation of DBEs in its Federal Transit Authority (FTA)-funded work. If DBE participation in those projects is less than its overall DBE goal in a particular year, then the agency must analyze the reasons for the difference and establish specific measures that enable it to meet the goal in the next year. For federal fiscal years (FFYs) 2023 through 2025, RTC set an overall goal of 18.1 percent for the participation of DBEs in its FTA-funded contracts and procurements. The agency projected that it will achieve 9.5 percent of its goal through the use of race- and gender-neutral measures and the remaining 8.6 percent through the use of race- and gender-conscious measures.

2. DBE certification. RTC is a member of the Nevada Unified Certification Program’s (NUCP’s) Review Board. The NUCP consists of six member agencies that meet monthly to review applications for certification. RTC recognizes DBE certification status from all members of the NUCP. To be eligible for DBE certification, business owners must sign an affidavit affirming they are part of a “socially and economically disadvantaged” group as defined by 49 Code of Federal Regulations (CFR) Part 26. The groups USDOT presumes to be disadvantaged as part of the Federal DBE Program include Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, Subcontinent Asian Americans, and women of any race. Business owners who identify as members of those groups must establish 51 percent “real and substantial ownership” in their businesses and must possess the power and expertise to control the daily operations and management of their businesses.

To be certified as a DBE, a business must be a small business, as defined by the Small Business Administration. A business must also have average revenues of less than \$30.72 million over the previous three years to be eligible to perform on a USDOT-funded contract as a DBE. To demonstrate economic disadvantage, business owners must also have personal net worths of less than \$2.047 million (not counting the values of their primary residences). Finally, business owners must be United States citizens or legal residents, and the businesses must be independent of other entities. Certified DBEs

⁸ 49 CFR Section 26.51.

must submit a “no change” affidavit annually on the anniversary dates of their certifications affirming that there have been no changes in the previous year that would affect their ability to qualify as DBEs. Along with their affidavits, they must also submit documentation of their businesses’ sizes and gross receipts. The NUCP Directory is available online and is one of the resources prime contractors can use to find DBEs with which to work.

3. Race- and gender-neutral measures. As part of its implementation of the Federal DBE Program, RTC uses, or facilitates vendor access to, various race- and gender-neutral measures to encourage the participation of small businesses—including many POC-, woman-, veteran-, and LGBTQ+-owned businesses—in its contracting:

- Advocacy and outreach efforts;
- Small business element;
- Financial assistance;
- Subcontractor commitments;
- Bonding and insurance assistance;
- Prompt payment policies;
- On the job training and workforce development; and
- Unbundling projects.

a. Advocacy and outreach efforts. RTC participates in various advocacy and outreach efforts, including providing resources and communications targeted to small and disadvantaged businesses.

i. Communications. RTC communicates with DBEs through e-mail and its website. The agency uses its website to announce special events and new DBE program measures. Outside of its website, RTC also disseminates information to DBEs and potential DBEs at trade fairs and other outreach events.

ii. Disadvantaged Business Directory. RTC is a member of the NUCP, which maintains a DBE/Airport Concessionaires Disadvantaged Business Enterprise (ACDBE) Directory on its website. The directory is updated monthly and contains the business names, addresses, phone numbers, and types of work for all certified DBEs/ACDBEs.

iii. Bidders lists. RTC maintains bidders lists of all DBE and non-DBE prime contractors and subcontractors that bid on the federally funded projects it awards. The bidders lists include the names, addresses, DBE statuses, ages, and information about annual gross receipts for all businesses that have submitted bids on RTC projects.

iv. Identification of potential DBEs. RTC make efforts to identify POC- and woman-owned businesses that are qualified to become certified as DBEs that are not currently certified and works to encourage them to complete the certification process.

v. Emerging Small Business (ESB) outreach. The Nevada Office of Economic Development offers an outreach program for local ESBs to connect with state agencies.⁹ To facilitate this outreach, a list of local ESBs is posted on the office’s website and state agencies are encouraged to use this directory to establish outreach programs within their offices.

b. Small business element. RTC operates a small business element as part of the Federal DBE program, which is used as a race- and gender-neutral tool to help achieve its overall DBE goal on FTA-funded projects. When RTC has met the race- and gender-conscious portion of its overall DBE goal or it is not feasible for it to use race- and gender-conscious measures to award FTA-funded projects, the agency uses small business enterprise (SBE) goals to award projects, which bidders must meet through subcontractor commitments with certified SBEs or by demonstrating GFEs to do so. RTC will then count the participation of SBEs that are also certified as DBEs toward the achievement of the race- and gender-neutral portion of its overall DBE goal. Business are certified as SBEs by the NUCP and must meet the revenue and personal net worth requirements set forth by the United States Small Business Administration (SBA).

c. Financial assistance. The State of Nevada certifies local ESBs that are then eligible for the following financial assistance programs through the state’s Office of Economic Development:^{10, 11}

- Grants or loans of money from the “Catalyst Account;”¹²
- The issuance of revenue bonds for industrial development;¹³
- The Nevada Collateral Support Program;¹⁴
- The Nevada Microenterprise Initiative Program;¹⁵
- The Nevada New Markets Jobs Act;¹⁶ and
- The Nevada Silver State Opportunities.¹⁷

In addition to these programs, the Office of Economic Development has developed the Small Business Enterprise Loan Account, a revolving loan fund available for certified SBEs, POC-owned businesses, woman-owned businesses, and DBEs to finance expansion. As part of the program, the Office of Economic Development may provide loans directly or offer grants to facilitate private lending. Businesses may also apply for tax credits through the Office of Economic Development.

⁹ NRS 231.14065

¹⁰ To qualify as a local ESB, a business must maintain its principal place of business in Nevada; must have less than 30 employees; and must not have average annual gross receipts that exceed \$3.5 million (construction), or \$1.3 million (all other industries).

¹¹ NRS 231.14055 2.b.1-8

¹² NRS 231.1573

¹³ NRS 349.400 to 349.670

¹⁴ 12 U.S.C. §§ 5701 et seq.

¹⁵ 12 U.S.C. §§ 5701 et seq.

¹⁶ NRS 231A

¹⁷ NRS 355.275

d. Subcontractor commitments. Throughout the life of projects, RTC tracks subcontractor commitments through monthly payment information submitted by prime contractors to DBE Liaison Officers (DBELOs). DBELOs verify payments to DBE subcontractors on projects on a quarterly basis to confirm the payments reported by prime contractors using verification forms DBE subcontractors submit. The DBELOs also conduct periodic site visits to confirm that the work committed to DBEs is actually performed by them.

e. Bonding and insurance assistance. DBELOs work with the Purchasing Division to simplify bonding processes, reduce bonding requirements, ameliorate impacts of surety costs from bids, and support DBEs and other small businesses in obtaining bonding.

f. Prompt payment policies. RTC has policies in place to help ensure prompt payment to subcontractors. Prime contractors are required to pay their subcontractors within 10 days of receiving payments. In addition, prime contractors must pay retainage within 30 days after subcontractors' work is completed. Should prime contractors be non-compliant, RTC can pay subcontractors directly and deduct these amounts from the retainage owed to prime contractors, issue stop-work orders, withhold payments to prime contractors, or cancel projects.

g. On-the-job training and workforce development. The Office of Economic Development has established a Workforce Innovation for a New Nevada (WINN) Account, through which it may authorize and fund (with payment matching of at least 25 percent of the awarded funds required by the program provider) third-party workforce development programs.¹⁸ In order to qualify for funding, an organization must be either an institution within the Nevada System of Higher Education, a state or local agency, a school district, a charter school, a nonprofit organization, a labor organization, or a private postsecondary education institution that provides a workforce development program that has been reviewed by and approved by the Governor's Office of Economic Development (GOED). Organizations seeking funding must submit a detailed application to the GOED. Organizations may use funding for administrative and personnel costs (personnel costs must not exceed 10 percent of the total grant), equipment, marketing, and facilities rental costs. In 2023, WINN granted nearly \$6 million to programs to support workforce development.

h. Unbundling projects. As part of RTC's small business element, the agency reviews multi-trade projects worth more than \$5 million to assess whether they can be unbundled into multiple project elements. Should a project offer a sufficient number of potential SBE opportunities, DBELOs will recommend that the project be unbundled to help encourage greater SBE participation.

4. Race- and gender-conscious measures. As part of its implementation of the Federal DBE Program, the agency uses race- and gender-conscious contract goals to encourage the participation of DBEs in various FTA-funded projects it awards. The agency sets DBE contract goals on individual projects based on the availability of DBEs in the marketplace for the types of services or materials involved. Prime contractors bidding on those projects must meet the goals by either making

¹⁸ NRS 231.141-152

subcontracting commitments to DBEs or submitting documentation that they made GFEs to meet the goals but failed to do so. Examples of GFEs are:

- Advertising or attending pre-bid meetings and events to solicit the interest of DBEs that have the capability to perform the work involved;
- Identifying DBE subcontracting opportunities as part of the project;
- Soliciting bids from DBEs directly, including following up and negotiating when possible;
- Providing DBEs with information about the project, contract requirements, and other elements of the work; and
- Assisting DBEs with obtaining bonding, insurance, other finance requirements, and supplies and materials.

Bidders may also provide additional information regarding the efforts they made in finding or partnering with DBEs if they feel they demonstrated genuine efforts to engage with them. If prime contractors do not meet the goals through subcontracting commitments or through approved GFE documentation, RTC can reject their bids.

CHAPTER 9.

Program Considerations

The disparity study provides substantial information the Regional Transportation Commission of Southern Nevada (RTC) should examine as it considers potential refinements to its implementation of the Federal Disadvantaged Business Enterprise (DBE) Program and other efforts to further encourage the participation of person of color (POC)- and woman-owned businesses in its contracts and procurements. BBC Research & Consulting (BBC) presents several recommendations RTC should consider, organized in the following manner:

- A. DBE Contract Goals;
- B. Procurement Policies;
- C. Contract Administration Policies;
- D. Supportive Services and Capacity Building; and
- E. Supplier Diversity Programs.

A. DBE Contract Goals

The Federal DBE Program requires agencies to use race- and gender-conscious measures—such as DBE contract goals—to meet any portion of their overall DBE goals they do not project being able to meet using race- and gender-neutral measures alone. USDOT guidance on the use of DBE contract goals, which are presented in 49 Code of Federal Regulations CFR Part 26.51(e), include the following requirements:

- Agencies may only use DBE contract goals on projects that have subcontracting possibilities.
- Agencies are not required to set DBE contract goals on every USDOT-funded project.
- During the time period their overall DBE goals cover, agencies must set DBE contract goals so they will cumulatively result in meeting the portions of their overall DBE goals they project being unable to meet through race- and gender-neutral measures alone.
- Agencies' DBE contract goals must provide for participation by all DBE groups eligible to participate in them and cannot be subdivided into group-specific goals.
- Agencies must maintain and report data on DBE participation separately for projects they awarded with and without the use of DBE contract goals.

Because the use of DBE contract goals is a race- and gender-conscious measure, agencies must ensure their use meets the requirements of the strict scrutiny standard of constitutional review, including showing a compelling governmental interest for their use and ensuring their use is narrowly tailored (for details, see Chapter 2 and Appendix B). In addition, prior to using DBE contract goals, RTC must consider whether it has maximized its use of race- and gender-neutral measures, including fully leveraging existing race- and gender-neutral measures and whether additional measures might further encourage the participation of POC- and woman-owned businesses in its work.

1. Group eligibility. Disparity analysis results indicated that most relevant race and gender groups—Asian Pacific American-, Black American-, Native American-, Subcontinent Asian American-, and white woman-owned businesses—showed substantial disparities on key sets of contracts and procurements RTC awarded during the study period. Because RTC already uses myriad race- and gender-neutral measures to encourage the participation of POC- and woman-owned businesses in its work, and because those measures have not addressed disparities for those businesses, the agency might consider continuing to use DBE contract goals to award USDOT-funded projects. To do so, RTC would continue to set goals on individual contracts based on the availability of POC- and woman-owned businesses for the types of work involved in the project, and, as a condition of award, prime contractors would have to meet those goals by making subcontracting commitments with eligible DBEs—that is, DBEs whose owners identify with race/ethnic or gender groups that are substantially underutilized on work—as part of their bids or by demonstrating good faith efforts (GFEs) to do so.

2. Overconcentration. Agencies implementing the Federal DBE Program are required to report and take corrective measures if they find that DBEs are so concentrated in certain work areas that they unduly burden non-DBEs working in those areas. Such measures may include:

- Developing ways to assist DBEs to move into other areas of work;
- Adjusting the use of DBE contract goals; and
- Working with contractors to find and use DBEs for different work types.

BBC investigated potential overconcentration in RTC work. The overconcentration analysis shown here is based only on subcontract dollars and does not include work that prime contractors self-performed in those areas. If BBC had included self-performed work in those analyses, the percentages for which DBEs accounted in each subindustry would likely have decreased. In addition, the analysis is only based on USDOT-funded projects and would likely have differed if we had expanded it to include both USDOT- and non USDOT-funded projects. There were five subindustries in which certified DBEs accounted for 50 percent or more of total subcontract dollars for projects the agency awarded between July 1, 2017, and June 30, 2022:

- Fencing, guardrails, barriers, and signs (100.0%);
- Cleaning and janitorial services (100.0%);
- Construction management (100.0%);
- Building construction (97.4%); and
- Business services and consulting (95.0%).

As shown above, there are several subindustries in which DBEs account for the vast majority of subcontracting dollars RTC awarded during the study period. The agency is required to consider the effects that such participation might have on non-DBEs attempting to perform similar work on RTC projects. RTC could consider offering training programs to help certified DBEs further diversify their lines of work and expand into other industries. The agency should also consider reviewing similar information and monitoring the above types of work for potential overconcentration in the future.

B. Procurement Policies

Based on our analysis of RTC policies and feedback we collected from stakeholders, BBC identified several procurement policies the agency should consider refining to help increase the participation of POC- and woman-owned businesses in its work. The refinements we recommend below are all race- and gender-neutral in nature—that is, they might help make it easier for all businesses, or all small business—to participate in RTC work, regardless of the race or gender of their owners.

1. Vendor selection. Comments from in-depth interviews indicate that RTC’s contract and evaluation requirements often favor larger companies and inhibit the ability of small businesses or sole proprietorships to win work with the organization. RTC should consider reviewing its contract and evaluation criteria to ensure they are not unduly restrictive for small or newly established businesses. RTC should pay particular attention to minimum requirements related to number of employees or experience—those of both the company and key personnel—and any bonding, insurance, or other financial requirements. Qualitative evidence demonstrates that stakeholders perceive local agencies to award work to a limited number of repeat vendors. Utilization results also show that four POC-owned businesses and three woman-owned businesses received 79 percent and 78 percent of the dollars RTC awarded to POC- and woman-owned businesses, respectively, during the study period. RTC should consider expanding its vendor pool through targeted advertising and outreach and revising evaluation criteria and policies to encourage the use of vendors with which the organization or prime contractors have never worked. As part of the anecdotal information we collected as part of the study, a business owner stated:

“We would like to work with RTC, but they seem to use the same firms over and over again.”

2. Bid process. As part of in-depth interviews and public meetings, business owners and representatives discussed barriers they have experienced in RTC’s bid process, such as excessive paperwork, lack of training to navigate the process, and the organization’s timeline for awarding contracts and procurements. RTC should consider streamlining the paperwork required for bidding and contract administration. In addition, RTC should consider providing guidance on preparing and submitting bids and proposals, offer trainings on how to interpret evaluation criteria, and provide feedback to unsuccessful bidders. Finally, RTC should also consider ways it can minimize time between bid and proposal due dates, when the organization awards a contract, and when projects start. As part of the anecdotal information we collected as part of the study, several businesses echoed these sentiments, stating:

“Every time I get a proposal with the LAS and RTC, they never acknowledge my proposal or call me to say that they received my proposal.”

“The lengthy procurement process for government agencies in Southern Nevada is the biggest obstacle to working with them, especially for small businesses that have limited cash flows. Such extended procurement timeframes are unsustainable for small businesses.”

“We have a small business and the dedication required for the whole proposal process is just too time-consuming. We would have to hire a person just to do proposals, as the process is really a job in itself.”

3. Advertising. Anecdotal comments collected as part of the disparity study suggest that many business owners experience difficulties learning about upcoming opportunities with RTC and other local agencies. Currently, state law requires all projects worth more than \$50,000 to be advertised for a minimum of seven days, with the exception of construction projects worth more than \$100,000, which are advertised for at least three weeks before closing. RTC should consider implementing longer windows to advertise upcoming projects and advertise small projects directly to small and diverse businesses that are registered with the agency. As part of the anecdotal information we collected as part of the study, business owners echoed these sentiments:

"I have not [attempted to work with RTC or LAS]. I don't know where those entry points are."

"If Harry Reid is redoing a lounge or needing some furniture, how can we get that information to bid on those things?"

In addition to increasing advertising timelines, RTC could consider providing forecasts of future contracting opportunities, to the extent practical, to all contractors and post that information on its website. While RTC's website contains a wealth of project information, supplementing that information with planned procurements, at least on a quarterly basis, could be a useful tool for businesses in planning and in establishing potential partnerships before project solicitations are issued.

C. Contract Administration

BBC also recommends RTC consider additional measures to support small businesses, including POC- and woman-owned businesses, as part of administering contracts and procurements. The refinements we recommend below are also race- and gender-neutral in nature.

1. Data collection. RTC does not collect comprehensive information on subcontractors that participate in its projects. RTC should consider collecting comprehensive subcontract data—that is, for all subcontractors regardless of the race or gender of their owners or certification status—on all projects, including:

- Associated prime contract numbers (e.g., purchase order or contract numbers);
- Subcontractor names, addresses, phone numbers, and email addresses;
- Types of associated work; and
- Award and paid-to-date amounts.

RTC should consider collecting those data at the time of award and requiring prime contractors to submit data on the payments they make to subcontractors as part of monthly invoicing. Doing so will improve the agency's monitoring of the participation of small businesses, including POC- and woman-owned businesses—regardless of certification—in its work and could also help the agency identify future subcontracting opportunities for those businesses as part of its projects. Collecting comprehensive subcontract data might require upgrading to a different data management system that allows RTC to collect and maintain that information efficiently and effectively. In addition, RTC should consider maintaining contract information from historical contracts and procurements, for a minimum

of five years after project completion. Doing so would improve the agency's ability to track the participation of small and diverse businesses in its work.

2. Program manuals. RTC currently hosts webpages for its DBE program; however, those webpages do not contain information related to RTC's program plans for those programs. RTC could consider posting its DBE Program plan in addition to its most recent DBE Goal and Methodology document. Access to program plans will enable internal staff, businesses, and other interested parties to better understand the requirements and procedures of RTC's programs and how the organization's programs are implemented.

3. Prompt payment. As part of in-depth interviews and surveys, several businesses, including many POC- and woman-owned businesses, reported difficulties with receiving payment in a timely manner on government contracts, particularly when they work as subcontractors and suppliers. Many businesses also commented that having capital on hand is crucial to business success and often a challenge for small businesses. RTC should consider reviewing and strengthening its current prompt payment policies to ensure timely payment to prime contractors and from prime contractors to subcontractors or suppliers. RTC should consider making efforts to further enforce those requirements, such as imposing internal late fee penalties for delayed payments to prime contractors and requiring prime contractors to remit late fees for delayed payments to subcontractors. To track those payments, RTC could consider creating electronic systems to track and confirm subcontractor payments to all subcontractors, regardless of certification status. As part of the anecdotal information we collected as part of the study, two interviewees pointed out:

"We've worked for the government before, and the problem we have with them is that they just pay us too late. It's a 90-day waiting period after the work is done. We're a small company, so we can't wait that long for our money, because we put out a lot of money on projects pertaining to overhead."

"One of the problems with being a sub is that you don't get paid until they get paid. ... I can put in my invoice for that month, and I've had to wait four months to get paid."

4. Subcontractor commitments. Qualitative evidence suggests that prime contractors sometimes reduce or eliminate subcontract work once they are awarded RTC projects, despite making specific commitments to subcontractors as part of the bid process. RTC should consider requiring contractors to provide copies of all subcontracts or subcontractor commitments, especially those with subcontractors that are DBEs and small businesses, to ensure that all subcontracts (including lower-tier subcontracts) are performed in accordance with applicable DBE Program provisions. Agency review of these subcontracts would also help ensure that subcontractor participation is consistent with the subcontractor participation stated in a prime contractor's proposal. In addition, RTC could consider establishing points of contact between subcontractors and RTC to address any underutilization or subcontractor substitutions to help ensure POC- and woman-owned businesses receive the work committed to them at the time of bid. Other measures RTC could consider include inviting subcontractors to contract negotiation meetings to discuss their expected portions of contracts and notifying the entire project team when projects have been awarded. Overall, RTC may consider taking steps to improve communication lines between the prime contractor, subcontractor, and the owner of a project. As part of the anecdotal information we collected as part of the study, two interviewees noted:

"Here we are in construction and finger pointing goes on all the time. ... Supposedly the [agency] told the [general contractor], 'This is our drop-dead, our schedule. This is when we need the work to be done by, period.' And then for whatever reason we don't always hear about that. Or supposedly it's been changed and moved up. So now all of a sudden the urgency is that much greater for us to get the product over to them for installation. Well, if we knew that that was a situation ahead of time, we would've then been able to expedite things."

"The problem that I have, is because I am a small company, and I don't know if it's because I am a woman-owned company, but I've had two prime contractors take advantage [of me]."

D. Supportive Services and Capacity Building

Based on our analysis of RTC policies and feedback we collected from stakeholders, BBC identified several policies and programs the agency should consider implementing or refining to help increase the participation of POC- and woman-owned businesses in its work. The refinements we recommend below are race- and gender-neutral in nature—that is, they might help make it easier for all businesses—or all small businesses—to participate in RTC work, regardless of the race or gender of their owners.

1. Mentor/protégé relationships. Many business representatives who provided qualitative insights as part of the study spoke highly of mentor/protégé relationships, noting the benefits of working with and learning from larger, more successful companies in similar industries. Multiple interviewees favorably discussed the Nevada Department of Transportation's (NDOT's) mentor/protégé program. RTC should consider coordinating with NDOT's mentor/protégé program to facilitate access to mentorship opportunities for its vendors or consider developing its own mentor protégé program. As part of the anecdotal information we collected as part of the study, two businesses stated:

"We should have some Mentoring Protégé Program. At least RTC or LAS should establish that program. I know NDOT has that."

"To work with someone who had experience [and] that wasn't threatened or whatever and realized there's enough for everyone to just train and grow and work together. That would be amazing."

2. Disadvantaged Business Enterprise Liaison. RTC has a specialized role, the Disadvantaged Business Enterprise Liaison (Liaison), whose primary responsibilities are to enforce the DBE Program and ensure that internal RTC staff have the necessary documentation and access to information to successfully implement the program. However, throughout the disparity study, business representatives emphasized the importance of connecting to different departments that may procure their services and having opportunities to learn about non-competitively bid opportunities. RTC should consider expanding the responsibilities of the Liaison or conducting additional "meet and greets" with local businesses and department decision makers to provide opportunities for more connections with the business community. As part of the anecdotal information we collected as part of the study, one business stated:

"RTC and McCarran ... [have] at least once a year the meet and greets, meet the generals, meet our people, come talk about what your small business can do. That is so helpful in

many ways because our time is valuable and when we're running the business, running our employees and trying to market, it's very tough to get out there and spend the time to actually meet the end users who would use our company's expertise."

3. Personnel and labor. Several business owners and managers mentioned difficulties finding personnel and labor, especially staff who have experience in their industries. RTC should consider coordinating with existing programs in Nevada that focus on intern and staffing connections to ensure the types of work the organization procures are represented in those programs and that vendors are aware of the opportunities to utilize those programs. As part of the anecdotal information we collected as part of the study, two businesses noted:

"The Workforce Opportunities and Development program that they offered through Clark County. [That was helpful]."

"If there are agencies that can identify the individuals that are truly working for work and trying to expand their capabilities in my practice and they're being sponsored. Because see, I cannot afford to bring someone and spend a lot of time and resources training. So, if there is some kind of assistance in their training process, yeah, I would welcome that."

E. Supplier Diversity Programs

RTC has myriad programs in place to help small businesses, including many POC- and woman-owned businesses, successfully compete for and participate in RTC contracts and procurements. Despite the relative success of those business programs, RTC should consider refining its current program measures to further encourage the participation of POC- and woman-owned businesses in its work. The refinements we recommend below are also all race- and gender-neutral in nature.

1. Outreach. RTC could consider providing additional details about the agency's business opportunities, resources available to small businesses, and the community and economic benefits of its supplier diversity programs to vendors in the Southern Nevada marketplace. For example, general information about the supplier diversity programs could include a brief summary explaining the DBE program, definitions of businesses eligible to participate in the program, and links to partner agencies that provide services to assist small, local, and diverse businesses. Additionally, RTC could post any informational documents distributed or presented at outreach events on the organization's website to give businesses access to that information, even if they did not attend the event. Those types of documents and presentations might include information about upcoming projects, solicitation requirements, and who to contact at an agency for more information.

2. Certification. RTC should consider ways it can improve the visibility of the certification options available to vendors and how businesses interested in applying for certification can seek assistance with the process. As an initial step, RTC could encourage NDOT to create a more robust certification platform with the ability for applications to track the progress of their applications. As part of the anecdotal information we collected as part of the study, business owners highlighted the need for improvements to the Nevada Unified Certification Program (NUCP) process, stating:

"The NUCP certification process is available on different agencies' website, so they [could] centralize one website or something where it's available and [shows] ... where [the] application [is] and ... how much time ... it takes. That will be very helpful."

"There's no way to improve [the NUCP certification process] ... but they could market [the certification] to these small businesses."

CHAPTER 10.

Overall DBE Goal

As part of its implementation of the Federal Disadvantaged Business Enterprise (DBE) Program, the Regional Transportation Commission of Southern Nevada (RTC) is required to set an overall goal for DBE participation in its United States Department of Transportation (USDOT)-funded projects [specifically, its Federal Transit Administration (FTA)-funded projects]. Agencies are required to develop overall DBE goals every three years, but they are *annual* goals in that agencies must monitor DBE participation in their USDOT-funded work every year. If an agency's DBE participation for a particular year is less than its overall DBE goal, then the agency must analyze the reasons for the difference and establish specific measures that enable it to meet the goal in the next year.

RTC must prepare and submit a Goal and Methodology document to USDOT that presents its overall DBE goals for USDOT-funded work. The goal must be supported by information about the steps the agency took to develop it and the factors it considered. RTC last developed an overall DBE goal for federal fiscal years (FFYs) 2023 through 2025. The agency initially set an overall DBE goal of 18.1 percent but later revised it to 0.3 percent for FFY 2023 and 20.8 percent for FFYs 2024 and 2025 to align with anticipated federal funding and projects. RTC indicated to USDOT that it planned to meet the goals through the use of a combination of race- and gender-neutral and race- and gender-conscious program measures.

RTC is required to develop new overall DBE goals for FFYs 2026 through 2028. Chapter 10 provides information the agency might consider as part of setting its new overall DBE goal for the FTA-funded contracts and procurements it anticipates awarding during FFYs 2026 through 2028. It is organized in three parts, based on guidance set forth in 49 Code of Federal Regulations (CFR) Part 26:

- A. Establishing a base figure;
- B. Considering a step-2 adjustment; and
- C. DBE groups eligible for race- and gender-conscious measures.

A. Establishing a Base Figure

Establishing a “base figure” is the first step in calculating an overall goal for DBE participation in RTC's FTA-funded work. As presented in Figure 10-1, the agency might be expected to award 27.1 percent of its FTA-funded prime contract and subcontract dollars to *potential DBEs*—that is, person of color (POC)- and woman-owned businesses that are DBE-certified or appear they could be DBE-certified according to the annual revenue limits described in 13 CFR Part 121 and 49 CFR Part 26—based on their availability for that work (see Appendix F, Figure F-15 for more detail). The agency might consider 27.1 percent as the base figure for its overall DBE goal if it anticipates that the types and sizes of FTA-funded projects it awards in the future will be similar to the FTA-funded projects it awarded during the study period (i.e., July 1, 2017 through June 30, 2022).

The calculation of the overall base figure reflects a weight of 71.9 percent for construction projects, 17.1 percent for professional services projects, and 11.1 percent for non-professional services and supplies projects based on the volume of dollars of FTA-funded work RTC awarded during the study period. If

RTC expects that the relative distributions of FTA-funded contract dollars by industry will change substantially in the future, the agency might consider applying different weights to the corresponding base figure components. Figure 10-2 provides availability estimates for the specific areas of work, or subindustries, considered in the analysis of RTC's FTA-funded projects. Those data could help RTC estimate a base figure should the agency determine that the mix of subindustries expected on future FTA-funded projects differs substantially from the projects analyzed in the disparity study. For additional details about the availability analysis, see Chapter 5.

Figure 10-1.
Base figure
components of
RTC's next overall
DBE goal

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals. See Figures F-16, F-17, and F-18 in Appendix F for corresponding disparity results tables.

Source:

BBC availability analysis.

Potential DBEs	Industry component			Weighted average
	Construction	Professional services	Non-prof. svcs. and supplies	
Asian Pacific American	2.2	7.4	5.0	3.4 %
Black American	4.3	10.4	6.4	5.6
Hispanic American	11.6	5.9	6.6	10.0
Native American	2.2	0.1	0.0	1.6
Subcontinent Asian American	0.1	0.3	0.0	0.1
Non-Hispanic white woman	5.0	7.9	12.5	6.3
Total potential DBEs	25.3 %	32.0 %	30.5 %	27.1 %
Industry weight	71.9 %	17.1 %	11.1 %	

B. Considering a Step-2 Adjustment

The Federal DBE Program requires RTC to consider a potential “step-2 adjustment” to its base figure as part of determining its overall DBE goal. RTC is not required to make a step-2 adjustment as long as it considers appropriate factors and explains its decision in its Goal and Methodology document. The Federal DBE Program outlines several factors an agency must consider when assessing whether to make a step-2 adjustment to its base figure:

1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years;
2. Information related to employment, self-employment, education, training, and unions;
3. Any disparities in the ability of DBEs to get financing, bonding, and insurance;
4. Other relevant data.¹

BBC Research & Consulting (BBC) completed an analysis of each of the above factors, although much of the information we examined was not easily quantifiable. In addition, accounting for those factors using quantified values may not result in any substantial changes to RTC's overall DBE goal. However, this information is still relevant to RTC as it determines whether to make a step-2 adjustment.

¹ 49 CFR Section 26.45.

Figure 10-2.
Availability of potential DBEs
for RTC USDOT-funded
contracts by subindustry

Note:
 Numbers rounded to nearest tenth of 1
 percent.
 Source:
 BBC availability analysis.

Industry	Potential DBE Availability
Construction	
Fencing, guardrails, barriers, and signs	54.5 %
Electrical equipment and supplies	44.0 %
Concrete work and materials	42.1 %
Vertical building trades	41.6 %
Excavation, drilling, wrecking, and demolition	40.5 %
Painting, striping, marking, and weatherproofing	39.2 %
Other construction services	35.4 %
Other construction materials	34.8 %
Water, sewer, and utility lines	31.8 %
Building construction	28.8 %
Electrical work	20.8 %
Highway, street, and bridge construction	20.0 %
Heavy construction equipment rental	11.1 %
Plumbing and HVAC	7.4 %
Rebar and reinforcing steel	0.0 %
Professional services	
Construction management	66.7 %
Advertising, marketing and public relations	58.8 %
Business services and consulting	56.0 %
Human resources and job training services	55.2 %
Other professional services	44.1 %
Engineering	33.8 %
Architectural and design services	28.8 %
Testing and inspection	26.7 %
Surveying and mapmaking	19.0 %
Transportation planning and environmental services	18.5 %
Non-prof. svcs. and supplies	
Cleaning and janitorial services	78.3 %
Cleaning and janitorial supplies	55.6 %
Other goods	43.9 %
Other services	30.6 %
Industrial equipment and machinery	29.8 %
Automobiles	25.0 %

1. Current capacity of DBEs to perform work. USDOT’s “Tips for Goal-Setting” suggests that agencies should examine data on past DBE participation in their FTA-funded projects in recent years. Results from the utilization analysis indicate that RTC awarded 17.6 percent of its FTA-funded contract and procurement dollars to certified DBEs during the study period, which supports a downward adjustment to the agency’s base figure. Based on past participation of DBEs, RTC might consider a downward adjustment to the base figure for its FTA-funded projects.

2. Information related to employment, self-employment, education, training, and unions. Chapter 3 summarizes information about conditions in the relevant geographic market area (RGMA) for POCs, women, and POC- and woman-owned businesses. They indicate that there are barriers certain POC groups and women face related to human capital, financial capital, business ownership, and business success throughout the region. Such barriers may decrease the availability of POC- and woman-

owned businesses for the FTA-funded projects RTC awards, which supports an upward adjustment to the agency's base figure. In addition, BBC used regression analyses to investigate whether race/ethnicity and gender are related to business ownership in relevant industries among workers in the Clark County marketplace independent of various other personal characteristics, including familial status, education, and age. Those analyses indicate that, even after accounting for such factors, POCs are less likely to own businesses in certain industries relative to white Americans, and women are less likely to own businesses in certain industries than men. (Chapter 3 and Appendix C provide details about our quantitative analyses of conditions in the RGMA.) Based on the results of those analyses, RTC might consider an upward adjustment to the base figure for its FTA-funded projects.

3. Any disparities in the ability of DBEs to get financing, bonding, and insurance. BBC's analysis of access to financing, bonding, and insurance also revealed quantitative and qualitative evidence that POCs, women, and POC- and woman-owned businesses in the region do not have the same access to those business inputs as non-Hispanic white men and businesses owned by non-Hispanic white men. Any such barriers might limit opportunities for POCs and women to successfully form and operate businesses in the RGMA. They would also place those businesses at a disadvantage in competing for RTC's FTA-funded prime contracts and subcontracts. Thus, information about financing, bonding, and insurance also supports an upward adjustment to the base figure.

4. Other factors. The Federal DBE Program suggests that federal fund recipients also examine "other factors" when determining whether to make step-2 adjustments to their base figures.²

a. Anticipated future contracts. If an agency expects that the relative distributions of USDOT-funded contract dollars by industry will change substantially in the future, the agency might consider an adjustment to its base figure. RTC anticipates awarding large FTA-funded transit services contracts in FFY's 2026 through 2028. Those contracts would be substantially different in terms of type and size from the federally funded contracts the agency awarded during the study period. Based on that information, RTC might consider adjusting the industry components of the base figure presented in Figure 10-1 to reflect the FTA-funded transit contracts it anticipates awarding in the future. RTC anticipates awarding approximately \$175 million annually in contracts for fixed route services and \$60 million annually in contracts for paratransit services, respectively, in FFYs 2026 through 2028 and that approximately two percent of those dollars will be associated with subcontracting opportunities. Based on that information, BBC calculated how the industry components of the agency's base figure might change in FFYs 2026 through 2028. Figure 10-3 presents those calculations. Figure 10-3 reflects a weight of 2.9 percent for construction contracts, 0.7 percent for professional services contracts, 2.2 percent for non-professional services and supplies contracts, and 94.3 percent for transit services contracts, based on the volume of dollars of FTA-funded work RTC anticipates awarding during FFYs 2026 through 2028. As presented in Figure 10-3, the agency might be expected to award 1.8 percent of its FTA-funded prime contract and subcontract dollars to potential DBEs based on their availability for that work. If the agency adjusts its base figure based on anticipated future contracts, it might take the average of its 27.1 percent base figure and the adjusted availability of 1.8 percent, yielding an adjusted overall DBE goal of 14.5 percent.

² 49 CFR Section 26.45.

Figure 10-3.
Adjusted industry components for RTC’s anticipated future contracts

Potential DBEs	Industry component				Weighted average
	Construction	Professional services	Non-prof. svcs. and supplies	Transit services	
Asian Pacific American	2.2	7.4	5.0	0.2	0.4 %
Black American	4.3	10.4	6.4	0.0	0.4
Hispanic American	11.6	5.9	6.6	0.0	0.5
Native American	2.2	0.1	0.0	0.0	0.1
Subcontinent Asian American	0.1	0.3	0.0	0.0	0.0
Non-Hispanic white woman	5.0	7.9	12.5	0.0	0.5
Total potential DBEs	25.3 %	32.0 %	30.5 %	0.2 %	1.8 %
Industry weight	2.9 %	0.7 %	2.2 %	94.3 %	

Note: Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

Source: BBC availability analysis.

b. Business success. There is quantitative evidence that certain groups of POC- and woman-owned businesses are less successful than businesses owned by non-Hispanic white men and face greater barriers in the marketplace, even after accounting for various business and owner characteristics. Chapter 3 summarizes that evidence and Appendix C presents additional, corresponding results. There is also qualitative evidence of barriers to the success of POC- and woman-owned businesses, as indicated by the qualitative evidence the study team collected through public meetings, business surveys, and in-depth interviews. Some of that information suggests that discrimination on the basis of race/ethnicity and gender adversely affects the success of POC- and woman-owned businesses in the RGMA. Thus, information about business success supports an upward adjustment to RTC’s base figure.

c. Evidence from disparity studies conducted within the region. USDOT suggests that federal aid recipients also examine evidence from disparity studies conducted within their RGMAs when determining whether to adjust their base figures. RTC should review results from those disparity studies when determining its overall DBE goal. However, the agency should note that the results of those studies are tailored specifically to the projects and policies of the agencies that commissioned them, which may differ in many important respects from those of RTC.

5. Summary. The quantitative and qualitative evidence the study team collected as part of the disparity study as well as information about the FTA-funded contracts RTC anticipates awarding in FFYs 2026 through 2028 may support an adjustment to the base figure as RTC considers setting its next overall DBE goal. Based on information from the study and about future contracts, there are reasons why RTC might consider an adjustment to its base figure:

- RTC might adjust its base figure upward to account for barriers POCs and women face in human capital and business ownership in the local contracting industry.
- Evidence of barriers that affect POCs, women, and POC- and woman-owned businesses in obtaining financing, bonding, and insurance, and evidence that certain groups of POC- and woman-owned businesses are less successful than comparable businesses owned by non-Hispanic white men also supports an upward adjustment to RTC’s base figure.

- Information about past DBE participation supports a downward adjustment to RTC's base figure.
- RTC anticipates awarding a substantial volume of FTA-funded transit-related contracts during FFYs 2026 through 2028, and those contracts would be substantially different in terms of type and size from the federally funded contracts the agency awarded the study period. RTC might adjust its base figure downward to account for the transit-related contracts it anticipates awarding in FFYs 2026 through 2028.

USDOT regulations state that an agency such as RTC is required to review a broad range of information when considering whether it is necessary to make a step-2 adjustment—either upward or downward—to its base figure. However, agencies are not required to make an adjustment as long as they can explain what factors they considered and can explain their decisions in their Goal and Methodology documents.

C. DBE Groups Eligible for Race- and Gender-Conscious Measures

Several seminal court cases have indicated that, in order to implement the Federal DBE Program in a narrowly tailored manner, agencies should limit the use of race- and gender-conscious program measures to those business groups “that have actually suffered discrimination” within their RGMAs.^{3, 4} Moreover, USDOT official guidance states that “even when discrimination is present in a state, a program is narrowly tailored only if its application is limited to those specific groups that have actually suffered discrimination or its effects.”⁵ As provided in 49 CFR Part 26, such guidance is “valid, and express[es] the official positions and views of the Department of Transportation”⁶

As part of the 2023 RTC Disparity Study, BBC assessed whether there were any disparities between the participation and availability of POC- and woman-owned businesses for RTC's FTA-funded contracts and procurements (for details, see Chapter 7 and Appendix F). The study showed substantial disparities—that is, disparities whereby utilization was less than 80 percent of availability—for all POC- and woman-owned business considered together as well as for most individual racial/ethnic and gender groups. Consistent with key court rulings and USDOT official guidance, RTC should assess disparity results to determine how to narrowly tailor any race- and gender-conscious measures the agency will use as part of its implementation of the Federal DBE Program for FTA-funded projects.

³ *AGC, San Diego Chapter v. California DOT*, 713 F.3d 1187, 1191, 1199, 2013 WL 1607239 (9th Cir. April 16, 2013)

⁴ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 997-98 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006)

⁵ United States Department of Transportation Official Questions and Answers (Q&A's) Disadvantaged Business Enterprise Program Regulation (49 CFR 26), <https://www.transportation.gov/sites/dot.gov/files/2020-01/docr-20180425-001part26qa.pdf>

⁶ 49 CFR Section 26.9

APPENDIX A.

Definitions of Terms

Appendix A defines terms useful to understanding the 2023 Regional Transportation Commission of Southern Nevada (RTC) Disparity Study report.

49 Code of Federal Regulations (CFR) Part 26

49 CFR Part 26 are the federal regulations that set forth requirements for the Federal Disadvantaged Business Enterprise (DBE) Program. The objectives of 49 CFR Part 26 are to:

- Ensure nondiscrimination in the award and administration of United States Department of Transportation- (USDOT-) funded work;
- Help remove barriers to the participation of DBEs in USDOT-funded work;
- Promote the use of DBEs in USDOT-funded work;
- Assist in the development of businesses so they can compete outside the Federal DBE Program;
- Create a level playing field on which DBEs can compete fairly for USDOT-funded work;
- Ensure the Federal DBE Program is narrowly tailored in accordance with applicable law;
- Ensure only businesses that fully meet eligibility standards are permitted to participate as DBEs; and
- Provide appropriate flexibility to agencies implementing the Federal DBE Program.

Anecdotal Information

Anecdotal information includes personal qualitative accounts and perceptions of specific incidents—including any incidents of discrimination—shared by individual interviewees, public meeting participants, focus group participants, and other stakeholders in the Southern Nevada marketplace.

Base Figure

In accordance with USDOT requirements, establishing a base figure is the first step agencies must take in calculating their overall DBE goals. Agencies must calculate their base figures from demonstrable evidence of the availability of potential DBEs to participate in their USDOT-funded projects.

Business

A business is a for-profit enterprise, including sole proprietorships, corporations, professional corporations, limited liability companies, limited partnerships, limited liability partnerships, and other business structures. The definition includes the headquarters of the organization as well as all its other locations, as applicable.

Commercially Useful Function

A commercially useful function refers to a business performing real and distinct work for which it has demonstrable skills, experience, and responsibilities. Businesses that prime contractors use to meet contract goals are often required to demonstrate that they will serve commercially useful functions on applicable projects.

Compelling Governmental Interest

As part of the strict scrutiny standard of constitutional review, a government agency must demonstrate a compelling governmental interest in remedying any identified barriers or discrimination in order to implement race-conscious measures. That is, an agency that uses race-conscious measures as part of a contracting program has the initial burden of showing evidence of barriers or discrimination—including statistical and anecdotal evidence—that supports the need for such measures. The agency must assess such discrimination within its own relevant geographic market area (RGMA).

Construction

Construction refers to the construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property. “Buildings, structures, or other real property” includes bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, cemeteries, pumping stations, railways, airport facilities, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, channels, and other structures.

Consultant

A consultant is a business that performs professional services work.

Contract

A contract is a legally binding relationship between the seller of goods or services and a buyer. The study team sometimes uses the term *contract* interchangeably with *procurement* or *project*.

Contract Goals

Contract goals are often a race- or gender-conscious effort whereby organizations set percentage goals for the participation of person of color (POC)- or woman-owned businesses in individual contracts or procurements they award. As a condition of award, prime contractors have to meet contract goals as part of their bids, quotes, or proposals by making participation commitments with eligible, certified businesses, or, if they fail to do so, by demonstrating they made genuine and sufficient good faith efforts to do so. The use of contract goals as they apply to POC- and woman-owned businesses must meet the strict scrutiny and intermediate scrutiny standards of constitutional review, respectively.

Contract Element

A contract element is either a prime contract or subcontract.

Contractor

A contractor is a business that performs construction work.

Control

Control means exercising management and executive authority over a business.

Custom Census Availability Analysis

A custom census availability analysis is one in which researchers attempt surveys with potentially available businesses working in the RGMA to collect information about their characteristics. Researchers then take survey information about potentially available businesses and match them to the characteristics of prime contracts and subcontracts an agency actually awarded during the study period to assess the percentage of contract and procurement dollars one might expect an agency to award to a specific group of businesses. A custom census approach is accepted in the industry as the preferred method for conducting availability analyses, because it takes various different characteristics of businesses and agency projects into account.

Disadvantaged Business Enterprise (DBE)

A DBE is a business certified as owned and controlled by one or more individuals who are socially and economically disadvantaged according to the guidelines in 49 CFR Part 26. USDOT presumes the following race and gender groups to be socially and economically disadvantaged as part of the Federal DBE Program:

- Asian Pacific Americans;
- Black Americans;
- Hispanic Americans;
- Native Americans;
- Subcontinent Asian Americans; and
- Women of any race or ethnicity.

To be certified as a DBE, a business must meet the small business size standards established by the Small Business Administration and must also have average revenues of less than \$30.72 million over the previous three years. To demonstrate economic disadvantage, business owners must also have personal net worths of less than \$1.32 million (not counting the values of their primary residences). Some POC- and woman-owned businesses do not qualify as DBEs because they do not meet gross revenue or net worth requirements. Businesses owned by white men can also be certified as DBEs if they meet the economic requirements set forth in 49 CFR Part 26 and if they suffer from certain social disadvantages, such as having physical or mental disabilities. Businesses must be certified as DBEs to fully participate in all the measures RTC uses as part of its implementation of the Federal DBE Program.

Disparity

A disparity is a difference between an actual outcome and some benchmark such that the actual outcome is less than the benchmark. In this report, “disparity” refers specifically to a difference between the participation of a specific group of businesses in RTC work and the estimated availability of the group for that work.

Disparity Analysis

A disparity analysis examines whether there are any differences between the participation of a specific group of businesses in agency contracts and procurements and the estimated availability of the group for that work.

Disparity Index

A disparity index, or disparity ratio, is computed by dividing the actual participation of a specific group of businesses in agency work by the estimated availability of the group for that work and multiplying the result by 100. Smaller disparity indices indicate larger disparities.

Federal DBE Program

USDOT established the Federal DBE Program after the enactment of the Transportation Equity Act for the 21st Century, as amended in 1998. It is designed to increase the participation of POC- and woman-owned businesses in USDOT-funded work. Regulations for the Federal DBE Program are set forth in 49 CFR Part 26.

Federal Transit Administration (FTA)

FTA is an office of USDOT that provides financial and technical assistance related to local public transportation systems.

Federally Funded Project

A federally funded project is any project funded in whole or part with USDOT funding, including loans. The study team considered a project to be federally funded if it included at least \$1 of USDOT funding.

Firm

See *business*.

Industry

An industry is a broad classification for businesses providing related goods or services (e.g., *construction* or *professional services*).

Inference of Discrimination

An inference of discrimination is the conclusion that businesses whose owners identify with particular race or gender groups suffer from barriers or discrimination in the marketplace based on sufficient quantitative or qualitative evidence. When inferences of discrimination exist, government organizations sometimes use race- or gender-conscious measures to address barriers affecting those businesses.

Intermediate Scrutiny

Intermediate scrutiny is the legal standard an agency's use of gender-conscious measures must meet to be considered constitutional. It is more rigorous than the rational basis test, which applies to business measures unrelated to race or gender, but less rigorous than the strict scrutiny test, which applies to business measures related to race. In order for a gender-conscious program to comply with

intermediate scrutiny, it must serve an important government objective, and it must be substantially related to achieving that objective.

Lesbian, Gay, Bisexual, Transgender, Queer (LGBTQ+)-owned Business

An LGBTQ+-owned business is a business with at least 51 percent ownership and control by individuals who identify as lesbian, gay, bisexual, transgender, queer, intersex, or asexual.

Middle Eastern/North African (MENA) American

A MENA American is an individual whose origins are from Afghanistan, Algeria, Bahrain, Comoros, Djibouti, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestinian Authority, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, United Arab Emirates, or Yemen.

Narrow Tailoring

As part of the strict scrutiny standard of constitutional review, a government organization must demonstrate its use of race-conscious measures is narrowly tailored. There are several factors a court considers when determining whether the use of such measures is narrowly tailored, including:

- The necessity of such measures and the efficacy of alternative, race-neutral measures;
- The degree to which the use of such measures is limited to those groups that suffer barriers or discrimination in the local marketplace;
- The degree to which the use of such measures is flexible and limited in duration, including the availability of waivers and sunset provisions;
- The relationship of any numerical goals to the relevant business marketplace; and
- The impact of such measures on the rights of third parties.

Nevada Unified Certification Program (NUCP)

The NUCP is responsible for certifying DBEs on behalf of all USDOT fund recipients in Nevada.

Non-professional Services and Supplies

A non-professional services and supplies business engages in providing goods, supplies, or services not elsewhere classified. Non-professional services typically do not require a license or high degree of expertise and training. Procurement rules and regulations for awarding non-professional services and supplies contracts or procurements often place emphasis solely on cost. Examples of non-professional services and supplies industries include cleaning and janitorial services and supplies; office equipment and supplies; printing, copying, and mailing services; safety equipment; security systems; security guard services; uniforms and apparel; automobiles; and vehicle repair services.

Overall DBE Goal

As part of the Federal DBE Program, every three years, agencies are required to set overall aspirational percentage goals for DBE participation in their USDOT-funded work, which they must work towards achieving each year through various efforts. If DBE participation in their USDOT-funded work is less

than their overall DBE goals in a particular year, then they must analyze reasons for the shortfall and establish specific measures that will enable them to meet the goal in the next year. USDOT sets forth a two-step process agencies must use in establishing their overall DBE goals. First, agencies must develop *base figures* for their overall DBE goals, and then second, they must consider whether making *step 2 adjustments* to their base figures is necessary to ensure their overall DBE goals accurately reflect conditions in the local marketplace and within their contracting and procurement processes.

Participation

See utilization.

Person of Color (POC)

A POC is an individual who identifies with one of the following race groups: Asian Pacific American, Black American, Hispanic American, MENA American, Native American, Subcontinent Asian American, or other non-white race group.

POC-owned Business

A POC-owned business is a business with at least 51 percent ownership and control by individuals who identify with one of the following race groups: Asian Pacific American, Black American, Hispanic American, MENA American, Native American, Subcontinent Asian American, or other non-white race group. The study team considered businesses owned by POC men or POC women as POC-owned businesses. A business does not have to be certified as a DBE or hold any other type of certification to be considered a POC-owned business.

Potential DBE

A potential DBE is a POC- or woman-owned business that is DBE-certified or appears it could be DBE-certified (regardless of actual DBE certification) based on revenue requirements specified in the Federal DBE Program.

Prime Consultant

A prime consultant is a professional services business that performs professional services prime contracts directly for end users, such as RTC.

Prime Contract

A prime contract is a contract between a prime contractor or prime consultant and an end user, such as RTC.

Prime Contractor

A prime contractor is a construction business that performs prime contracts directly for an end user, such as RTC.

Procurement

See contract or project.

Professional Services

Professional services refers to the professional, scientific, or technical services that require a high degree of expertise and training. Frequently—but not always—individuals that perform professional services are required to have a license or specific educational background. Procurement rules and regulations for professional services often place emphasis on qualifications in addition to cost. Examples of professional services include legal advice and representation; accounting, bookkeeping, and payroll services; architectural, engineering, and specialized design services; computer services; consulting services; research services; advertising services; photographic services; translation and interpretation services; veterinary services; and other professional, scientific, and technical services.

Project

A project refers to a construction; professional services; or non-professional services and supplies endeavor an agency bids out. A project could include one or more prime contracts and corresponding subcontracts. The study team sometimes uses the term project interchangeably with *contract* or *procurement*.

Race- and Gender-conscious Measures

Race- and gender-conscious measures are contracting measures designed to increase the specific participation of POC- and woman-owned businesses in government work. Businesses owned by individuals who identify with particular race groups might be eligible for such measures whereas others would not. Similarly, businesses owned by individuals who identify as women might be eligible for such measures whereas businesses owned by individuals who identify as men would not. An example of race- and gender-conscious measures is an organization's use of POC- or woman-owned business contract goals on individual contracts or procurements.

Race- and Gender-neutral Measures

Race- and gender-neutral measures are measures designed to remove potential barriers for businesses attempting to perform work with an agency, regardless of the race or gender of the owners. Race- and gender-neutral measures might include assistance in overcoming bonding and financing obstacles, simplifying bidding procedures, providing technical assistance, and establishing programs to assist start-ups.

Rational Basis

Government agencies that implement contracting programs that rely only on race- and gender-neutral measures must show a rational basis for their programs. Showing a rational basis requires agencies to demonstrate that their contracting programs are rationally related to a legitimate government interest. It is the lowest threshold for evaluating the legality of government contracting programs.

Regional Transportation Commission of Southern Nevada (RTC)

RTC oversees public transportation, traffic management, transportation planning, and roadway design and construction projects in the Southern Nevada region. As a recipient of USDOT funds, RTC implements the Federal DBE Program and other programs to encourage the participation of POC- and woman-owned businesses in its work.

Relevant Geographic Market Area (RGMA)

The RGMA is the geographic area in which the businesses to which agencies award most of their contracting dollars are located. Case law related to contracting programs and disparity studies requires analyses to focus on the RGMA. The RGMA for the disparity study is Clark County, Nevada.

State-/Locally-funded Project

A state-/locally-funded project is any contract or procurement wholly funded by state or local sources. That is, the project does not include any USDOT or other federal funds.

Statistically Significant Difference

A statistically significant difference refers to a quantitative difference for which there is a 0.95 or 0.90 probability that chance can be correctly rejected as an explanation for the difference. In other words, there is a 0.05 or 0.10 probability, respectively, that chance in the sampling process could correctly account for the difference.

Strict Scrutiny

Strict scrutiny is the legal standard a government agency's use of race-conscious measures must meet to be considered constitutional. Strict scrutiny is the highest threshold for evaluating the legality of measures that might impinge on the rights of others, short of prohibiting them altogether. Under the strict scrutiny standard, an organization must:

- Have a compelling governmental interest in remedying past identified discrimination or its present effects; and
- Establish that the use of any such measures is narrowly tailored to achieve the goal of remedying the identified discrimination.

An organization's use of race-conscious measures must meet both the compelling governmental interest and the narrow tailoring components of the strict scrutiny standard for it to be considered constitutional.

Study Period

The study period is the time period on which the study team focused for the utilization, availability, and disparity analyses. The study period for the disparity study was July 1, 2017 to June 30, 2022. RTC had to have awarded a contract or procurement during the study period for it to be included in the study team's analyses.

Subcontract

A subcontract is a contract between a prime contractor or prime consultant and another business selling goods or services to the prime contractor or prime consultant as part of a larger project.

Subcontractor

A subcontractor is a business that performs services for prime contractors as part of larger contracts or projects.

Subindustry

A subindustry is a specific classification for businesses providing related goods or services within a particular industry (e.g., *highway and street construction* is a subindustry of *construction*).

Substantial Disparity

A substantial disparity is a disparity index of 80 or less, indicating that the actual participation of a specific business group in agency work is 80 percent or less of the group's estimated availability. Substantial disparities are considered *inferences of discrimination* in the marketplace against particular business groups. Government organizations sometimes use substantial disparities as justification for the use of race- or gender-conscious measures to address barriers affecting certain groups.

Utilization

Utilization refers to the percentage of total dollars associated with a particular set of contracts or procurements RTC awarded to a specific group of businesses during the study period. The study team uses the term *utilization* synonymously with *participation*.

Veteran-owned Business Enterprise (VBE)

A VBE is a business with at least 51 percent ownership and control by individuals who are veterans of the United States military.

Woman-owned Business

A woman-owned business is a business with at least 51 percent ownership and control by white women. A business does not have to be certified as a DBE or hold any other type of certification to be considered a woman-owned business. (The study team considered businesses owned by women of color as POC-owned businesses.)

APPENDIX B.

Legal Framework and Analysis

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APPENDIX B.

Legal Framework and Analysis

Executive Summary

A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases regarding the Federal Disadvantaged Business Enterprise (Federal DBE) Program¹ and provides an analysis of the implementation of the Federal DBE Program by local and state governments. The Federal DBE Program was continued and reauthorized by the 2015 Fixing America’s Surface Transportation Act (FAST Act).² In May 2024, Congress passed the Federal Aviation Administration (FAA) Reauthorization Act.³ In November 2021, Congress passed the Infrastructure Investment and Jobs Act of 2021, which reauthorized the Federal DBE Program based on findings of continuing discrimination and related barriers posing significant obstacles for minority-owned business enterprises, woman-owned business enterprises, and disadvantaged business enterprises (MBE/WBE/DBEs).⁴

The appendix also discusses recent cases involving local and state government MBE/WBE/DBE programs, which are instructive to the study and MBE/WBE/DBE programs. The appendix provides a summary of the legal framework for the disparity study as applicable to the Harry Reid International Airport (LAS) and the Regional Transportation Commission of Southern Nevada (RTC).

Appendix B begins with a review of the landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson* (*Croson*).⁵ *Croson* sets forth the *strict scrutiny* constitutional analysis applicable in the legal framework for conducting a disparity study. This section also notes the United States Supreme Court decision in *Adarand Constructors, Inc. v. Peña*,⁶ (*Adarand I*), which applied the strict scrutiny analysis set forth in *Croson* to federal programs that provide federal assistance to a recipient of federal funds. The Supreme Court’s decisions in *Adarand I* and *Croson* as well as subsequent cases and authorities provide the basis for the legal analysis in connection with the study.

¹ 49 CFR Part 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs (“Federal DBE Program”). See the Transportation Equity Act for the 21st Century (TEA-21) as amended and reauthorized (“MAP-21,” “SAFETEA” and “SAFETEA-LU”), and the United States Department of Transportation (“USDOT” or “DOT”) regulations promulgated to implement TEA-21 the Federal regulations known as Moving Ahead for Progress in the 21st Century Act (“MAP-21”), Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.; preceded by Pub L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1156; preceded by Pub L. 105-178, Title I, § 1101(b), June 9, 1998, 112 Stat. 107.

² Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

³ Pub L. 118-63, H.R. 3935 § 730, May 16, 2024, MUR24332 HT0.

⁴ Pub. L. 117-58, H.R. 3684, § 1101(e), November 15, 2021, 135 Stat 443-449.

⁵ *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

The legal framework analyzes, discusses, and includes significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this disparity study, the Federal DBE Program, and its implementation by state and local governments and recipients of federal funds, MBE/WBE/DBE programs, and the strict scrutiny analysis. The Harry Reid International Airport and Regional Transportation Commission of Southern Nevada are in the U.S. Court of Appeals for the Ninth Circuit. In particular, this analysis discusses and references recent Ninth Circuit Court of Appeals decisions that are instructive to the study, including the recent decisions in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al. (AGC, SDC v. Caltrans)*,⁷ *Western States Paving Co. v. Washington State Department of Transportation (DOT), (Western States)*,⁸ *Orion Insurance Group, Ralph G. Taylor v. Washington Minority & Women's Business Enterprise, United States Department of Transportation (USDOT), et al. (Orion)*,⁹ the recent non-published decision in *Mountain West Holding Co. v. Montana, Montana DOT, et al. (Mountain West)*,¹⁰ and the District Court decision in *M.K. Weeden Construction v. Montana, Montana DOT, et al. (M.K. Weeden)*.¹¹

The significant 2005 decision in *Western States Paving v. Washington DOT, USDOT and Federal Highway Administration (FHWA)* set forth legal standards in the Ninth Circuit Court of Appeals for state departments of transportation (DOTs) to satisfy the strict scrutiny standard for determining whether there is a compelling governmental interest to have a *narrowly tailored* race- and ethnic-conscious DBE program in compliance with the Federal DBE Program, and for cases involving challenges to the Federal DBE Program and its implementation by state DOTs. As noted in this Executive Summary below, the *Western States Paving* decision resulted in a specific United States Department of Transportation (USDOT) Official Guidance for recipients of federal financial assistance from the FHWA, Federal Transit Administration (FTA), and FAA located in the states comprising the Ninth Federal Judicial Circuit, including Nevada, to follow.

In addition, the analysis includes and references recent federal cases from other jurisdictions that have considered the validity of the Federal DBE Program and its implementation by state DOTs and local or state government agencies, and the validity of local and state DBE programs, including: *Dunnet Bay Construction Co. v. Illinois DOT (Dunnet Bay)*,¹² *Northern Contracting, Inc. v. Illinois DOT (Northern Contracting)*,¹³ *Sherbrooke Turf, Inc. v. Minnesota DOT* and *Gross Seed v. Nebraska Department of Roads*

⁷ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013).

⁸ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

⁹ *Orion Insurance Group, a Washington Corporation, Ralph G. Taylor, an individual, Plaintiffs v. Washington State Office of Minority & Woman's Business Enterprises, United States DOT, et al.*, 2018 WL 6695345 (9th Cir. 2018), Memorandum opinion (not for publication), Petition for Rehearing denied, February 2019. Petition for Writ of Certiorari filed with the U.S. Supreme Court on April 22, 2019, which is pending.

¹⁰ *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. 2017). The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

¹¹ *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013).

¹² *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), *cert. denied*, 2016 WL 193809 (2016); *Dunnet Bay Construction Co. v. Illinois DOT, et al.*, 2014 WL 552213 (C. D. Ill. 2014), *affirmed by Dunnet Bay*, 2015 WL 4934560 (7th Cir. August 19, 2015).

¹³ *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007).

(*Sherbrooke Turf*),¹⁴ *Geyer Signal, Inc. v. Minnesota DOT (Geyer Signal)*,¹⁵ *Adarand Constructors, Inc. v. Slater*¹⁶ (*Adarand VII*), *Midwest Fence Corp. v. USDOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al. (Midwest Fence)*,¹⁷ *Geod Corp. v. New Jersey Transit Corp.*¹⁸ and *South Florida Chapter of the AGC v. Broward County, Florida*.¹⁹

The analysis also discusses and analyzes recent court decisions that involved challenges to MBE/WBE/DBE programs and social and economic disadvantaged business programs in other jurisdictions, which are instructive to the study and the Harry Reid International Airport and Regional Transportation Commission of Southern Nevada.

The appendix points out recent informative Congressional findings as to discrimination regarding MBE/WBE/DBEs²⁰ including relating to the Federal DBE Program that was continued and reauthorized by the Fixing America's Surface Transportation Act (2015 FAST Act), which set forth Congressional findings as to discrimination against MBE/WBE/DBEs, including from disparity studies and other evidence.²¹ In May 2024, Congress passed the FAA Reauthorization Act, which also provides Congressional findings as to discrimination against MBE/WBE/DBEs, including from disparity studies and other evidence.²² In November 2021, Congress passed the Infrastructure Investment and Jobs Act (H.R. 3684 – 117th Congress, Section 1101) that reauthorized the Federal DBE Program based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.²³

The analyses of these and other recent cases discussed below, including the Ninth Circuit decisions in *AGC, SDC v. Caltrans*, *Western States Paving*, *Mountain West Holding*, *M.K. Weeden*, and *Orion* are instructive to the disparity study because they are the most recent and significant decisions by courts setting forth the legal framework applied to the Federal DBE Program and its implementation by local and state governments receiving USDOT funds, disparity studies, MBE/WBE/DBE programs, and construing the validity of government programs involving MBE/WBE/DBEs. They also are pertinent in terms of an analysis and consideration and, if legally appropriate under the strict scrutiny standard, preparation of a narrowly tailored DBE Program by a state DOT implementing the Federal DBE Program and local or state government MBE/WBE/DBE programs submitted in compliance with the case law, and applicable federal regulations, including 49 Code of Federal Regulations (CFR) Part 26.

¹⁴ *Sherbrooke Turf, Inc. v. Minnesota DOT* and *Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).

¹⁵ *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014).

¹⁶ *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*").

¹⁷ *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), *cert. denied*, 2017 WL 497345 (2017).

¹⁸ *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d 642 (D. N.J. 2010).

¹⁹ *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

²⁰ 49 CFR Part 23 (Participation of Disadvantaged Business Enterprises in Airport Concessions).

²¹ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

²² Pub L. 118-63, H.R. 3935 § 730, May 16, 2024, MUR24332 HT0.

²³ Pub L. 117-58, H.R. 3684, § 11101(e), November 15, 2021, 135 Stat 443-449.

Finally, the appendix discusses and analyzes in Section D.4. below significant pending and very recent cases instructive and informative to the study and MBE/WBE/DBE and social and economic disadvantaged business type programs. These cases may potentially have an impact on the implementation of MBE/WBE/DBE programs; related legislation; implementation of the Federal DBE Program by state and local governments, airports, transportation and public authorities and agencies; and other types of programs involving the participation of MBE/WBE/DBEs/social and economic disadvantaged businesses.

B. Ninth Circuit Court of Appeals decisions

As stated above and discussed below, the *Western States Paving* decision is a leading case in the Ninth Circuit establishing legal standards for satisfying the strict scrutiny test regarding whether there is the *compelling governmental interest* in a state's transportation marketplace to have a narrowly tailored race- and ethnic-conscious DBE program in compliance with the Federal DBE Program, that the DOT DBE Program by the state or local government or recipient of federal funds is narrowly tailored and properly implements the federal regulations at 49 CFR Part 26 and the Federal DBE Program, and the standard relevant to cases involving challenges to the Federal DBE Program and its implementation by state DOTs. In *Western States Paving*, the Ninth Circuit upheld the validity of the Federal DBE Program, but the Court held invalid Washington State DOT's DBE Program implementing the DBE Federal Program. The Court held that mere compliance with the Federal DBE Program by state recipients of federal funds, absent independent and sufficient state-specific evidence of discrimination in the state's transportation contracting industry marketplace, did not satisfy the strict scrutiny analysis.

Following *Western States Paving*, the USDOT—in particular for agencies, transportation authorities, airports and other governmental entities implementing the Federal DBE Program in states in the Ninth Circuit Court of Appeals—recommended the use of disparity studies by recipients of federal financial assistance to examine whether or not there is evidence of discrimination and its effects, and how remedies might be narrowly tailored in developing their DBE Program to comply with the Federal DBE Program.²⁴ The USDOT suggests consideration of both statistical and anecdotal evidence. The USDOT instructs that recipients should ascertain evidence for discrimination and its effects separately for each group presumed to be disadvantaged in 49 CFR Part 26.²⁵ The USDOT's Guidance provides that recipients should consider evidence of discrimination and its effects.²⁶

The USDOT's Guidance is recognized by the federal regulations as “valid, and express the official positions and views of the Department of Transportation”²⁷ for states in the Ninth Circuit.

In *Western States Paving*, the United States intervened to defend the Federal DBE Program's facial constitutionality, and, according to the Court, stated “that [the Federal DBE Program's] race conscious measures can be constitutionally applied only in those states where the effects of discrimination are

²⁴ *Questions and Answers Concerning Response to Western States Paving Company v. Washington State Department of Transportation (January 2006) [hereinafter USDOT Guidance]*, available at 71 Fed. Reg. 14,775 and http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm; see 49 CFR § 26.9; see, also, 49 CFR Section 26.45.

²⁵ USDOT Guidance, available at http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm (January 2006).

²⁶ *Id.*

²⁷ *Id.*, 49 CFR § 26.9; See, 49 CFR § 23.13.

present.”²⁸ Accordingly, the USDOT advised federal aid recipients that any use of race-conscious measures must be predicated on evidence that the recipient has concerning discrimination or its effects within the local transportation contracting marketplace.²⁹

In *AGC, SDC v. Caltrans*, which is a leading case after *Western States Paving*, the Ninth Circuit in 2013 upheld the validity of Caltrans’ DBE Program implementing the Federal DBE Program. The Ninth Circuit Court of Appeals and the United States District Court for the Eastern District of California in *AGC, SDC v. Caltrans* held that Caltrans’ implementation of the Federal DBE Program is constitutional.³⁰ The Ninth Circuit found that Caltrans’ DBE Program implementing the Federal DBE Program was constitutional and survived strict scrutiny by: (1) having a strong basis in evidence of discrimination within the California transportation contracting industry based in substantial part on the evidence from the disparity study conducted for Caltrans; and (2) being “narrowly tailored” to benefit only those groups that have actually suffered discrimination.

The District Court had held that the “Caltrans DBE Program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry,” satisfied the strict scrutiny standard, and is “clearly constitutional” and “narrowly tailored” under *Western States Paving* and the Supreme Court cases.³¹

There are other recent cases in the Ninth Circuit instructive for the study, including as follows:

In *Mountain West*,³² the Ninth Circuit and the District Court applied the decision in *Western States*,³³ and the decision in *AGC, SDC v. Caltrans*,³⁴ as establishing the law to be followed in this case. The District Court noted that in *Western States*, the Ninth Circuit held that a state’s implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program.³⁵ The Ninth Circuit and the District Court stated the Ninth Circuit has held that whether a state’s implementation of the DBE Program “is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry.”³⁶ The Ninth Circuit in *Mountain West* also pointed out it had held that “even when

²⁸ *Western States Paving*, 407 F.3d at 996; see, also, *Br. for the United States*, at 28 (April 19, 2004).

²⁹ DOT Guidance, available at 71 Fed. Reg. 14,775 and http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm (January 2006).

³⁰ *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, 713 F.3d 1187 (9th Cir. April 16, 2013); *Associated General Contractor of America, San Diego Chapter, Inc. v. California DOT*, U.S.D.C. E.D. Cal., Civil Action No.S:09-cv-01622, Slip Opinion (E.D. Cal. April 20, 2011) appeal dismissed based on standing, on other grounds Ninth Circuit held Caltrans’ DBE Program constitutional, *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. April 16, 2013).

³¹ *Id.*, *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, Slip Opinion Transcript of U.S. District Court at 42-56.

³² 2017 WL 2179120 (9th Cir. 2017), Memorandum opinion, (Not for Publication), dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. 2014).

³³ 407 F.3d 983 (9th Cir. 2005)

³⁴ 713 F.3d 1187 (9th Cir. 2013)

³⁵ 2014 WL 6686734 at *2 (D. Mont. 2014)

³⁶ *Mountain West*, 2014 WL 6686734 at *2, quoting *Western States*, at 997-998, and *Mountain West*, 2017 WL 2179120 at *2 (9th Cir. 2017) Memorandum, at 5-6, quoting *AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination.”³⁷

Montana, the Court found, bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state’s DBE contracting program, “(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be ‘limited to those minority groups that have actually suffered discrimination.’”³⁸ Discrimination may be inferred from “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 the locality or the locality’s prime contractors.”³⁹

The Ninth Circuit reversed the District Court’s grant of summary judgment to Montana based on issues of fact as to the evidence and remanded the case for trial. The *Mountain West* case was settled and voluntarily dismissed by the parties on remand in 2018.

The District Court decision in the Ninth Circuit in *M.K. Weeden*,⁴⁰ which also involved Montana, followed the *AGC, SDC v. Caltrans* Ninth Circuit decision, and held as valid and constitutional the Montana DOT’s implementation of the Federal DBE Program.

Another recent case in the Ninth Circuit is *Orion*.⁴¹ Plaintiffs, Orion Insurance Group (Orion) and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law.

Plaintiff Taylor received results from a genetic ancestry test that estimated he was 90 percent European, 6 percent Indigenous American, and 4 percent Sub-Saharan African. Taylor submitted an application to the Washington Office of Minority and Women’s Business Enterprises (OMWBE) seeking to have Orion certified as an MBE under Washington State law. Taylor identified himself as Black. His application was initially rejected, but after Taylor appealed, the OMWBE voluntarily reversed its decision and certified Orion as an MBE. Plaintiffs submitted to the OMWBE Orion’s application for DBE certification under federal law. Taylor identified himself as Black and Native American in the Affidavit of Certification.

Orion’s DBE application was denied because there was insufficient evidence that: he was a member of a racial group recognized under the regulations; was regarded by the relevant community as either Black or Native American; or that he held himself out as being a member of either group. The OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

³⁷ *Mountain West*, 2017 WL 2179120 at *2, Memorandum, at 6, and 2014 WL 6686734 at *2, quoting *Western States*, 407 F.3d at 997-999.

³⁸ *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, at 6-7, quoting, *Assoc. Gen. Contractors of Am. v. Cal. Dep’t of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (quoting *W. States Paving*, 407 F.3d at 997-999).

³⁹ *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, at 6-7, quoting, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

⁴⁰ *M.K. Weeden*, 2013 WL 4774517.

⁴¹ 2018 WL 6695345 (9th Cir. December 19, 2018)(Memorandum)(Not for Publication).

The District Court held the OMWBE did not act arbitrarily or capriciously when it found the presumption was rebutted that Taylor was socially and economically disadvantaged because there was insufficient evidence he was either Black or Native American. By requiring individualized determinations of social and economic disadvantage, the court found the Federal DBE Program requires states to extend benefits only to those who are actually disadvantaged.

The District Court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause, and the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause. The court found no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus, or creates a disparate impact on mixed-race individuals. The court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

The District Court dismissed claims that the definitions of “Black American” and “Native American” in the DBE regulations are impermissibly vague. Plaintiffs’ claims were dismissed against the State Defendants for violation of Title VI because Plaintiffs failed to show the State engaged in intentional racial discrimination. The DBE regulations’ requirement that the State make decisions based on race was held constitutional.

On appeal, the Ninth Circuit in affirming the District Court held it correctly dismissed Taylor’s claims against Acting Director of the USDOT’s Office of Civil Rights, in her individual capacity, Taylor’s discrimination claims under 42 U.S. Code (USC) §1983 because the federal defendants did not act “under color or state law,” Taylor’s claims for damages because the United States has not waived its sovereign immunity, and Taylor’s claims for equitable relief under 42 USC §2000d because the Federal DBE Program does not qualify as a “program or activity” within the meaning of the statute.

The Ninth Circuit held the OMWBE did not act in an arbitrary and capricious manner when it determined it had a “well-founded reason” to question Taylor’s membership claims, determined that Taylor did not qualify as a “socially and economically disadvantaged individual,” and when it affirmed the state’s decision was supported by substantial evidence and consistent with federal regulations. The court held the USDOT “articulated a rational connection” between the evidence and the decision to deny Taylor’s application for certification.

In *Braunstein v. Arizona DOT* (ADOT),⁴² Paul Braunstein brought this suit in federal court against ADOT and employees of the DOT alleging that ADOT violated his right to equal protection by using race and gender preferences in its solicitation and award of the 2005 contract. The District Court dismissed as moot Braunstein’s claims for injunctive and declaratory relief because ADOT had suspended its DBE program in 2006 following the Ninth Circuit’s 2005 decision in *Western States Paving*. This left only Braunstein’s damages claims against the state and ADOT and against the named individual defendants in their individual capacities.

The District Court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT’s DBE program had affected him personally. The court noted that “Braunstein was afforded the opportunity to bid on subcontracting work, and the DBE goal did not

⁴² 683 F. 3d 1177 (9th Cir. 2012).

serve as a barrier to doing so, nor was it an impediment to his securing a subcontract.”⁴³ The District Court found that Braunstein’s inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE.⁴⁴

The Ninth Circuit Court of Appeals held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT and the individual employees of ADOT. The Court found that Braunstein had not provided any evidence showing that ADOT’s DBE program affected him personally or that it impeded his ability to compete for utility location work on an equal basis.⁴⁵ The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract.⁴⁶

The Court also pointed out that Braunstein did not seek prospective relief against the government “affirmative action” program, noting the District Court dismissed as moot his claims for declaratory and injunctive relief since ADOT had suspended its DBE program before he brought the suit.⁴⁷ Thus, Braunstein’s surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE Program. Accordingly, the Court held he must show more than that he is “able and ready” to seek subcontracting work, which the Court found he did not do.⁴⁸

Also, in a split in approach with the Ninth Circuit regarding the legal standard, burden, and analysis in connection with a state government implementing the Federal DBE Program, the Seventh Circuit Court of Appeals in *Midwest Fence Corp.*⁴⁹ and in *Dunnet Bay*⁵⁰ upheld the implementation of the Federal DBE Program by the Illinois DOT (IDOT).⁵¹ The court held Dunnet Bay lacked standing to challenge the IDOT DBE Program, and that even if it had standing, any other federal claims were foreclosed by the *Northern Contracting v. Illinois DOT, et al.* decision because there was no evidence IDOT exceeded its authority under federal law.⁵² The Seventh Circuit in *Midwest Fence* also held the Federal DBE Program is facially constitutional, and upheld the implementation of that federal Program by IDOT in its DBE Program following the *Northern Contracting* decision. The Seventh Circuit agreed with the Eighth, Ninth, and Tenth Circuits that the Federal DBE Program is narrowly tailored on its face, and thus survives strict scrutiny.⁵³

These decisions regarding state DOTs, transit and transportation authorities, and recipients of federal financial assistance implementing the Federal DBE Program and MBE/WBE/DBE cases throughout the country will be referenced and discussed in connection with the legal framework in the appendix below.

⁴³ *Id.* at 1183.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1185.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1186.

⁴⁸ *Id.*

⁴⁹ 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

⁵⁰ 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

⁵¹ 799 F. 3d 676, 2015 WL 4934560 (7th Cir. 2015).

⁵² *Id.*

⁵³ 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

Congressional findings. The appendix points out recent informative Congressional findings as to discrimination regarding MBE/WBE/DBEs, including relating to the Federal DBE Program that was continued and reauthorized by the Fixing America’s Surface Transportation Act (2015 FAST Act); which set forth Congressional findings as to discrimination against MBE/WBE/DBEs, including from disparity studies and other evidence.⁵⁴ And, Congress recently passed legislation in November 2021, which was signed by the president, (H.R. 3684 - 117th Congress, Section 11101, Infrastructure Investment and Jobs Act of 2021)⁵⁵ that again reauthorized the Federal DBE Program and its implementation by local and state governments based on evidence and findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs. It also is instructive that recently there were Congressional findings as to discrimination regarding MBE/WBE/DBEs relating to the Federal ACDBE Program.⁵⁶

Department of Justice 2022 Compelling Interest report. It is noteworthy and instructive to the study that the U.S. Department of Justice (DOJ) in January 2022 issued a report: “The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence.” This report “summarizes recent evidence required to justify the use of race- and sex-conscious provisions in federal contracting programs.” The “Notice of Report on Lawful Uses of Race or Sex in Federal Contracting Programs” is published in the Federal Register, Vol. 87 at page 4955, January 31, 2022. This notice announces the availability on the DOJ’s website of the “updated report regarding the legal and evidentiary frameworks that justify the continued use of race or sex, in appropriate circumstances, by federal agencies to remedy the current and lingering effects of past discrimination in federal contracting programs.” The report is available on the DOJ’s website at: <https://www.justice.gov/crt/page/file/1463921/download>.

C. U.S. Supreme Court Cases

1. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In *Croson*, the U.S. Supreme Court struck down the City of Richmond’s “set-aside” program as unconstitutional because it did not satisfy the strict scrutiny analysis applied to “race-based” governmental programs.⁵⁷ J.A. Croson Co. (Croson) challenged the City of Richmond’s minority contracting preference plan, which required prime contractors to subcontract at least 30 percent of the dollar amount of contracts to one or more MBE. In enacting the plan, the City cited past discrimination and an intent to increase minority business participation in construction projects as motivating factors.

The Supreme Court held the City of Richmond’s “set-aside” action plan violated the Equal Protection Clause of the Fourteenth Amendment. The Court applied the “strict scrutiny” standard, generally applicable to any race-based classification, which requires a governmental entity to have a “compelling governmental interest” in remedying past identified discrimination and that any program adopted by a local or state government must be “narrowly tailored” to achieve the goal of remedying the identified discrimination.

⁵⁴ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312 49 CFR Part 26.

⁵⁵ Pub. L. 117-58; H.R. 3684 – 117th Congress (2021), § 11101(e), November 15, 2021, 135 Stat 443-449.

⁵⁶ 49 CFR Part 23 (Participation of Disadvantaged Business Enterprises in Airport Concessions).

⁵⁷ 488 U.S. 469 (1989).

The Court determined that the plan neither served a compelling governmental interest nor offered a narrowly tailored remedy to past discrimination. The Court found no compelling governmental interest because the City had not provided “a strong basis in evidence for its conclusion that [race-based] remedial action was necessary.”⁵⁸ The Court held the City presented no direct evidence of any race discrimination on its part in awarding construction contracts or any evidence that the City’s prime contractors had discriminated against minority-owned subcontractors.⁵⁹ The Court also found there were only generalized allegations of societal and industry discrimination coupled with positive legislative motives. The Court concluded that this was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

Similarly, the Court held the City failed to demonstrate that the plan was narrowly tailored for several reasons, including because there did not appear to have been any consideration of race-neutral means to increase minority business participation in city contracting, and because of the over-inclusiveness of certain minorities in the “preference” program (for example, Aleuts) without any evidence they suffered discrimination in Richmond.⁶⁰

The Court stated that reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the City was misplaced. There is no doubt, the Court held, that “[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination” under Title VII.⁶¹ But it is equally clear that “[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.”⁶²

The Court concluded that where 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. The Court noted that “the city does not even know how many MBEs in the relevant market are qualified to undertake prime or subcontracting work in public construction projects.”⁶³ “Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city.”⁶⁴

The Supreme Court stated that it did not intend its decision to preclude a state or local government from “taking action to rectify the effects of identified discrimination within its jurisdiction.”⁶⁵ The Court held 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

⁵⁸ 488 U.S. at 500, 510.

⁵⁹ 488 U.S. at 480, 505.

⁶⁰ 488 U.S. at 507-510.

⁶¹ 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-308, 97 S.Ct. 2736, 2741.

⁶² 488 U.S. at 501 quoting *Hazelwood*, 433 U.S. at 308, n. 13, 97 S.Ct., at 2742, n. 13.

⁶³ 488 U.S. at 502.

⁶⁴ *Id.*

⁶⁵ 488 U.S. at 509.

engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise."⁶⁶

The Court said: "If the City of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion."⁶⁷ "Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria." "In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."⁶⁸

The Court further found "if the City could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the City could take affirmative steps to dismantle such a system. 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."⁶⁹

2. *Adarand Constructors, Inc. v. Peña (Adarand I)*, 515 U.S. 200 (1995). In *Adarand I*, the U.S. Supreme Court extended the holding in *Croson* and ruled that all federal government programs that use racial or ethnic criteria as factors in procurement decisions must pass a test of strict scrutiny in order to survive constitutional muster.

The cases interpreting *Croson* and *Adarand I* are the most recent and significant decisions by federal courts setting forth the legal framework for disparity studies as well as the predicate to satisfy the constitutional strict scrutiny standard of review, which applies to the implementation of the Federal DBE Program by recipients of federal funds.

Note: *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (June 29, 2023)

In *Students for Fair Admissions, Inc. (SFFA) v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (June 29, 2023) (*SFFA v. Harvard et al.*), the Supreme Court held unconstitutional under the Equal Protection Clause of the Fourteenth Amendment the admissions systems used by Harvard College and the University of North Carolina. The majority decision of the Court referenced, cited, and applied the Supreme Court decisions in *Croson* and *Adarand*—including the strict scrutiny standard—to the university admissions systems in these cases. The majority decision of the *SFFA* case did not specifically rule on or address the constitutionality of MBE/WBE/DBE contracting programs or the implementation of the Federal DBE Program by local or state governments, airports, transit or transportation authorities, or other government agencies.

It is noteworthy that, subsequent to the Supreme Court decision in *SFFA v. Harvard et al.*, attorneys general from 13 states sent a letter, dated July 13, 2023, to "Fortune 100 CEOs" in which, among other

⁶⁶ *Id.*

⁶⁷ 488 U.S. at 509.

⁶⁸ *Id.*

⁶⁹ 488 U.S. at 492.

statements, they urged businesses, to “immediately cease any unlawful race-based quotas or preferences your company has adopted for its employment and contracting practices.”

On July 19, 2023, attorneys general from 20 states sent a letter to “Fortune 100 CEOs” in which they responded to and opposed the statements in the July 13, 2023 letter sent by the attorneys general from the 13 states. Among the state attorneys general signing the letter, and the author of the letter, was the Nevada Attorney General. This letter provides that “*SFFA* does not directly address or govern the behavior or the initiatives of private sector businesses.” In addition, the letter provides that “*SFFA* acknowledges that our society has a compelling interest in ‘remediating specific, identified instances of past discrimination that violated the Constitution or a statute.’ *SFFA*, slip op. at 15.”

D. The Legal Framework Applied to State and Local Government MBE/WBE/DBE Programs and Their Implementation of the Federal DBE Program

The following provides an analysis for the legal framework focusing on recent key cases regarding state DOT DBE programs and state and local government DBE programs implementing the Federal DBE Program and federal regulations, state and local government MBE/WBE/DBE programs, social and economic disadvantaged business programs, and their implications for a disparity study. The recent decisions involving these programs, the Federal DBE Program and its implementation by state DOTs, state and local government DBE programs, and social and economic disadvantaged business programs are instructive because they concern the strict scrutiny analysis, the legal framework in this area, challenges to the validity of MBE/WBE/DBE programs, and an analysis of disparity studies, and implementation of the Federal DBE Program by local and state government recipients of federal financial assistance (USDOT funds) based on 49 CFR Part 26 and 49 CFR Part 23.

a. The Federal DBE Program implemented by state and local governments. It is instructive to analyze the Federal DBE Program and its implementation by state and local governments because the program on its face and as applied by state and local governments has survived challenges to its constitutionality, concerned application of the strict scrutiny standard, considered findings as to disparities, discrimination and barriers to MBE/WBE/DBEs, examined narrow tailoring by local and state governments of their DBE programs implementing the Federal DBE Program, and involved consideration of disparity studies. The cases involving the program and its implementation by state DOTs and state and local governments are informative; recent; and applicable to the legal framework regarding state DOT DBE programs and MBE/WBE/DBE state and local government programs, and disparity studies.

After the *Adarand I* decision, the DOJ in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally funded contracts.⁷⁰

⁷⁰ Appendix-The Compelling Interest for Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,050, 26,051-63 & nn. 1-136 (May 23, 1996) (hereinafter “The Compelling Interest”); see *Adarand VII*, 228 F.3d at 1167-1176, citing “The Compelling Interest.”

Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21st Century (TEA-21), which authorized USDOT to expend funds for federal highway programs for 1998-2003. Pub.L. 105-178, Title I, § 1101(b), 112 Stat. 107, 113 (1998). USDOT promulgated new regulations in 1999 contained at 49 CFR Part 26 to establish the current Federal DBE Program. TEA-21 was subsequently extended in 2003, 2005, and 2012. The reauthorization of TEA-21 in 2005 was for a five-year period from 2005 to 2009. Pub.L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1153-57 (SAFETEA). In July 2012, Congress passed the Moving Ahead for Progress in the 21st Century Act (MAP-21).⁷¹ In December 2015, Congress passed the Fixing America’s Surface Transportation Act (FAST Act).⁷² In May 2024, Congress passed the FAA Reauthorization Act.⁷³ In November 2021, Congress passed the Infrastructure Investment and Jobs Act (H.R. 3684 – 117th Congress, Section 11101) that reauthorized the Federal DBE Program based on evidence and findings of continuing discrimination and related barriers found to cause significant obstacles for MBE/WBE/DBEs.⁷⁴

As noted above, the DOJ in January 2022 issued a report that updated its 1996 report: “The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence,” which “summarizes recent evidence required to justify the use of race- and sex-conscious provisions in federal contracting programs.” The “Notice of Report on Lawful Uses of Race or Sex in Federal Contracting Programs” is published in the Federal Register, Vol. 87 at page 4955, January 31, 2022. This “updated report regarding the legal and evidentiary frameworks that justify the continued use of race or sex, in appropriate circumstances, by federal agencies to remedy the current and lingering effects of past discrimination in federal contracting programs” is available on the DOJ’s website at: <https://www.justice.gov/crt/page/file/1463921/download>.

The Federal DBE Program provides requirements for federal aid recipients and accordingly changed how recipients of federal funds implement the Federal DBE Program for federally assisted contracts. The federal government determined that there is a compelling governmental interest for race- and gender-based programs at the national level, and that the program is narrowly tailored because of the federal regulations, including the flexibility in implementation provided to individual federal aid recipients by the regulations. State and local governments are not required to implement race- and gender-based measures where they are not necessary to achieve DBE goals and those goals may be achieved by race- and gender-neutral measures.⁷⁵

The Federal DBE Program established responsibility for implementing the DBE Program to state and local government recipients of federal funds. A recipient of federal financial assistance must set an annual DBE goal specific to conditions in the relevant marketplace. Even though an overall annual 10 percent aspirational goal applies at the federal level, it does not affect the goals established by individual state or local governmental recipients. The Federal DBE Program outlines certain steps a state or local government recipient can follow in establishing a goal, and USDOT considers and must approve the goal and the recipient’s DBE program. The implementation of the Federal DBE Program is substantially in the

⁷¹ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁷² Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

⁷³ Pub L. 118-63, H.R. 3935 § 730, May 16, 2024, MUR24332 HT0.

⁷⁴ Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021, 135 Stat 443-449.

⁷⁵ 49 CFR § 26.51; see 49 CFR § 23.25.

hands of the state or local government recipient and is set forth in detail in the federal regulations, including 49 CFR Part 26 § 26.45 and 49 CFR §§ 23.41-51.

Provided in 49 CFR § 26.45 and 49 CFR §§ 23.41-51 are instructions as to how recipients of federal funds should set the overall goals for their DBE programs. In summary, the recipient establishes a base figure for relative availability of DBEs.⁷⁶ This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient's market.⁷⁷ Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.⁷⁸ There are many types of evidence considered when determining if an adjustment is appropriate, according to 49 CFR § 26.45(d) and 49 CFR §23.51(d). These include, among other types, the current capacity of DBEs to perform work on the recipient's contracts as measured by the volume of work DBEs performed in recent years. If available, recipients consider evidence from related fields that affect the opportunities for DBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs to obtain financing, bonding, and insurance, as well as data on employment, education, and training.⁷⁹ This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE participation one would expect absent the effects of discrimination.⁸⁰

Further, the Federal DBE Program requires state and local government recipients of federal funds to assess how much of the DBE goals can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.⁸¹ A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.⁸²

Federal aid recipients are to certify DBEs according to their race/gender, size, net worth, and other factors related to defining an economically and socially disadvantaged business as outlined in 49 CFR §§ 26.61-26.73.⁸³

b. Infrastructure Investment and Jobs Act of 2021, FAA Reauthorization Act of 2018, FAST Act, and MAP-21. In November 2021, Congress passed the Infrastructure Investment and Jobs Act (H.R. 3684 – 117th Congress, Section 11101(e)) that reauthorized the Federal DBE Program based on findings of continuing discrimination and related barriers that cause significant obstacles for MBE/WBE/DBEs.⁸⁴ Previously, in October 2018, December 2015, and in July 2012, Congress passed the FAA Reauthorization Act, FAST Act, and MAP-21, respectively, which made “findings” that “discrimination and related barriers continued to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets,” in “federally-assisted surface

⁷⁶ 49 CFR § 26.45(a), (b), (c); 49 CFR § 23.51(a), (b), (c).

⁷⁷ *Id.*

⁷⁸ *Id.* at § 26.45(d); *Id.* at § 23.51(d).

⁷⁹ *Id.*

⁸⁰ 49 CFR § 26.45(b)-(d); 49 CFR § 23.51.

⁸¹ 49 CFR § 26.51; 49 CFR § 23.51(a).

⁸² 49 CFR § 26.51(b); 49 CFR § 23.25.

⁸³ 49 CFR §§ 26.61-26.73; 49 CFR §§ 23.31-23.39.

⁸⁴ Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021, 135 Stat 443-449.

transportation markets,” and that the continuing barriers “merit the continuation” of the Federal DBE Program.⁸⁵ Congress also found in the Infrastructure Investment and Jobs Act of 2021, the FAA Reauthorization Act of 2018, the FAST Act, and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination, which “provide a strong basis that there is a compelling need for the continuation of the” Federal DBE Program.⁸⁶

c. Infrastructure Investment and Jobs Act of 2021 (November 15, 2021)

SEC. 11101. Authorization of Appropriations.

(e) Disadvantaged Business Enterprises-

(1) FINDINGS- Congress finds that—

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

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

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

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

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

Therefore, Congress in the Infrastructure Investment and Jobs Act passed on November 15, 2022 found based on testimony, evidence and documentation updated since the FAST Act adopted in 2015 and MAP-21 adopted in 2012, as follows: (1) discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States; (2) the continuing barriers described in §

⁸⁵ Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁸⁶ *Id.* at Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, § 1101(b)(1) (2015).

11101(e), subparagraph (A) above merit the continuation of the disadvantaged business enterprise program; and (3) there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.⁸⁷

d. FAA Reauthorization Act of 2018 (October 5, 2018)

- Extended the FAA DBE and ACDBE programs for five years.
- Contains an additional prompt payment provision.
- Increases in the size cap for highway, street, and bridge construction for construction firms working on airport improvement projects.
- Establishes Congressional findings of discrimination that provides a strong basis there is a compelling need for the continuation of the airport DBE program and the ACDBE program to address race and gender discrimination in airport related business.

SEC. 157 MINORITY AND DISADVANTAGED BUSINESS PARTICIPATION.

(a) Findings. Congress finds the following:

(1) While significant progress has occurred due to the establishment of the airport disadvantaged business enterprise program (sections 47107(e) and 47113 of title 49, United States Code), discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets across the nation. These continuing barriers merit the continuation of the airport disadvantaged business enterprise program.

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

(3) This testimony and documentation demonstrates that discrimination across the nation poses a barrier to full and fair participation in airport-related businesses of women business owners and minority business owners in the racial groups detailed in 49 CFR Parts 23 and 26, and has impacted firm development and many aspects of airport-related business in the public and private markets.

(4) This testimony and documentation provides a strong basis that there is a compelling need for the continuation of the airport DBE program and the ACDBE program to address race and gender discrimination in airport related business.

⁸⁷ Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021, 135 Stat 443-449.

e. USDOT Final Rule, 76 Fed. Reg. 5083 (January 28, 2011). USDOT promulgated a Final Rule on January 28, 2011, effective February 28, 2011, 76 Fed. Reg. 5083 (January 28, 2011) (2011 Final Rule) amending the Federal DBE Program at 49 CFR Part 26.

The Department stated in the 2011 Final Rule, with regard to disparity studies and in calculating goals, that it agrees “it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (*e.g.*, firms apparently owned and controlled by minorities or women that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance.”⁸⁸

USDOT in the 2011 Final Rule stated that there was a continuing compelling need for the DBE program.⁸⁹ The USDOT concluded that, as court decisions have noted, the USDOT’s DBE regulations and the statutes authorizing them, “are supported by a compelling need to address discrimination and its effects.”⁹⁰ The DOT said that the “basis for the program has been established by Congress and applies on a nationwide basis ...” and noted that both the House and Senate FAA Reauthorization Bills contained findings reaffirming the compelling need for the program and referenced additional information presented to the House of Representatives in a March 26, 2009 hearing before the Transportation and Infrastructure Committee, and a Department of Justice document entitled “The Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: A Decade Later An Update to the May 23, 1996 Review of Barriers for Minority- and Women-Owned Businesses.”⁹¹ This information, the USDOT stated, “confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program.”⁹²

Thus, the implementation of the Federal DBE Program by state and local governments, the application of the strict scrutiny standard to the state and local government DBE programs, the analysis applied by the courts in challenges to state and local government DBE programs, and the evidentiary basis and findings relied upon by Congress and the federal government regarding the program and its implementation are informative and instructive to state DOTs and state and local governments and this study.

1. Strict scrutiny analysis. A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.⁹³ The strict scrutiny analysis is comprised of two prongs:

- The program must serve an established compelling governmental interest; and

⁸⁸ 76 F.R. at 5092.

⁸⁹ 76 F.R. at 5095.

⁹⁰ 76 F.R. at 5095.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Peña (Adarand I)*, 515 U.S. 200, 227 (1995); *see, e.g., Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H.B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3^d Cir. 1993).

- The program must be narrowly tailored to achieve that compelling government interest.⁹⁴

a. The compelling governmental interest requirement. The first prong of the strict scrutiny analysis requires a governmental entity to have a “compelling governmental interest” in remedying past identified discrimination in order to implement a race- and ethnicity-based program.⁹⁵ State and local governments cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions.⁹⁶ Rather, state and local governments must measure discrimination in their state or local market. However, that is not necessarily confined by the jurisdiction’s boundaries.⁹⁷

The federal courts have held that, with respect to the Federal DBE Program, recipients of federal funds, such as state DOTs, do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.⁹⁸ The federal courts also have held that Congress had ample evidence of discrimination in the transportation contracting industry to justify the Federal DBE Program (TEA-21), and the federal regulations implementing the program (49 CFR Part 26).⁹⁹

⁹⁴ *Adarand I*, 515 U.S. 200, 227 (1995); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730 (6th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3^d Cir. 1993).

⁹⁵ *Id.*

⁹⁶ *Id.*; see, e.g., *Concrete Works, Inc. v. City and County of Denver (“Concrete Works I”)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

⁹⁷ See, e.g., *Concrete Works I*, 36 F.3d at 1520.

⁹⁸ *N. Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; see *Midwest Fence*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), and *affirming*, 84 F. Supp. 3d 705, 2015 WL 1396376.

⁹⁹ *Id.* In the case of *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so “outdated” so as to provide an insufficient basis in evidence for the Department of Defense program (i.e., whether a compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Federal Circuit Court of Appeals after its 2005 decision remanded the case to the district court to rule on this issue. *Rothe* considered the validity of race- and gender-conscious Department of Defense (“DOD”) regulations (2006 Reauthorization of the 1207 Program). The decisions in *N. Contracting*, *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in *Rothe* on August 10, 2007 issued its order denying plaintiff *Rothe*’s Motion for Summary Judgment and granting Defendant United States Department of Defense’s Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe Devel. Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D. Tex. 2007). The district court found the data contained in the Appendix (The Compelling Interest, 61 Fed. Reg. 26050 (1996)), the Urban Institute Report, and the Benchmark Study – relied upon in part by the courts in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* in upholding the constitutionality of the Federal DBE Program – was “stale” as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F.3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F.3d 1023, 1050. See also the 2012 district court decision in *DynaLantic Corp. v. U.S. Department of Defense, et al.*, 885 F.Supp.2d 237, (D.D.C.). In the 2016 decision in *Rothe Development, Inc. v. U.S. Dept of Defense and U.S. S.B.A.*, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016), the United States Court of Appeals, District of Columbia Circuit, upheld the constitutionality of the Section 8(a) Program on its face, finding the Section 8(a) statute was race-neutral. The Court of Appeals affirmed on other grounds the district court decision that had upheld the constitutionality of the Section 8(a) Program. The district court had found the federal government’s evidence of discrimination provided a sufficient basis for the Section 8(a) Program. 107 F.Supp. 3d 183, 2015 WL 3536271 (D. D.C. June 5, 2015).

It is instructive to review the type of evidence utilized by Congress and considered by the courts to support the Federal DBE Program, and its implementation by local and state governments and agencies, which is similar to evidence considered by cases ruling on the validity of MBE/WBE/DBE programs. The federal courts found Congress “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.”¹⁰⁰ The evidence found to satisfy the compelling interest standard included numerous congressional investigations and hearings, and outside studies of statistical and anecdotal evidence (e.g., disparity studies).¹⁰¹ The evidentiary basis on which Congress relied to support its finding of discrimination includes:

- **Barriers to minority business formation.** Congress found that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide, noting the existence of “good ol’ boy” networks, from which minority firms have traditionally been excluded, and the race-based denial of access to capital, which affects the formation of minority subcontracting enterprise.¹⁰²
- **Barriers to competition for existing minority enterprises.** Congress found evidence showing systematic exclusion and discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies precluding minority enterprises from opportunities to bid. When minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. Congress found evidence of the same prime contractor using a minority business enterprise on a government contract not using that minority business enterprise on a private contract, despite being satisfied with that subcontractor’s work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.¹⁰³
- **Local disparity studies.** Congress found that local studies throughout the country tend to show a disparity between utilization and availability of minority-owned firms, raising an inference of discrimination.¹⁰⁴
- **Results of removing affirmative action programs.** Congress found evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears, which courts have found

¹⁰⁰ *Sherbrooke Turf*, 345 F.3d at 970, (citing *Adarand VII*, 228 F.3d at 1167 – 76 (10th Cir. 2000); *Western States Paving*, 407 F.3d at 992-93.

¹⁰¹ See, e.g., *Adarand VII*, 228 F.3d at 1167– 76 (10th Cir. 2000); see also *Western States Paving*, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”); *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁰² *Adarand VII*, 228 F.3d. at 1168-70 (10th Cir. 2000); *Western States Paving*, 407 F.3d at 992; see *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237.

¹⁰³ *Adarand VII*, at 1170-72 (10th Cir. 2000); see *DynaLantic*, 885 F.Supp.2d 237.

¹⁰⁴ *Id.* at 1172-74 (10th Cir. 2000); see *DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

strongly supports the government's claim that there are significant barriers to minority competition, raising the specter of discrimination.¹⁰⁵

- Infrastructure Investment and Jobs Act of 2021, FAA Reauthorization Act of 2018, FAST Act, and MAP-21. In May 2024, November 2021, December 2015, and July 2012, Congress passed the FAA Reauthorization Act, the Infrastructure Investment and Jobs Act or 2021, FAST Act, and MAP-21, respectively, which made “findings” that “discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in “federally-assisted surface transportation markets,” in airport-related markets, and that the continuing barriers “merit the continuation” of the Federal DBE Program.¹⁰⁶ Congress also found in the Infrastructure Investment and Jobs Act of 2021, the FAA Reauthorization Act of 2024, the FAST Act, and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which “provide a strong basis that there is a compelling need for the continuation of the” Federal DBE Program.¹⁰⁷

And, as stated above, the DOJ in January 2022 issued a report entitled: “The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence,” which “summarizes recent evidence required to justify the use of race- and sex-conscious provisions in federal contracting programs.”¹⁰⁸ This “updated report” by the DOJ is issued “regarding the legal and evidentiary frameworks that justify the continued use of race or sex, in appropriate circumstances, by federal agencies to remedy the current and lingering effects of past discrimination in federal contracting programs.”¹⁰⁹

i. Burden of proof to establish the strict scrutiny standard. Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.¹¹⁰ If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.¹¹¹ The challenger bears the ultimate burden of

¹⁰⁵ *Adarand VII*, 228 F.3d at 1174-75 (10th Cir. 2000); see, *H. B. Rowe*, 615 F.3d 233, 247-258 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 973-4.

¹⁰⁶ Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021; Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

¹⁰⁷ *Id.* at Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021; Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, § 1101(b)(1) (2015).

¹⁰⁸ Vol. 87 Fed. Reg. 4955, January 31, 2022; located at <https://www.justice.gov/crt/page/file/1463921/download>.

¹⁰⁹ *Id.*; see <https://www.justice.gov/crt/page/file/1463921/download>.

¹¹⁰ See *AGC, SDC v. Caltrans*, 713 F.3rd at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242, 247-258 (4th Cir. 2010); *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater (“Adarand VII”)*, 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng’g Contractors Ass’n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3^d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813; *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

¹¹¹ *Adarand VII*, 228 F.3d at 1166; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3^d Cir. 1993); *Eng’g Contractors Ass’n*, 122 F.3d at 916; *Geyer Signal, Inc.*, 2014 WL 1309092.

showing that the governmental entity's evidence "did not support an inference of prior discrimination."¹¹²

In applying the strict scrutiny analysis, the courts hold that the burden is on the government to show both a compelling interest and narrow tailoring.¹¹³ It is well established that "remediating the effects of past or present racial discrimination" is a compelling interest.¹¹⁴ In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."¹¹⁵

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."¹¹⁶ "An inference of discrimination may be made with empirical evidence that demonstrates 'a significant statistical disparity between a number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality's prime contractors.'"¹¹⁷ Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.¹¹⁸

In addition to providing "hard proof" to support its compelling interest, the government must also show that the challenged program is narrowly tailored.¹¹⁹ Once the governmental entity has shown acceptable proof of a compelling interest and remediating past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the

¹¹² See, e.g., *Adarand VII*, 228 F.3d at 1166; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Eng'g Contractors Ass'n*, 122 F.3d at 916; see also *Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721; *Geyer Signal, Inc.*, 2014 WL 1309092.

¹¹³ *Id.*; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990; See also *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000); *Geyer Signal, Inc.*, 2014 WL 1309092.

¹¹⁴ *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989); see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

¹¹⁵ *Croson*, 488 U.S. at 500; see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242; *Sherbrooke Turf*, 345 F.3d at 971-972; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092.

¹¹⁶ *Midwest Fence*, 2015 W.L. 1396376 at *7 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1200; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994); *Geyer Signal*, 2014 WL 1309092 (D. Minn. 2014); see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

¹¹⁷ See e.g., *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 2015 W.L. 1396376 at *7, quoting *Concrete Works*, 36 F.3d 1513, 1522 (quoting *Croson*, 488 U.S. at 509), *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d 233, 241-242 (8th Cir. 2003); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

¹¹⁸ *Croson*, 488 U.S. at 509; see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1196; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1200; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994); *Geyer Signal*, 2014 WL 1309092 (D. Minn. 2014); see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

¹¹⁹ *Adarand Constructors, Inc. v. Peña*, ("Adarand III"), 515 U.S. 200 at 235 (1995); see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Majeske v. City of Chicago*, 218 F.3d at 820; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

ultimate burden of proving that the plan is unconstitutional.¹²⁰ Therefore, notwithstanding the burden of initial production rests with the government, the ultimate burden remains with the party challenging the application of a DBE or MBE/WBE program to demonstrate the unconstitutionality of an affirmative-action type program.¹²¹

To successfully rebut the government's evidence, the courts hold that a challenger must introduce "credible, particularized evidence" of its own that rebuts the government's showing of a strong basis in evidence for the necessity of remedial action.¹²² This rebuttal can be accomplished by providing a neutral explanation for the disparity between MBE/WBE/DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data.¹²³ Conjecture and unsupported criticisms of the government's methodology are insufficient.¹²⁴ The courts have held that mere speculation the government's evidence is insufficient or methodologically flawed does not suffice to rebut a government's showing.¹²⁵

The courts have stated that "it is insufficient to show that 'data was susceptible to multiple interpretations,' instead, plaintiffs must 'present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts.'"¹²⁶ The courts hold that in assessing the evidence offered in support of a finding of discrimination, it considers "both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself."¹²⁷

¹²⁰ *Majeske*, 218 F.3d at 820; see, e.g., *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277-78; *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Midwest Fence*, 2015 WL 1396376 *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Geyer Signal, Inc.*, 2014 WL 1309092; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹²¹ *Id.*; *Adarand VII*, 228 F.3d at 1166 (10th Cir. 2000).

¹²² See, e.g., *H.B. Rowe v. NCDOT*, 615 F.3d 233, at 241-242(4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.

¹²³ See, e.g., *H.B. Rowe v. NCDOT*, 615 F.3d 233, at 241-242(4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; see, generally, *Engineering Contractors*, 122 F.3d at 916; *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

¹²⁴ *Id.*; *H. B. Rowe*, 615 F.3d at 242; see also, *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Sherbrooke Turf*, 345 F.3d at 971-974; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

¹²⁵ *H.B. Rowe*, 615 F.3d at 242; see *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 991; see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹²⁶ *Geyer Signal, Inc.*, 2014 WL 1309092, quoting *Sherbrooke Turf*, 345 F.3d at 970.

¹²⁷ *Id.*, quoting *Adarand Constructors, Inc.*, 228 F.3d at 1166; see, e.g., *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 597 (3d Cir. 1996).

The courts have noted that “there is no ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.”¹²⁸ The courts hold that a state need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary.¹²⁹ Instead, the Supreme Court stated that a government may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.¹³⁰ It has been further held by the courts that the statistical evidence be “corroborated by significant anecdotal evidence of racial discrimination” or bolstered by anecdotal evidence supporting an inference of discrimination.¹³¹

The courts have stated the strict scrutiny standard is applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically “fatal in fact.”¹³² In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.”¹³³

Thus, courts have held that to justify a race-conscious measure, a government must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary.¹³⁴

ii. Statistical evidence. Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt, and support a remedial program (i.e., to prove a compelling governmental interest), or in the case of a state or local government recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the

¹²⁸ *H.B. Rowe*, 615 F.3d at 241, quoting *Rothe Dev. Corp. v. Dep’t of Def.*, 545 F.3d 1023, 1049 (Fed. Cir. 2008) (quoting *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 n. 11 (5th Cir. 1999)); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹²⁹ *H.B. Rowe Co.*, 615 F.3d at 241; see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 958 (10th Cir. 2003);, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹³⁰ *Croson*, 488 U.S. 509, see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d at 241; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹³¹ *H.B. Rowe*, 615 F.3d at 241, quoting *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *AGC, San Diego v. Caltrans*, 713 F.3d at 1196; see also, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹³² See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, e.g., *H. B. Rowe*, 615 F.3d at 241; 615 F.3d 233 at 241.

¹³³ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, e.g., *H. B. Rowe*; quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

¹³⁴ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); *H. B. Rowe*; 615 F.3d 233 at 241 quoting, *Croson*, 488 U.S. at 504, and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993).

state or local government recipient level.¹³⁵ “Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”¹³⁶

One form of statistical evidence is the comparison of a government’s utilization of MBE/WBEs compared to the relative availability of qualified, willing, and able MBE/WBEs.¹³⁷ The federal courts have held that a significant statistical disparity between the utilization and availability of minority- and women-owned firms may raise an inference of discriminatory exclusion.¹³⁸ However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.¹³⁹

Other considerations regarding statistical evidence include:

iii. Availability analysis. A disparity index requires an availability analysis. MBE/WBE and DBE availability measures the relative number of MBE/WBEs/DBEs among all firms ready, willing, and able to perform a certain type of work within a particular geographic market area.¹⁴⁰ There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered.¹⁴¹ “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”¹⁴²

¹³⁵ See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Concrete Works*, 321 F.3d 950, 959 (10th Cir. 2003); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

¹³⁶ *Croson*, 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); see *Midwest Fence*, 840 F.3d 932, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1196-1197; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999).

¹³⁷ *Croson*, 488 U.S. at 509; see *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver (“Concrete Works II”)*, 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹³⁸ See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossmann Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

¹³⁹ *Western States Paving*, 407 F.3d at 1001.

¹⁴⁰ See, e.g., *Croson*, 488 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁴¹ *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁴² *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”);

iv. Utilization analysis. Courts have accepted measuring utilization based on the proportion of an agency's contract dollars going to MBE/WBEs and DBEs.¹⁴³

v. Disparity index. An important component of statistical evidence is the "disparity index."¹⁴⁴ A disparity index is defined as the ratio of the percent utilization to the percent availability times 100. A disparity index below 80 has been accepted as evidence of adverse impact. This has been referred to as "The Rule of Thumb" or "The 80 percent Rule."¹⁴⁵

vi. Two standard deviation test. The standard deviation figure describes the probability that the measured disparity is the result of mere chance. Some courts have held that a statistical disparity corresponding to a standard deviation of less than two is not considered statistically significant.¹⁴⁶

In terms of statistical evidence, the courts, including the Ninth Circuit, have held that a state "need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence," but rather it may rely on "a significant statistical disparity" between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.¹⁴⁷

vii. Marketplace discrimination and data. The Tenth Circuit in *Concrete Works* held the District Court erroneously rejected the evidence the local government presented on marketplace discrimination.¹⁴⁸ The court rejected the District Court's "erroneous" legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in its 1994 decision

H.B. Rowe, v. NCDOT, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁴³ See *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *Eng'g Contractors Ass'n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

¹⁴⁴ *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *Eng'g Contractors Ass'n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3^d Cir. 1996); *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

¹⁴⁵ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *Midwest Fence*, 840 F.3d 932, 950 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *Rothe*, 545 F.3d at 1041; *Eng'g Contractors Ass'n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

¹⁴⁶ See, e.g., *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng'g Contractors Ass'n*, 122 F.3d at 914, 917, 923. The Eleventh Circuit found that a disparity greater than two or three standard deviations has been held to be statistically significant and may create a presumption of discriminatory conduct; *Peightal v. Metropolitan Eng'g Contractors Ass'n*, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7th Cir. 2001), raised questions as to the use of the standard deviation test alone as a controlling factor in determining the admissibility of statistical evidence to show discrimination. Rather, the Court concluded it is for the judge to say, on the basis of the statistical evidence, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury. 255 F.3d at 363.

¹⁴⁷ *H. B. Rowe*, 615 F.3d 233 at 241, citing *Croson*, 488 U.S. at 509 (plurality opinion), and citing *Concrete Works*, 321 F.3d at 958; see, e.g.; *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605; *Concrete Works*, 36 F.3d at 1529 (10th Cir. 1994); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3^d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossmann Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁴⁸ *Id.* at 973.

in *Concrete Works II* and the plurality opinion in *Croson*.¹⁴⁹ The court held it previously recognized in this case that “a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area.”¹⁵⁰ In *Concrete Works II*, the court stated that “we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination.”¹⁵¹

The court stated that the local government could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination.¹⁵² Thus, the local government was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden.¹⁵³

Additionally, the court had previously concluded that the local government’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination.¹⁵⁴ Thus, the court held the local government’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination.¹⁵⁵

The court held the District Court, *inter alia*, erroneously concluded that the disparity studies upon which the local government relied were significantly flawed because they measured discrimination in the overall local government metropolitan statistical area (MSA) construction industry, not discrimination by the municipality itself.¹⁵⁶ The court found that the District Court’s conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant.¹⁵⁷

In *Adarand VII*, the Tenth Circuit noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation.¹⁵⁸ (“[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus any findings Congress has made as to the entire construction industry are relevant.”¹⁵⁹) Further, the court pointed out that it earlier rejected the argument that marketplace data are irrelevant, and remanded the case to the District Court to determine whether the local government could link its public spending to “the Denver MSA evidence of industry-wide discrimination.”¹⁶⁰ The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added).

¹⁵¹ *Concrete Works*, 321 F.3d 950, 973 (10th Cir. 2003), quoting *Concrete Works II*, 36 F.3d at 1529 (10th Cir. 1994).

¹⁵² *Id.* at 973.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 974.

¹⁵⁷ *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67.

¹⁵⁸ *Concrete Works*, 321 F.3d at 976, citing *Adarand VII*, 228 F.3d at 1166-67.

¹⁵⁹ *Id.* (emphasis added).

¹⁶⁰ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

the *private construction market in the Denver MSA*” was relevant to the local government’s burden of producing strong evidence.¹⁶¹

Consistent with the court’s mandate in *Concrete Works II*, the local government attempted to show at trial that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business.”¹⁶² The Tenth Circuit ruled that the local government can demonstrate that it is a “passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination.¹⁶³

The court in *Concrete Works* rejected the argument that the lending discrimination studies and business formation studies presented by the local government were irrelevant. In *Adarand VII*, the Tenth Circuit concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.”¹⁶⁴

The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the local government MSA construction industry, studies showing that discriminatory barriers to business formation exist in the local government construction industry are relevant to the municipality’s showing that it indirectly participates in industry discrimination.¹⁶⁵

The local government also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The court held that the District Court’s conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. “[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion.”¹⁶⁶

In sum, the Tenth Circuit held the District Court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the local government’s burden of

¹⁶¹ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

¹⁶² *Id.*

¹⁶³ *Concrete Works*, 321 F.3d at 976, quoting *Croson*, 488 U.S. at 492.

¹⁶⁴ *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68.

¹⁶⁵ *Id.* at 977.

¹⁶⁶ *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary.¹⁶⁷

viii. Anecdotal evidence. Anecdotal evidence includes personal accounts of incidents, including of discrimination, told from the witness' perspective. Anecdotal evidence of discrimination, standing alone, generally is insufficient to show a systematic pattern of discrimination.¹⁶⁸ But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.¹⁶⁹ It has been held that anecdotal evidence of a local or state government's institutional practices that exacerbate discriminatory market conditions are often particularly probative, and that the combination of anecdotal and statistical evidence is "potent."¹⁷⁰

Examples of anecdotal evidence may include:

- Testimony of MBE/WBE or DBE owners regarding whether they face difficulties or barriers;
- Descriptions of instances in which MBE/WBE or DBE owners believe they were treated unfairly or were discriminated against based on their race, ethnicity, or gender or believe they were treated fairly without regard to race, ethnicity, or gender;
- Statements regarding whether firms solicit, or fail to solicit, bids or price quotes from MBE/WBEs or DBEs on non-goal projects; and
- Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets.¹⁷¹

Courts have accepted and recognize that anecdotal evidence is the witness' narrative of incidents told from his or her perspective, including the witness' thoughts, feelings, and perceptions, and thus anecdotal evidence need not be verified.¹⁷²

¹⁶⁷ *Id.* at 979-80.

¹⁶⁸ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng'g Contractors Ass'n*, 122 F.3d at 924-25; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

¹⁶⁹ See, e.g., *Midwest Fence*, 840 F.3d 932, 953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *H. B. Rowe*, 615 F.3d 233, 248-249; *Concrete Works*, 321 F.3d 950, 989-990 (10th Cir. 2003); *Eng'g Contractors Ass'n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520 (10th Cir. 1994); *Contractors Ass'n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁷⁰ *Concrete Works I*, 36 F.3d at 1520; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Construction Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

¹⁷¹ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242; 249-251; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7th Cir. 2007); see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76. For additional examples of anecdotal evidence, see *Eng'g Contractors Ass'n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic*, 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

¹⁷² See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242, 248-249; *Concrete Works II*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at *21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

b. The narrow tailoring requirement. The second prong of the strict scrutiny analysis requires that a race- or ethnicity-based program or legislation implemented to remedy past identified discrimination in the relevant market be “narrowly tailored” to reach that objective.

The narrow tailoring requirement has several components and the courts, including the Ninth Circuit Court of Appeals, analyze several criteria or factors in determining whether a program or legislation satisfies this requirement including:

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral 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 a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.¹⁷³

To satisfy the narrowly tailored prong of the strict scrutiny analysis in the context of the Federal DBE Program, which is instructive to the study, the federal courts that have evaluated state and local DBE Programs and their implementation of the Federal DBE Program, held the following factors are pertinent:

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.¹⁷⁴

The Eleventh Circuit described the “the essence of the ‘narrowly tailored’ inquiry [as] the notion that explicitly racial preferences ... must only be a ‘last resort’ option.”¹⁷⁵ Courts have found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does

¹⁷³ See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181 (10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n*, 122 F.3d at 927 (internal quotations and citations omitted); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 605-610 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1008-1009 (3d Cir. 1993); see also, *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁷⁴ See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 243-245, 252-255; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248; see also *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁷⁵ *Eng’g Contractors Ass’n*, 122 F.3d at 926 (internal citations omitted); see also *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 264, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion); *Webster v. Fulton County*, 51 F. Supp.2d 1354, 1380 (N.D. Ga. 1999), *aff’d per curiam* 218 F.3d 1267 (11th Cir. 2000).

require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.”¹⁷⁶

Similarly, the Sixth Circuit Court of Appeals in *Associated Gen. Contractors v. Drabik (Drabik II)*, stated: “*Adarand* teaches that a court called upon to address the question of narrow tailoring must ask, for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting ... or whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’”¹⁷⁷

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*¹⁷⁸ also found that race- and ethnicity-based measures should be employed as a last resort. The majority opinion stated: “Narrow tailoring requires ‘serious, good faith consideration of workable race-neutral alternatives,’ and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration.”¹⁷⁹ The Court found that the District failed to show it seriously considered race-neutral measures.

The “narrowly tailored” analysis is instructive in terms of developing any potential legislation or programs that involve MBE/WBE/DBEs or in connection with determining appropriate remedial measures to achieve legislative objectives.

i. Implementation of the Federal DBE Program: Narrow tailoring. The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by state DOTs and state and local government recipients of federal funds be “narrowly tailored” to remedy identified discrimination in the particular state or local government recipient’s contracting and procurement market.¹⁸⁰ The cases considering challenges to a state government’s implementation of the Federal DBE Program are instructive to the study, as stated above, in connection with establishing a compelling governmental interest and narrow tailoring, which are the two prongs of the strict scrutiny standard. The narrow tailoring requirement has several components.

In *Western States Paving*, the Ninth Circuit held the recipient of federal funds must have independent evidence of discrimination within the recipient’s own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-, ethnicity-, or gender-conscious remedial action.¹⁸¹ Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.¹⁸²

¹⁷⁶ See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; see also *Adarand I*, 515 U.S. at 237-38.

¹⁷⁷ *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730, 738 (6th Cir. 2000).

¹⁷⁸ 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007).

¹⁷⁹ 551 U.S. 701, 734-37, 127 S.Ct. at 2760-61; see also *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 305 (2003).

¹⁸⁰ *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199 (9th Cir. 2013); *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71; see, e.g., *Midwest Fence*, 840 F.3d 932, 949-953.

¹⁸¹ *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

¹⁸² *Id.* at 995-1003. The Seventh Circuit Court of Appeals in *Northern Contracting* stated in a footnote that the court in *Western States Paving* “misread” the decision in *Milwaukee County Pavers*. 473 F.3d at 722, n. 5.

In *Western States Paving*, and in *AGC, SDC v. Caltrans*, the Court found that even where evidence of discrimination is present in a recipient's market, a narrowly tailored program must apply only to those minority groups who have actually suffered discrimination. Thus, under a race- or ethnicity-conscious program, for each of the minority groups to be included in any race- or ethnicity-conscious elements in a recipient's implementation of the Federal DBE Program, there must be evidence that the minority group suffered discrimination within the recipient's marketplace.¹⁸³

In *Northern Contracting* decision (2007) the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold "that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT's program."¹⁸⁴ The Seventh Circuit Court of Appeals distinguished both the Ninth Circuit Court of Appeals decision in *Western States Paving* and the Eighth Circuit Court of Appeals decision in *Sherbrooke Turf*, relating to an as-applied narrow tailoring analysis.

The Seventh Circuit Court of Appeals held that the state DOT's (IDOT's) application of a federally mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program.¹⁸⁵ The Seventh Circuit Court of Appeals analyzed IDOT's compliance with the federal regulations regarding calculation of the availability of DBEs, adjustment of its goal based on local market conditions, and its use of race-neutral methods set forth in the federal regulations.¹⁸⁶ The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).¹⁸⁷ Accordingly, the Seventh Circuit Court of Appeals affirmed the District Court's decision upholding the validity of IDOT's DBE program.¹⁸⁸

The 2015 and 2016 Seventh Circuit Court of Appeals decisions in *Dunnet Bay* and *Midwest Fence* followed the ruling in *Northern Contracting* that a state DOT implementing the Federal DBE Program is insulated from a constitutional challenge absent a showing that the state exceeded its federal authority.¹⁸⁹ The court held the IDOT DBE Program implementing the Federal DBE Program was valid, finding there was not sufficient evidence to show the Illinois DOT exceeded its authority under the federal regulations.¹⁹⁰ The court found *Dunnet Bay* had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.¹⁹¹ In addition, the court in *Midwest Fence* upheld the constitutionality of the Federal DBE Program, and upheld the Illinois

¹⁸³ 407 F.3d at 996-1000; See *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

¹⁸⁴ 473 F.3d at 722.

¹⁸⁵ *Id.* at 722.

¹⁸⁶ *Id.* at 723-24.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*; See, e.g., *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Midwest Fence*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill. 2015), affirmed, 840 F.3d 932 (7th Cir. 2016); *Geod Corp. v. New Jersey Transit Corp., et al.*, 746 F.Supp 2d 642 (D.N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F.Supp.2d 1336 (S.D. Fla. 2008).

¹⁸⁹ *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F. 3d 676, 2015 WL 4934560 at **18-22 (7th Cir. 2015).

¹⁹⁰ *Dunnet Bay*, 799 F.3d 676, 2015 WL 4934560 at **18-22.

¹⁹¹ *Id.*

DOT DBE Program and Illinois State Tollway Highway Authority DBE Program that did not involve federal funds under the Federal DBE Program.¹⁹²

ii. Race-, ethnicity-, and gender-neutral measures. To the extent a “strong basis in evidence” exists concerning discrimination in a local or state government’s relevant contracting and procurement market, the courts analyze several criteria or factors to determine whether a state’s implementation of a race- or ethnicity-conscious program is necessary and thus narrowly tailored to achieve remedying identified discrimination. One of the key factors discussed above is consideration of race-, ethnicity-, and gender-neutral measures.

The courts require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.¹⁹³ And the courts have held unconstitutional those race- and ethnicity-conscious programs implemented without consideration of race- and ethnicity-neutral alternatives to increase minority business participation in state and local contracting.¹⁹⁴

The Court in *Croson*, followed by decisions from federal courts of appeal, found that local and state governments have at their disposal a “whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races.”¹⁹⁵

Examples of race-, ethnicity-, and gender-neutral alternatives include, but are not limited to, the following:

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;

¹⁹² 840 F.3d 932 (7th Cir. 2016).

¹⁹³ See, e.g., *Midwest Fence*, 840 F.3d 932, 937-938, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179 (10th Cir. 2000); *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Contractors Ass’n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d at 608-609 (3^d Cir. 1996); *Contractors Ass’n (CAEP I)*, 6 F.3d at 1008-1009 (3^d Cir. 1993); *Coral Constr.*, 941 F.2d at 923.

¹⁹⁴ See, *Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Virdi*, 135 Fed. Appx. At 268; *Contractors Ass’n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d at 608-609 (3^d Cir. 1996); *Contractors Ass’n (CAEP I)*, 6 F.3d at 1008-1009 (3^d Cir. 1993).

¹⁹⁵ *Croson*, 488 U.S. at 509-510.

- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- “How to do business” seminars;
- Sponsoring networking sessions throughout the state to acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.¹⁹⁶

The courts have held that while the narrow tailoring analysis does not require a governmental entity to exhaust every possible race-, ethnicity-, and gender-neutral alternative, it does “require serious, good faith consideration of workable race-neutral alternatives.”¹⁹⁷

iii. Additional factors considered under narrow tailoring. In addition to the required consideration of the necessity for the relief and the efficacy of alternative remedies (race- and ethnicity-neutral efforts), the courts require evaluation of additional factors as listed above.¹⁹⁸ For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;¹⁹⁹ (2) good faith efforts provisions;²⁰⁰ (3) waiver provisions;²⁰¹ (4) a rational basis for goals;²⁰² (5) graduation provisions;²⁰³ (6) remedies only for groups for which there were findings of

¹⁹⁶ See, e.g., *Croson*, 488 U.S. at 509-510; *H. B. Rowe*, 615 F.3d 233, 252-255; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179 (10th Cir. 2000); 49 CFR § 26.51(b); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927-29; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

¹⁹⁷ *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 732-47, 127 S.Ct 2738, 2760-61 (2007); *AGC, SDC v. Caltrans*, 713 F.3d at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Eng’g Contractors Ass’n*, 122 F.3d at 927.

¹⁹⁸ See *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255; *Sherbrooke Turf*, 345 F.3d at 971-972; *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

¹⁹⁹ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality (“AGC of Ca.”)*, 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir. 1990).

²⁰⁰ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

²⁰¹ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

²⁰² *Id.*; *Sherbrooke Turf*, 345 F.3d at 971-973; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

²⁰³ *Id.*

discrimination;²⁰⁴ (7) sunset provisions;²⁰⁵ and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.²⁰⁶

Several federal court decisions have upheld the Federal DBE Program and its implementation by state DOTs and recipients of federal funds, including satisfying the narrow tailoring factors.²⁰⁷

2. Intermediate scrutiny analysis. Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.²⁰⁸ The Ninth Circuit and Nevada courts have applied “intermediate scrutiny” to classifications based on gender.²⁰⁹ Restrictions subject to intermediate scrutiny are permissible so long as they are substantially related to serve an important governmental interest.²¹⁰

The courts have interpreted this intermediate scrutiny standard to require that gender-based classifications be:

²⁰⁴ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 253-255; *Western States Paving*, 407 F.3d at 998; *AGC of Ca.*, 950 F.2d at 1417; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 593-594, 605-609 (3d Cir. 1996); *Contractors Ass’n (CAEP I)*, 6 F.3d at 1009, 1012 (3d Cir. 1993); *Kossmann Contracting Co., Inc., v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016); *Sherbrooke Turf*, 2001 WL 150284 (unpublished opinion), *aff’d* 345 F.3d 964.

²⁰⁵ See, e.g., *H. B. Rowe*, 615 F.3d 233, 254; *Sherbrooke Turf*, 345 F.3d at 971-972; *Peightal*, 26 F.3d at 1559; see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016).

²⁰⁶ *Coral Constr.*, 941 F.2d at 925.

²⁰⁷ See, e.g., *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), *cert. denied*, 2017 WL 497345 (2017); *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), *cert. denied*, 2016 WL 193809 (2016); *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006); *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. May 16, 2017); *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007); *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004); *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VII*”); *Dunnet Bay Construction Co. v. Illinois DOT, et al.*, 2014 WL 552213 (C. D. Ill. 2014), *affirmed by Dunnet Bay*, 2015 WL 4934560 (7th Cir. 2015); *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014); *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013); *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d. 642 (D. N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

²⁰⁸ *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); See generally, *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”); *Geyer Signal*, 2014 WL 1309092.

²⁰⁹ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); see, generally, *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see also, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989) (citing *Craig v. Boren*, 429 U.S. 190 (1976), and *Lalli v. Lalli*, 439 U.S. 259(1978)); *Nevada Wildlife Alliance v. Department of Wildlife*, 497 P.3d 622 (Nev. 2021); *Rico v. Rodriguez*, 120 P. 3d 812 (Nev. 2005); *Tarango v. State Indus. Ins. System*, 25 P.3d 175 (Nev. 2001).

²¹⁰ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see, also *Serv. Emp. Int’l Union, Local 5 v. City of Hous.*, 595 F.3d 588, 596 (5th Cir. 2010); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6

1. Supported by both “sufficient probative” evidence or “exceedingly persuasive justification” in support of the stated rationale for the program; and
2. Substantially related to the achievement of that underlying objective.²¹¹

Under the traditional intermediate scrutiny standard, the court reviews a gender-conscious program by analyzing whether the state actor has established a sufficient factual predicate for the claim that female-owned businesses have suffered discrimination, and whether the gender-conscious remedy is an appropriate response to such discrimination. This standard requires the state actor to present “sufficient probative” evidence in support of its stated rationale for the program.²¹²

Intermediate scrutiny, as interpreted by federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective.²¹³ The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.²¹⁴

The Tenth Circuit in *Concrete Works* stated with regard evidence as to woman-owned business enterprises as follows:

“We do not have the benefit of relevant authority with which to compare Denver’s disparity indices for WBEs. *See Contractors Ass’n*, 6 F.3d at 1009–11 (reviewing case law and noting that “it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary”). Nevertheless, Denver’s data indicates significant WBE underutilization such that the Ordinance’s gender classification arises from “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Mississippi Univ. of Women*,

F.3d at 1009-1011 (3d Cir. 1993); .); *see also*, *Nevada Wildlife Alliance v. Department of Wildlife*, 497 P.3d 622 (Nev. 2021); *Rico v. Rodriguez*, 120 P. 3d 812 (Nev. 2005); *Tarango v. State Indus. Ins. System*, 25 P.3d 175 (Nev. 2001).

²¹¹ *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *see, e.g., Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)(“exceedingly persuasive justification.”); *see also*, *Nevada Wildlife Alliance v. Department of Wildlife*, 497 P.3d 622 (Nev. 2021); *Rico v. Rodriguez*, 120 P. 3d 812 (Nev. 2005); *Tarango v. State Indus. Ins. System*, 25 P.3d 175 (Nev. 2001).

²¹² *Id.* The Seventh Circuit Court of Appeals, however, in *Builders Ass’n of Greater Chicago v. County of Cook, Chicago*, did not hold there is a different level of scrutiny for gender discrimination or gender-based programs. 256 F.3d 642, 644-45 (7th Cir. 2001). The Court in *Builders Ass’n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors*.

²¹³ *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Assoc. Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F.Supp 2d 613, 619-620 (2000); *see also, U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)(“exceedingly persuasive justification.”).

²¹⁴ *Coral Constr. Co.*, 941 F.2d at 931-932; *see Eng’g Contractors Ass’n*, 122 F.3d at 910.

458 U.S. at 726, 102 S.Ct. at 3337 (striking down, under the intermediate scrutiny standard, a state statute that excluded males from enrolling in a state-supported professional nursing school).”

The Fourth Circuit cites with approval the guidance from the Eleventh Circuit that has held “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”²¹⁵

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.”²¹⁶ The Third Circuit found this standard required the City of Philadelphia to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.²¹⁷ The Court in *Contractors Association of Eastern Pennsylvania v. City of Philadelphia (CAEP I)* held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business, but the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in that case.²¹⁸

The Third Circuit in *CAEP I* held the evidence offered by the City of Philadelphia regarding women-owned construction businesses was insufficient to create an issue of fact. The study in *CAEP I* contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses.²¹⁹ Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance.²²⁰ But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.²²¹ The only other testimony on this subject, the Court found in *CAEP I*, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing.²²² This evidence, the Court held, was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard.

3. Rational basis analysis. Where a challenge to the constitutionality of a statute or a regulation does not involve a fundamental right or a suspect class, the appropriate level of scrutiny to apply is the rational basis standard.²²³ When applying rational basis review under the Equal Protection Clause of the

²¹⁵ 615 F.3d 233, 242; 122 F.3d at 929 (internal citations omitted).

²¹⁶ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

²¹⁷ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

²¹⁸ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

²¹⁹ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ See, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9th Cir. 2019); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir.

Fourteenth Amendment of the United States Constitution, a court is required to inquire whether the challenged classification has a legitimate purpose and whether it was reasonable for the legislature to believe that use of the challenged classification would promote that purpose.²²⁴

Courts in applying the rational basis test generally find that a challenged law is upheld “as long as there could be some rational basis for enacting [it],” that is, that “the law in question is rationally related to a legitimate government purpose.”²²⁵ So long as a government legislature had a reasonable basis for adopting the classification the law will pass constitutional muster.²²⁶

“[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.”²²⁷ Moreover, “courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.”²²⁸

Under a rational basis review standard, a legislative classification will be upheld “if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”²²⁹ Because

1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.”); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Nevada Wildlife Alliance v. Department of Wildlife*, 497 P.3d 622 (Nev. 2021); *Rico v. Rodriguez*, 120 P. 3d 812 (Nev. 2005); *Tarango v. State Indus. Ins. System*, 25 P.3d 175 (Nev. 2001).

²²⁴ See, *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.”); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Contractors Ass’n of E. Pa.*, 6 F.3d at 1011 (3^d Cir. 1993); *Nevada Wildlife Alliance v. Department of Wildlife*, 497 P.3d 622 (Nev. 2021); *Rico v. Rodriguez*, 120 P. 3d 812 (Nev. 2005); *Tarango v. State Indus. Ins. System*, 25 P.3d 175 (Nev. 2001).

²²⁵ See, e.g., *Kadmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998) see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, (1985) (citations omitted); *Heller v. Doe*, 509 U.S. 312, 318-321 (1993) (Under rational basis standard, a legislative classification is accorded a strong presumption of validity); *Nevada Wildlife Alliance v. Department of Wildlife*, 497 P.3d 622 (Nev. 2021); *Rico v. Rodriguez*, 120 P. 3d 812 (Nev. 2005); *Tarango v. State Indus. Ins. System*, 25 P.3d 175 (Nev. 2001).

²²⁶ *Id.*; *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013), (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)); see e.g. *Nevada Wildlife Alliance v. Department of Wildlife*, 497 P.3d 622 (Nev. 2021); *Rico v. Rodriguez*, 120 P. 3d 812 (Nev. 2005); *Tarango v. State Indus. Ins. System*, 25 P.3d 175 (Nev. 2001).

²²⁷ *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *United States v. Timms*, 664 F.3d 436, 448-49 (4th Cir. 2012), cert. denied, 133 S. Ct. 189 (2012) (citing *Heller v. Doe*, 509 U.S. 312, 320-21 (1993)) (quotation marks and citation omitted); see e.g., *Nevada Wildlife Alliance v. Department of Wildlife*, 497 P.3d 622 (Nev. 2021); *Rico v. Rodriguez*, 120 P. 3d 812 (Nev. 2005); *Tarango v. State Indus. Ins. System*, 25 P.3d 175 (Nev. 2001).

²²⁸ *Heller v. Doe*, 509 U.S. 312, 321 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); see e.g., *Nevada Wildlife Alliance v. Department of Wildlife*, 497 P.3d 622 (Nev. 2021); *Rico v. Rodriguez*, 120 P. 3d 812 (Nev. 2005); *Tarango v. State Indus. Ins. System*, 25 P.3d 175 (Nev. 2001).

²²⁹ *Heller v. Doe*, 509 U.S. 312, 320 (1993); see, e.g., *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir

all legislation classifies its objects, differential treatment is justified by “any reasonably conceivable state of facts.”²³⁰

Under the federal standard of review, a court will presume the “legislation is valid and will sustain it if the classification drawn by the statute is rationally related to a legitimate [government] interest.”²³¹

A federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States (Firstline)*, is instructive and analogous to some of the issues in a small business program. The case is informative as to the use, estimation, and determination of goals (small business goals, including veteran preference goals) in a procurement under the Federal Acquisition Regulations (FAR).²³²

Firstline involved a solicitation that established a small business subcontracting goal requirement. In *Firstline*, the Transportation Security Administration (TSA) issued a solicitation for security screening services at the Kansas City Airport. The solicitation stated that the: “Government anticipates an overall Small Business goal of 40 percent,” and that “[w]ithin that goal, the government anticipates further small business goals of: Small, Disadvantaged business[:] 14.5 percent; Woman Owned[:] 5 percent; HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent.”²³³

The court applied the rational basis test in construing the challenge to the establishment by the TSA of a 40 percent small business participation goal as unlawful and irrational.²³⁴ The court stated it “cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis.”²³⁵

The court found that “an agency may rationally establish aspirational small business subcontracting goals for prospective offerors” Consequently, the court held one rational method by which the government may attempt to maximize small business participation (including veteran preference goals) is to establish a rough subcontracting goal for a given contract, and then allow potential contractors to compete in designing innovative ways to structure and maximize small business subcontracting within their proposals.²³⁶ The court, in an exercise of judicial restraint, found the “40 percent goal is a rational expression of the Government’s policy of affording small business concerns ... the maximum practicable

2012); see e.g., *Nevada Wildlife Alliance v. Department of Wildlife*, 497 P.3d 622 (Nev. 2021); *Rico v. Rodriguez*, 120 P. 3d 812 (Nev. 2005); *Tarango v. State Indus. Ins. System*, 25 P.3d 175 (Nev. 2001).

²³⁰ *Id.*

²³¹ *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Chance Mgmt., Inc. v. S. Dakota*, 97 F.3d 1107, 1114 (8th Cir. 1996); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); see also *Lawrence v. Texas*, 539 U.S. 558, 580, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (“Under our rational basis standard of review, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. . . . Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster.” (internal citations and quotations omitted)) (O’Connor, J., concurring); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1019 (8th Cir. 2012) (“Under rational basis review, the classification must only be rationally related to a legitimate government interest.”).

²³² 2012 WL 5939228 (Fed. Cl. 2012).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

opportunity to participate as subcontractors"²³⁷

4. Pending cases (at the time of this report) and informative recent decisions. There are recent court decisions and pending cases in the federal courts at the time of this report involving challenges to MBE/WBE/DBE programs and federal programs with minority and woman-owned business and social and economic disadvantaged business preferences that may potentially impact and are informative and instructive to the study, including the following:

i. Christian Bruckner et al. v. Joseph R. Biden Jr. et al., U.S. District Court for the Middle District of Florida, Case No. 8:22-cv-01582. filed July 13, 2022. Dismissed, 2023 WL 2744026 (March 31, 2023).

ii. Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the Small Business Administration, 993 F.3d 353, 2021 WL 2172181 (6th Cir. May 27, 2021).

iii. Greer’s Ranch Café v. Guzman, 2021 WL 2092995 (N.D. Tex. 5/18/21), U.S. District Court for the Northern District of Texas.

iv. Faust v. Vilsack, 2021 WL 2409729, US District Court, E.D. Wisconsin (June 10, 2021).

v. Wynn v. Vilsack, 2021 WL 2580678, (M.D. Fla. June 23, 2021), Case No. 3:21-cv-514-MMH-JRK, U.S. District Court for the Middle District of Florida.

vi. Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et al., 2023 WL 4633481 (July 19, 2023), U.S. District Court for the Eastern District of Tennessee, 2:20-cv-00041-DCLC-CRW.

vii. Mark One Electric Company, Inc. v. City of Kansas City, Missouri, 2022 WL 3350525 (8th Cir. 2022).

viii. Nuziard, et al. v. MBDA, et al., 2023 WL 3869323 (June 5, 2023), U.S. District Court for the N.D. of Texas, Fort Worth Division, Case No. 4:23-cv-00278. Complaint filed March 20, 2023.

The following summarizes the above listed pending cases and informative recent decisions:

i. Christian Bruckner et al. v. Joseph R. Biden Jr. et al., 2023 WL 27744026 (M.D. Fla. March 31, 2023), U.S. District Court for the Middle District of Florida, Case No. 8:22-cv-01582. filed July 13, 2022. Dismissed, 2023 WL 2744026 (March 31, 2023). Federal Defendants’ Motion to Dismiss Granted and Plaintiffs’ Motion for Preliminary Injunction Denied on March 31, 2023. Judgment entered on April 3, 2023.

The Complaint filed on July 13, 2022 alleges that on November 15, 2021, President Joe Biden signed into law the Infrastructure Investment and Jobs Act, a \$1.2 trillion spending bill to improve America’s infrastructure. As part of this bill, the Complaint alleges Congress authorized \$370 billion in new spending for roads, bridges, and other surface transportation projects. The Complaint asserts that Congress also implemented a set-aside, or quota, requiring that at least 10 percent of these

²³⁷ *Id.*

funds be reserved for certain “disadvantaged” small businesses. According to the White House, the Complaint alleges, the law reserves more than \$37 billion in contracts to be awarded to “small, disadvantaged business contractors.”

The Complaint asserts that Plaintiff Christian Bruckner cannot benefit from the program and compete for the projects because of his race and gender, that the \$37 billion fund is reserved for small businesses owned by certain minorities and women, and that Bruckner is a white male.

The Complaint alleges the Infrastructure Act sets an unlawful quota based on race and gender because at least 10 percent of all contracts for certain infrastructure projects must be awarded based on race and gender, that this quota is unconstitutional, that Defendants have no justification for the Act’s \$37 billion race-and-gender quota, and therefore the court should declare this alleged quota unconstitutional and enjoin its enforcement, “just as other courts have similarly enjoined other race-and-gender-based preferences in the American Rescue [Plan Act] against \$28.6 billion Restaurant Revitalization Fund (RRF) priority period; *Faust v. Vilsack*, 519 F. Supp. 3d 470 (E.D. Wis. 2021) (injunction against \$4 billion Farmer Loan Forgiveness program Plan Act. E.g., *Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021) (injunction).”

The Complaint alleges that Congress attempted to justify these race-and-gender classifications through findings of “race and gender discrimination” in the Infrastructure Act, “but none of these findings establish that Congress is attempting to remedy a specific and recent episode of intentional discrimination that it had a hand in.” The Complaint alleges that “because he is a white male, Plaintiff Bruckner and his business, PMC, cannot compete on an equal footing for contracts under the Infrastructure Act with businesses that are owned by women and certain racial minorities preferred by federal law.”

The Complaint alleges that the racial classifications under Section 11101(e)(2) & (3) of the Infrastructure Act are unconstitutional because they violate the equal protection guarantee in the United States Constitution, and that these racial classifications in the Infrastructure Act are not narrowly tailored to serve a compelling government interest. The Complaint alleges that the gender-based classification under Sections 11101(e)(2) & (3) of the Infrastructure Act is unconstitutional because it violates the equal protection guarantee in the United States Constitution. The Complaint asserts this gender-based classification is not supported by an exceedingly persuasive objective, and the discriminatory means employed are not substantially related to the achievement of that objective.

The Complaint requests the court: (a) enter a preliminary injunction removing all unconstitutional race and gender-based classification in Section 11101(e)(3) of the Infrastructure Act; (b) enter a declaratory judgment that the race- and gender-based classifications under Section 11101(e)(3) of the Infrastructure Act are unconstitutional; and (c) enter an order permanently enjoining Defendants from applying race- and gender-based classifications when awarding contracts under Section 11101(e)(3) of the Infrastructure Act.

The Plaintiffs filed in July 2022 an Amended Motion for Preliminary Injunction, which is pending. The federal Defendants filed a Reply in Opposition to the Motion for Preliminary Injunction on August 29, 2022. On September 27, 2022, the federal Defendants filed a Motion to Dismiss the Complaint, which is pending.

The court issued an Order on November 21, 2022 requesting the parties to address certain listed questions describing the administration and implementation process of the Federal DBE Program. In particular, the court requested the parties submit supplemental briefing describing the authorization of funds by Congress and explain how state and local recipients award federally funded contracts.

The court ordered the Plaintiffs may clarify whether the complaint challenges the Federal DBE Program as it applies to direct contracting with the federal government. The court also ordered the Defendants may file a statement certifying whether there are localities or federal agencies receiving funding from the Infrastructure Act that have set a DBE goal of 0 percent.

The parties responded on December 2, 2022. Bruckner filed a statement asserting that his complaint “challenges a single sentence in federal law: Section 11101(e)(3) of the Infrastructure Investment and Jobs Act, P.L. 117-58” and that his “requested remedy is therefore narrow and precise: an injunction preventing Defendants from enforcing and implementing this one sentence.” Plaintiffs’ Verified Complaint only challenges Section 11101(e)(3), which contains a \$37 billion race-and-gender preference.

The Defendants submitted a supplemental briefing describing the administration and implementation process of the Federal DBE Program and filed Declarations of DOT personnel attesting to the goals implemented by recipients. The Defendants also addressed: (a) how the DOT calculates and assesses whether recipients are fulfilling their DBE goals; (b) whether a recipient’s DBE goal influences the amount of federal funds awarded under the Act; (c) the race-neutral means used by recipients that employ only neutral means to award contracts; (d) whether recipients and prime contractors are aware of a bidder’s DBE status when determining whether to award a contract where a jurisdiction exclusively uses neutral means; (e) whether a subcontractor knows before bidding if the recipient or prime contractor is employing race- and gender-conscious or neutral means to award subcontracts; and (f) the certification process.

Order and Opinion in *Bruckner v. Biden*, 2023 WL 2744026 (March 31, 2023). The District Court on March 31, 2023 issued an Order that granted the Federal Defendants’ Motion to Dismiss and denied the Plaintiffs’ Motion for Preliminary Injunction without prejudice. Judgment was issued in favor of Defendants by the court on April 3, 2023. The Order of the court was based on lack of standing by the Plaintiffs.

The court stated: “Although the Plaintiffs raise compelling merits arguments based on the preliminary-injunction-stage record, they fail to demonstrate an injury-in-fact to satisfy Article III standing. Some recipients of the Infrastructure Act’s funds do not employ race- and gender-conscious means when awarding contracts. Others employ discriminatory means only with respect to some contracts. Because the Plaintiffs do not identify which contracts they intend to bid on, the Plaintiffs’ alleged harm is speculative and they fail to allege facts demonstrating a “certainly impending” “direct exposure to unequal treatment.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409, (2013); *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1280 (11th Cir. 2001). “Without subject-matter jurisdiction, I deny the motion for a preliminary injunction and dismiss the case without prejudice.”

The court held that the Plaintiffs fail to allege facts showing that they are “able and ready” to bid on Infrastructure Act-funded contracts. They also fail to allege facts, the court found, demonstrating that they will necessarily be denied equal treatment based on Bruckner’s race and gender if and when they bid. The court concluded that Plaintiffs therefore have not alleged an injury in fact.

Conclusion. The burden is on Bruckner and PMC to prove standing. Because the Plaintiffs failed to allege facts clearly demonstrating that they were able and ready to compete in a discriminatory scheme, the Plaintiffs failed to demonstrate standing. Accordingly, the Defendants’ motion to dismiss was granted, and this action was dismissed without prejudice. The Plaintiffs’ motion for a preliminary injunction was denied as moot.

ii. ***Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the Small Business Administration***, 993 F.3D 353, 2021 WL 2172181 (6th Cir. May 27, 2021), on appeal to Sixth Circuit Court of Appeals from decision by United States District Court, E.D. Tennessee, Northern Division, 2021 WL 2003552, which District Court issued an Order denying plaintiffs’ motion for temporary restraining order on May 19, 2021, and Order denying plaintiffs’ motion for preliminary injunction on May 25, 2021. The appeal was filed in Sixth Circuit Court of Appeals on May 20, 2021. The Plaintiffs applied to the Sixth Circuit for an Emergency Motion for Injunction Pending Appeal and to Expedite Appeal. The Sixth Circuit, two of the three judges on the three-judge panel, granted the motion to expedite the appeal and then decided and filed its Opinion on May 27, 2021. *Vitolo v. Guzman*, 2021 WL 2172181 (6th Cir. May 27, 2021).

Background and District Court memorandum opinion and order. On March 27, 2020, § 1102 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) created the Paycheck Protection Program (PPP), a \$349 billion federally guaranteed loan program for businesses distressed by the pandemic. On April 24, 2020, the Paycheck Protection Program and Health Care Enhancement Act appropriated an additional \$310 billion to the fund.

The District Court in this case said that PPP loans were not administered equally to all kinds of businesses, however. Congressional investigation revealed that minority-owned and women-owned businesses had more difficulty accessing PPP funds relative to other kinds of business (analysis noting that black-owned businesses were more likely to be denied PPP loans than white-owned businesses with similar application profiles due to outright lending discrimination, and that funds were more quickly disbursed to businesses in predominantly white neighborhoods). The court stated from the testimony to Congress that this was due in significant part to the lack of historical relationships between commercial lenders and minority-owned and women-owned businesses. The historical lack of access to credit, the court noted from the testimony, also meant that minority-owned and women-owned businesses tended to be in more financially precarious situations entering the pandemic, rendering them less able to weather an extended economic contraction of the sort COVID-19 unleashed.

Against this backdrop, on March 11, 2021, the President signed the American Rescue Plan Act of 2021 (ARPA). H.R. 1319, 117th Cong. (2021). As part of the ARPA, Congress appropriated \$28.6 billion to a Restaurant Revitalization Fund and tasked the administrator of the Small Business Administration (SBA) with disbursing funds to restaurants and other eligible entities that suffered COVID-19 pandemic-related revenue losses. *See Id.* § 5003. Under the ARPA, the administrator “shall award grants to eligible entities in the order in which applications are received by the

Administrator,” except that during the initial 21-day period in which the grants are awarded, the administrator shall prioritize awarding grants to eligible entities that are small business concerns owned and controlled by women, veterans, or socially and economically disadvantaged small business concerns.

On April 27, 2021, the SBA announced that it would open the application period for the RRF on May 3, 2021. The SBA announcement also stated, consistent with the ARPA, that “[f]or the first 21 days that the program is open, the SBA will prioritize funding applications from businesses owned and controlled by women, veterans, and socially and economically disadvantaged individuals.”

Antonio Vitolo is a white male who owns and operates Jake’s Bar and Grill, LLC in Harriman, Tennessee. Vitolo applied for a grant from the RRF through the SBA on May 3, 2021, the first day of the application period. The SBA emailed Vitolo and notified him that “[a]pplicants who have submitted a non-priority application will find their application remain in a Review status while priority applications are processed during the first 21 days.”

On May 12, 2021, Vitolo and Jake’s Bar and Grill initiated the present action against Defendant Isabella Casillas Guzman, the administrator of the SBA. In their complaint, Vitolo and Jake’s Bar and Grill assert that the ARPA’s 21-day priority period violates the United States Constitution’s Equal Protection Clause and Due Process Clause because it impermissibly grants benefits and priority consideration based on race and gender classifications.

Based on allegations in the complaint and averments made in Vitolo’s sworn declaration dated May 11, 2021, Vitolo and Jake’s Bar and Grill requested that the Court enter: (1) a temporary restraining order prohibiting the SBA from paying out grants from the Restaurant Revitalization Fund, unless it processes applications in the order they were received without regard to the race or gender of the applicant; (2) a temporary injunction requiring the SBA to process applications and pay grants in the order received regardless of race or gender; (3) a declaratory judgment that race-and gender-based classifications under § 5003 of the ARPA are unconstitutional; and (4) an order permanently enjoining the SBA from applying race- and gender-based classifications in determining eligibility and priority for grants under § 5003 of the ARPA.

Strict scrutiny. The parties agreed that this system is subject to strict scrutiny. Accordingly, the District Court found that whether Plaintiffs are likely to succeed on the merits of their race-based equal-protection claims turns on whether Defendant has a compelling government interest in using a race-based classification, and whether that classification is narrowly tailored to that interest. Here, the government asserts that it has a compelling interest in “remedying the effect of past or present racial discrimination” as related to the formation and stability of minority-owned businesses.

Compelling interest found by District Court. The court found that over the past year, Congress has gathered myriad evidence suggesting that small businesses owned by minorities (including restaurants, which have a disproportionately high rate of minority ownership) have suffered more severely than other kinds of businesses during the COVID-19 pandemic, and that the government’s early attempts at general economic stimulus—i.e., the PPP—disproportionately failed to help those businesses directly because of historical discrimination patterns. To the extent that Plaintiffs argue that evidence racial disparity or disparate impact alone is not enough to support a compelling

government interest, the court noted Congress also heard evidence that racial bias plays a direct role in these disparities.

At this preliminary stage, the court found that the government has a compelling interest in remediating past racial discrimination against minority-owned restaurants through § 5003 of the ARPA and in ensuring public relief funds are not perpetuating the legacy of that discrimination. At the very least, the court stated Congress had evidence before it suggesting that its initial COVID-relief program, the PPP, disproportionately failed to reach minority-owned businesses due (at least in part) to historical lack of relationships between banks and minority-owned businesses, itself a symptom of historical lending discrimination.

The court cited the Supreme Court decision in *Croson*, 488 U.S. at 492 (“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.”); and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1169 (10th Cir. 2000) (“The government’s evidence is particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied.”); *DynaLantic Corp v. U.S. Dep’t of Def.*, 885 F. Supp. 2d 237, 258–262 (D.D.C. 2012) (rejecting facial challenge to the SBA’s 8(a) program in part because “the government [had] presented significant evidence on race-based denial of access to capital and credit”).

The court said that the PPP was stymied in reaching minority-owned businesses because historical patterns of discrimination are reflected in the present lack of relationships between minority-owned businesses and banks. This, according to the court, caused minority-owned businesses to enter the pandemic with more financial precarity, and therefore to falter at disproportionately higher rates as the pandemic has unfolded. The court found that Congress has a compelling interest in remediating the present effects of historical discrimination on these minority-owned businesses, especially to the extent that the PPP disproportionately failed those businesses because of factors clearly related to that history. Plaintiff, the court held, has not rebutted this initial showing of a compelling interest, and therefore has not shown a likelihood of success on the merits in this respect.

Narrow tailoring found by District Court. The court then addressed the narrow tailoring requirement under the strict scrutiny analysis, concluding that: “Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still ‘constrained in how it may pursue that end: [T]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.’”

Section 5003 of the ARPA is a one-time grant program with a finite amount of money that prioritizes small restaurants owned by women and socially and economically disadvantaged individuals because Congress, the court concluded, had evidence before it showing that those businesses were inadequately protected by earlier COVID-19 financial relief programs. While individuals from certain racial minorities are rebuttably presumed to be “socially and economically disadvantaged” for purposes of § 5003, the court found Defendant correctly points out that the presumption does not exclude individuals like Vitolo from being prioritized, and that the prioritization does not mean individuals like Vitolo cannot receive relief under this program. Section 5003 is therefore time-

limited, fund-limited, not absolutely constrained by race during the priority period, and not constrained to the priority period.

And while Plaintiffs asserted during the temporary restraining order (TRO) hearing that the SBA is using race as an absolute basis for identifying “socially and economically disadvantaged” individuals, the court pointed out that assertion relies essentially on speculation rather than competent evidence about the SBA’s processing system. The court therefore held it cannot conclude on the record before it that Plaintiffs are likely to show that Defendant’s implementation of § 5003 is not narrowly tailored to the compelling interest at hand.

In support of Plaintiffs’ motion, they argue that the priority period is not narrowly tailored to achieving a compelling interest because it does not address “any alleged inequities or past discrimination.” However, the court said it has already addressed the inequities that were present in the past relief programs. At the hearing, Plaintiffs argued that a better alternative would have been to prioritize applicants who did not receive PPP funds or applicants who had “a weaker income statement” or “a weaker balance sheet.” But, the court noted, “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” only “serious, good faith consideration of workable race-neutral alternatives” to promote the stated interest. The government received evidence that the race-neutral PPP was tainted by lingering effects of past discrimination and current racial bias.

Accordingly, the court stated the race-neutral approach that the government found to be tainted did not further its compelling interest in ensuring that public funds were not disbursed in a manner that perpetuated racial discrimination. The court found the government not only considered but actually used race-neutral alternatives during prior COVID-19 relief attempts. It was precisely the failure of those race-neutral programs to reach all small businesses equitably, that the court said appears to have motivated the priority period at issue here.

Plaintiffs argued that the priority period is simultaneously overinclusive and underinclusive based on the racial, ethnic, and cultural groups that are presumed to be “socially disadvantaged.” However, the court stated the race-based presumption is just that: a presumption. Counsel for the government explained at the hearing, consistent with other evidence before the court, that any individual who felt they met § 5003’s broader definition of “socially and economically disadvantaged” was free to check that box on the application. (“[E]ssentially all that needs to be done is that you need to self-certify that you fit within that standard on the application, ... you check that box.”) For the sake of prioritization, the court noted there is no distinction between those who were presumptively disadvantaged and those who self-certified as such. Accordingly, the court found the priority period is not underinclusive in a way that defeats narrow tailoring.

Further, according to the court, the priority period is not overinclusive. Prior to enacting the priority period, the government considered evidence relative to minority business owners generally as well as data pertaining to specific groups. It is also important to note, the court stated, that the RRF is a national relief program. As such, the court found it is distinguishable from other regional programs that the Supreme Court found to be overinclusive.

The inclusion in the presumption, the court pointed out, for example, of Alaskan and Hawaiian Natives is quite logical for a program that offers relief funds to restaurants in Alaska and Hawaii.

This is not like the racial classification in *Croson*, the court said, which was premised on the interest of compensating Black contractors for past discrimination in Richmond, Virginia, but would have extended remedial relief to “an Aleut citizen who moves to Richmond tomorrow.” Here, the court found any narrowly tailored racial classification must necessarily account for the national scale of prior and present COVID-19 programs.

The District Court noted that the Supreme Court has historically declined to review sex- or gender-based classifications under strict scrutiny. The District Court pointed out the Supreme Court held, “[t]o withstand constitutional challenge, ... classifications by gender must serve important governmental objective and must be substantially related to achievement of those objectives. ...” “[A] gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.” However, remedying past discrimination cannot serve as an important governmental interest when there is no empirical evidence of discrimination within the field being legislated.

Intermediate scrutiny applied to women-owned businesses found by District Court. As with the strict-scrutiny analysis, the court found that Congress had before it evidence showing that woman-owned businesses suffered historical discrimination that exposed them to greater risks from an economic shock like COVID-19, and that they received less benefit from earlier federal COVID-19 relief programs. Accordingly, the court held that Defendant has identified an important governmental interest in protecting women-owned businesses from the disproportionately adverse effects of the pandemic and failure of earlier federal relief programs. The District Court therefore stated it cannot conclude that Plaintiffs are likely to succeed on their gender-based equal-protection challenge in this respect.

To be constitutional, the court concluded, a particular measure including a gender distinction must also be substantially related to the important interest it purports to advance. “The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.”

Here, as above, the court found § 5003 of the ARPA is a one-time grant program with a finite amount of money that prioritizes small restaurants owned by veterans, women, and socially and economically disadvantaged individuals because Congress had evidence before it showing that those businesses were disproportionately exposed to harm from the COVID-19 pandemic and inadequately protected by earlier COVID-19 financial relief programs. The prioritization of women-owned businesses under § 5003, the court found, is substantially related to the problem Congress sought to remedy because it is directly aimed at ameliorating the funding gap between women-owned and men-owned businesses that has caused the former to suffer from the COVID-19 pandemic at disproportionately higher rates. Accordingly, on the record before it, the District Court held it cannot conclude that Plaintiffs are likely to succeed on the merits of their gender-based equal-protection claim.

The court stated: [W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated.” However, the District Court did not conclude that Plaintiffs’ constitutional rights are likely being

violated. Therefore, the court held Plaintiffs are likely not suffering any legally impermissible irreparable harm.

The District Court said that if it were to enjoin distributions under § 5003 of the ARPA, others would certainly suffer harm, as these COVID-19 relief grants—which are intended to benefit businesses that have suffered disproportionate harm—would be even further delayed. In the constitutional context, the court found that whether an injunction serves the public interest is inextricably intertwined with whether the plaintiff has shown a likelihood of success on the merits. Plaintiff, the court held, has not demonstrated a likelihood of success on the merits. The District Court found that therefore it cannot conclude the public interest would be served by enjoining disbursement of funds under § 5003 of the ARPA.

Denial by District Court of Plaintiffs’ motion for preliminary injunction. Subsequently, the court addressed the Plaintiffs’ motion for a preliminary injunction. The court found its denial of Plaintiffs’ motion for a TRO addresses the same factors that control the preliminary-injunction analysis, and the court incorporated that reasoning by reference to this motion.

The court received from the Defendant additional materials from the Congressional record that bear upon whether a compelling interest justifies the race-based priority period at issue and an important interest justifies the gender-based priority period at issue. Defendant’s additional materials from the Congressional record the court found strengthen the prior conclusion that Plaintiffs are unlikely to succeed on the merits.

For example, a Congressional committee received the following testimony, which linked historical race and gender discrimination to the early failures of the PPP: “As noted by my fellow witnesses, closed financial networks, longstanding financial institutional biases, and underserved markets work against the efforts of women and minority entrepreneurs who need capital to start up, operate, and grow their businesses. While the bipartisan CARES Act got money out the door quickly [through the PPP] and helped many small businesses, the distribution channels of the first tranche of the funding underscored how the traditional financial system leaves many small businesses behind, particularly women- and minority-owned businesses.”

There was a written statement noting that “[m]inority- and women-owned business owners who lack relationships with banks or other financial institutions participating in PPP lacked early access to the program;” testimony observing that historical lack of access to capital among minority- and women-owned businesses contributed to significantly higher closure rates among those businesses during the COVID-19 pandemic, and that the PPP disproportionately failed to reach those businesses; and evidence that lending discrimination against people of color continues to the present and contemporary wealth distribution is linked to the intergenerational impact of historical disparities in credit access.

The court stated it could not conclude Plaintiffs are likely to succeed on the merits. The court held that the points raised in the parties’ briefing on Plaintiff’s motion for preliminary injunction have not impacted the court’s analysis with respect to the remaining preliminary injunction factors. Accordingly, for the reasons stated in the court’s memorandum opinion denying Plaintiff’s motion for a temporary restraining order, a preliminary injunction the court held is not warranted and is denied.

Appeal by Plaintiff to Sixth Circuit Court of Appeals. The Plaintiffs appealed the court’s decision to the Sixth Circuit Court of Appeals. Vitolo had asked for a temporary restraining order and ultimately a preliminary injunction that would prohibit the government from handing out grants based on the applicants’ race or sex. Vitolo asked the District Court to enjoin the race and sex preferences until his appeal was decided. The District Court denied that motion too. Finally, the District Court denied the motion for a preliminary injunction. Vitolo also appealed that order.

Emergency motion for injunction pending appeal and to expedite appeal granted by Sixth Circuit. The Plaintiffs applied to the Sixth Circuit for an Emergency Motion for Injunction Pending Appeal and to Expedite Appeal. The Sixth Circuit, two of the three judges on the three-judge panel, granted the motion to expedite the appeal and then decided and filed its opinion on May 27, 2021. *Vitolo v. Guzman*, 2021 WL 2172181 (6th Cir. May 27, 2021). The Sixth Circuit stated that this case is about whether the government can allocate limited coronavirus relief funds based on the race and sex of the applicants. The Court held that it cannot, and thus enjoined the government from using “these unconstitutional criteria when processing” Vitolo’s application.

Standing and mootness. The Sixth Circuit agreed with the District Court that Plaintiffs had standing. The Court rejected the Defendant Government’s argument that the Plaintiffs’ claims were moot because the 21-day priority phase of the grant program ended.

Preliminary injunction. Application of strict scrutiny by Sixth Circuit. Vitolo challenges the SBA’s use of race and sex preferences when distributing Restaurant Revitalization Funds. The government concedes that it uses race and sex to prioritize applications, but it contends that its policy is still constitutional. The Court focused its strict scrutiny analysis under the factors in determining whether a preliminary injunction should issue on the first factor the is typically dispositive: the factor of Plaintiffs’ likelihood of success on the merits.

Compelling interest rejected by Sixth Circuit. The Court states that government has a compelling interest in remedying past discrimination only when three criteria are met: First, the policy must target a specific episode of past discrimination. It cannot rest on a “generalized assertion that there has been past discrimination in an entire industry.” Second, there must be evidence of intentional discrimination in the past. Third, the government must have had a hand in the past discrimination it now seeks to remedy. The Court said that if the government “show[s] that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of [a] local ... industry,” then the government can act to undo the discrimination. But, the Court notes, if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal-protection principles.

The government’s asserted compelling interest, the Court found, meets none of these requirements. First, the government points generally to societal discrimination against minority business owners. But it does not identify specific incidents of past discrimination. And, the Court said, since “an effort to alleviate the effects of societal discrimination is not a compelling interest,” the government’s policy is not permissible.

Second, the government offers little evidence of past intentional discrimination against the many groups to whom it grants preferences. Indeed, the schedule of racial preferences detailed in the

government's regulation—preferences for Pakistanis but not Afghans; Japanese but not Iraqis; Hispanics but not Middle Easterners—is not supported by any record evidence at all.

When the government promulgates race-based policies, it must operate with a scalpel. And its cuts must be informed by data that suggest intentional discrimination. The broad statistical disparities cited by the government, according to the Court, are not nearly enough. But when it comes to general social disparities, the Court stated, there are too many variables to support inferences of intentional discrimination.

Third, the Court found the government has not shown that it participated in the discrimination it seeks to remedy. When opposing the plaintiffs' motions at the District Court, the government identified statements by members of Congress as evidence that race- and sex-based grant funding would remedy past discrimination. But rather than telling the court what Congress learned and how that supports its remedial policy, the Court stated it said only that Congress identified a "theme" that "minority- and women-owned businesses" needed targeted relief from the pandemic because Congress's "prior relief programs had failed to reach" them. A vague reference to a "theme" of governmental discrimination, the Court said is not enough.

To satisfy equal protection, the Court said, government must identify "prior discrimination by the governmental unit involved" or "passive participa[tion] in a system of racial exclusion." An observation that prior, race-neutral relief efforts failed to reach minorities, the Court pointed out is no evidence at all that the government enacted or administered those policies in a discriminatory way. For these reasons, the Court concluded that the government lacks a compelling interest in awarding Restaurant Revitalization Funds based on the race of the applicants. And as a result, the policy's use of race violates equal protection.

Narrow tailoring rejected by Sixth Circuit. Even if the government had shown a compelling state interest in remedying some specific episode of discrimination, the discriminatory disbursement of Restaurant Revitalization Funds is not narrowly tailored to further that interest. For a policy to survive narrow-tailoring analysis, the government must show "serious, good faith consideration of workable race-neutral alternatives." This requires the government to engage in a genuine effort to determine whether alternative policies could address the alleged harm. And, in turn, a court must not uphold a race-conscious policy unless it is "satisfied that no workable race-neutral alternative" would achieve the compelling interest. In addition, a policy is not narrowly tailored if it is either overbroad or underinclusive in its use of racial classifications.

Here, the Court found that the government could have used any number of alternative, nondiscriminatory policies, but it failed to do so. For example, the court noted the government contends that minority-owned businesses disproportionately struggled to obtain capital and credit during the pandemic. But, the Court stated, an "obvious" race-neutral alternative exists: the government could grant priority consideration to all business owners who were unable to obtain needed capital or credit during the pandemic.

Or, the Court said, consider another of the government's arguments. It contends that earlier coronavirus relief programs "disproportionately failed to reach minority-owned businesses." But, the Court found a simple race-neutral alternative exists again: the government could simply grant

priority consideration to all small business owners who have not yet received coronavirus relief funds.

Because these race-neutral alternatives exist, the Court held the government's use of race is unconstitutional. Aside from the existence of race-neutral alternatives, the government's use of racial preferences, according to the Court, is both overbroad and underinclusive. The Court held this is also fatal to the policy.

The government argues its program is not underinclusive because people of all colors can count as suffering "social disadvantage." But, the Court pointed out, there is a critical difference between the designated races and the non-designated races. The designated races get a presumption that others do not. The government argues its program is not underinclusive because people of all colors can count as suffering "social disadvantage." But, the Court said, there is a critical difference between the designated races and the non-designated races. The designated races get a presumption that others do not.

The government's policy, the Court found, is "plagued" with other forms of under inclusivity. The Court considered the requirement that a business must be at least 51 percent owned by women or minorities. How, the Court asked, does that help remedy past discrimination? Black investors may have small shares in lots of restaurants, none greater than 51 percent. But does that mean those owners did not suffer economic harm from racial discrimination? The Court noted that the restaurant at issue, Jake's Bar and Grill, is 50 percent owned by a Hispanic female. It is far from obvious, the Court stated, why that 1 percent difference in ownership is relevant, and the government failed to explain why that cutoff relates to its stated remedial purpose.

The dispositive presumption enjoyed by designated minorities, the Court found, bears strikingly little relation to the asserted problem the government is trying to fix. For example, the Court pointed out the government attempts to defend its policy by citing a study showing it was harder for Black business owners to obtain loans from Washington, D.C., banks. Rather than designating those owners as the harmed group, the Court noted, the government relied on the SBA's 2016 regulation granting racial preferences to vast swaths of the population. For example, individuals who trace their ancestry to Pakistan and India qualify for special treatment. But those from Afghanistan, Iran, and Iraq do not. Those from China, Japan, and Hong Kong all qualify. But those from Tunisia, Libya, and Morocco do not. The Court held this "scattershot approach" does not conform to the narrow tailoring strict scrutiny requires.

Women-owned businesses. Intermediate scrutiny applied by Sixth Circuit. The plaintiffs also challenge the government's prioritization of women-owned restaurants. Like racial classifications, sex-based discrimination is presumptively invalid. Government policies that discriminate based on sex cannot stand unless the government provides an "exceedingly persuasive justification." Government policies that discriminate based on sex cannot stand unless the government provides an "exceedingly persuasive justification." To meet this burden, the government must prove that (1) a sex-based classification serves "important governmental objectives," and (2) the classification is "substantially and directly related" to the government's objectives. The government, the Court held, fails to satisfy either prong. The Court found it failed to show that prioritizing women-owned restaurants serves an important governmental interest. The government claims an interest in "assisting with the economic recovery of women-owned businesses, which were 'disproportionately

affected' by the COVID-19 pandemic." But, the Court stated, while remedying specific instances of past sex discrimination can serve as a valid governmental objective, general claims of societal discrimination are not enough.

Instead, the Court said, to have a legitimate interest in remedying sex discrimination, the government first needs proof that discrimination occurred. Thus, the government must show that the sex being favored "actually suffer[ed] a disadvantage" as a result of discrimination in a specific industry or field. Without proof of intentional discrimination against women, the Court held, a policy that discriminates on the basis of sex cannot serve a valid governmental objective.

Additionally, the Court found, the government's prioritization system is not "substantially related to" its purported remedial objective. The priority system is designed to fast-track applicants hardest hit by the pandemic. Yet under the Act, the Court said, all women-owned restaurants are prioritized—even if they are not "economically disadvantaged." For example, the Court noted, that whether a given restaurant did better or worse than a male-owned restaurant next door is of no matter—as long as the restaurant is at least 51 percent women-owned and otherwise meets the statutory criteria, it receives priority status. Because the government made no effort to tailor its priority system, the Court concluded it cannot find that the sex-based distinction is "substantially related" to the objective of helping restaurants disproportionately affected by the pandemic.

Ruling by Sixth Circuit. The Court held that plaintiffs are entitled to an injunction pending appeal, thus reversing the District Court decision. Since the government failed to justify its discriminatory policy, the Court found that plaintiffs likely will win on the merits of their constitutional claim. And, the Court stated, similar to most constitutional cases, that is dispositive here.

The Court ordered the government to fund the Plaintiffs' grant application, if approved, before all later-filed applications, without regard to processing time or the applicants' race or sex. The government, however, may continue to give veteran-owned restaurants priority in accordance with the law. The Court held the preliminary injunction shall remain in place until this case is resolved on the merits and all appeals are exhausted.

Dissenting opinion. One of the three judges filed a dissenting opinion.

Amended complaint and second emergency motion for a temporary restraining order and preliminary injunction. The Plaintiffs on June 1, 2021, filed an amended complaint in the District Court adding Additional Plaintiffs. Additional Plaintiffs, who were not involved in the initial motion for temporary restraining order, on June 2, 2021 filed a second emergency motion for a temporary restraining order and preliminary injunction. The court, in its order issued on June 10, 2021, found based on evidence submitted by Defendants that the allegedly wrongful behavior harming the Additional Plaintiffs cannot reasonably be expected to recur, and therefore the Additional Plaintiffs' claims are moot.

The court thus denied the Additional Plaintiffs' motion for temporary restraining order and preliminary injunction. The court also ordered the Defendant Government to file a notice with the court if and/or when Additional Plaintiffs' applications have been funded, and SBA decides to resume processing of priority applications.

The Sixth Circuit issued a briefing schedule on June 4, 2021 to the parties that requires briefs on the merits of the appeal to be filed in July and August 2021. Subsequently, on July 14, 2021, the Plaintiffs-Appellants filed a motion to dismiss the appeal voluntarily that was supported and jointly agreed to by the Defendant-Appellee stating that Plaintiffs-Appellants have received their grant from Defendant-Appellee. The Court granted the motion and dismissed the appeal, terminating the case.

iii. Greer’s Ranch Café v. Guzman, 540 F. Supp. 3d 638, 2021 WL 2092995 (N.D. Tex. May 18, 2021). Plaintiff Philip Greer owns and operates Plaintiff Greer’s Ranch Café—a restaurant which lost nearly \$100,000 in gross revenue during the COVID-19 pandemic (collectively, Plaintiffs). Greer sought monetary relief under the \$28.6 billion RRF created by the ARPA and administered by the SBA. See American Rescue Plan Act of 2021, Pub. L. No. 117-2 § 5003. Greer prepared an application on behalf of his restaurant and is eligible for a grant from the RRF, but has not applied because he is barred from consideration altogether during the program’s first 21 days from May 3 to May 24, 2021.

During that window, ARPA directed the SBA to “take such steps as necessary” to prioritize eligible restaurants “owned and controlled” by “women,” by “veterans,” and by those “socially and economically disadvantaged.” ARPA incorporates the definitions for these prioritized small business concerns from prior-issued statutes and SBA regulations.

To effectuate the prioritization scheme, SBA announced that, during the program’s first 21 days, it “will accept applications from all eligible applicants, but only process and fund priority group applications”—namely, applications from those priority-group applicants listed in ARPA. Priority-group “[a]pplicants must self-certify on the application that they meet [priority-group] eligibility requirements” as “an eligible small business concern owned and controlled by one or more women, veterans, and/or socially and economically disadvantaged individuals.”

Plaintiffs sued Defendants SBA and Isabella Casillas Guzman, in her official capacity as administrator of SBA. Shortly thereafter, Plaintiffs moved for a TRO, enjoining the use of race and sex preferences in the distribution of the RRF.

Substantial likelihood of success on the merits. Standing. Equal protection claims. The court first held that the Plaintiffs had standing to proceed, and then addressed the likelihood of success on the merits of their equal protection claims. As to race-based classifications, Plaintiffs challenged SBA’s implementation of the “socially disadvantaged group” and “socially disadvantaged individual” race-based presumption and definition from SBA’s Section 8(a) government-contract-procurement scheme into the RRF-distribution-priority scheme as violative of the Equal Protection Clause. Defendants argued the race-conscious rules serve a compelling interest and are narrowly tailored, satisfying strict scrutiny.

The parties agreed strict scrutiny applies where government imposes racial classifications, like here, where the RRF prioritization scheme incorporates explicit racial categories from Section 8(a). Under strict scrutiny, the court stated, government must prove a racial classification is “narrowly tailored” and “furthers compelling governmental interests.”

Defendants propose as the government’s compelling interest “remedying the effects of past and present discrimination” by “supporting small businesses owned by socially and economically disadvantaged small business owners ... who have borne an outsized burden of economic harms of [the] COVID-19 pandemic.” To proceed based on this interest, the court said, Defendants must provide a “strong basis in evidence for its conclusion that remedial action was necessary.”

As its strong basis in evidence, Defendants point to the factual findings supporting the implementation of Section 8(a) itself in removing obstacles to government contract procurement for minority-owned businesses, including House Reports in the 1970s and 1980s and a D.C. District Court case discussing barriers for minority business formation in the 1990s and 2000s. The court recognized the “well-established principle about the industry-specific inquiry required to effectuate Section 8(a)’s standards.” Thus, the court looked to Defendants’ industry-specific evidence to determine whether the government has a “strong basis in evidence to support its conclusion that remedial action was necessary.”

According to Defendants, “Congress has heard a parade of evidence offering support for the priority period prescribed by ARPA.” The Defendants’ evidence was summarized by the court as follows:

- A House Report specifically recognized that “underlying racial, wealth, social, and gender disparities are exacerbated by the pandemic,” that “[w]omen—especially mothers and women of color—are exiting the workforce at alarming rates,” and that “eight out of ten minority-owned businesses are on the brink of closure;”
- Expert testimony describing how “[b]usinesses headed by people of color are less likely to have employees, have fewer employees when they do, and have less revenue compared to white-owned businesses” because of “structural inequities resulting from less wealth compared to whites who were able to accumulate wealth with the support of public policies,” and that having fewer employees or lower revenue made COVID-related loans to those businesses less lucrative for lenders;
- Expert testimony explaining that “businesses with existing conventional lending relationships were more likely to access PPP funds quickly and efficiently,” and that minorities are less likely to have such relationships with lenders due to “pre-existing disparities in access to capital;”
- House Committee on Small Business Chairwoman Velázquez’s evidence offered into the record showing that “[t]he COVID-19 public health and economic crisis has disproportionately affected Black, Hispanic, and Asian-owned businesses, in addition to women-owned businesses” and that “minority-owned and women-owned businesses were particularly vulnerable to COVID-19, given their concentration in personal services firms, lower cash reserves, and less access to credit;”
- Witness testimony that emphasized the “[u]nderrepresentation by women and minorities in both funds and in small businesses accessing capital” and noted that “[t]he amount of startup capital that a Black entrepreneur has versus a White entrepreneur is about 1/36th;”
- Other expert testimony noting that in many cases, minority-owned businesses struggled to access earlier COVID-19 relief funding, such as PPP loans, “due to the heavy reliance on large banks, with whom they have had historically poor relationships;”

- Evidence presented at other hearing showing that minority- and women-owned business lack access to capital and credit generally, and specifically suffered from inability to access earlier COVID-19 relief funds and also describing “long-standing structural racial disparities in small business ownership and performance;” and
- A statement of the Center for Responsible Lending describing present-day “overtly discriminatory practices by lenders” and “facially neutral practices with disparate effects” that deprive minority-owned businesses of access to capital.

This evidence, the court found, “largely falters for the same reasoning outlined above—it lacks the industry-specific inquiry needed to support a compelling interest for a government-imposed racial classification.” The court, quoting the *Croson* decision, stated that while it is mindful of these statistical disparities and expert conclusions based on those disparities, “[d]efining these sorts of injuries as ‘identified discrimination’ would give ... governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.”

Thus, the court concluded that the government failed to prove that it likely has a compelling interest in “remedying the effects of past and present discrimination” in the restaurant industry during the COVID-19 pandemic. For the same reason, the court found that Defendants have failed to show an “important governmental objective” or exceedingly persuasive justification necessary to support a sex-based classification.

Having concluded Defendants lack a compelling interest or persuasive justification for their racial and gender preferences, the court stated it need not address whether the RRF is related to those particular interests. Accordingly, the Court held that Plaintiffs are likely to succeed on the merits of their claim that Defendants’ use of race-based and sex-based preferences in the administration of the RRF violates the Equal Protection Clause of the Constitution.

Conclusion. The court granted Plaintiffs’ motion for temporary restraining order, and enjoins Defendants to process Plaintiffs’ application for an RRF grant.

Subsequently, the Plaintiffs filed a Notice of Dismissal without prejudice on May 19, 2021.

iv. Faust v. Vilsack, 519 F. Supp. 3d 470, 2021 WL 2409729, US District Court, E.D. Wisconsin (June 10, 2021). This is a Federal District Court decision that on June 10, 2021 granted Plaintiffs’ motion for a temporary restraining order holding the federal government’s use of racial classifications in awarding funds under the loan-forgiveness program violated the Equal Protection Clause of the U.S. Constitution.

Background. Twelve white farmers, who resided in nine different states, including Wisconsin, brought this action against Secretary of Agriculture and Administrator of Farm Service Agency (FSA) seeking to enjoin United States Department of Agriculture (USDA) officials from implementing loan-forgiveness program for farmers and ranchers under Section 1005 of the ARPA by asserting eligibility to participate in program based solely on racial classifications violated equal protection. Plaintiffs/Farmers filed a motion for temporary restraining order.

The District Court granted the motion for a temporary restraining order.

The USDA describes how the loan-forgiveness plan will be administered on its website. It explains, “Eligible Direct Loan borrowers will begin receiving debt relief letters from FSA in the mail on a rolling basis, beginning the week of May 24. After reviewing closely, eligible borrowers should sign the letter when they receive it and return to FSA.” It advises that, in June 2021, the FSA will begin to process signed letters for payments, and “about three weeks after a signed letter is received, socially disadvantaged borrowers who qualify will have their eligible loan balances paid and receive a payment of 20 percent of their total qualified debt by direct deposit, which may be used for tax liabilities and other fees associated with payment of the debt.”

Application of strict scrutiny standard. The court noted Defendants assert that the government has a compelling interest in remedying its own past and present discrimination and in assuring that public dollars drawn from the tax contributions of all citizens do not serve to finance the evil of private prejudice. “The government has a compelling interest in remedying past discrimination only when three criteria are met.” (*Citing, Vitolo*, F.3d at, 2021 WL 2172181, at *4; *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion).

The court stated the Sixth Circuit recently summarized the three requirements as follows:

“First, the policy must target a specific episode of past discrimination. It cannot rest on a ‘generalized assertion that there has been past discrimination in an entire industry.’ *J.A. Croson Co.*, 488 U.S. at 498, 109.”

“Second, there must be evidence of intentional discrimination in the past. *J.A. Croson Co.*, 488 U.S. at 503, 109 S.Ct. 706. Statistical disparities don’t cut it, although they may be used as evidence to establish intentional discrimination”

“Third, the government must have had a hand in the past discrimination it now seeks to remedy. So if the government ‘shows that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of a local industry,’ then the government can act to undo the discrimination. *J.A. Croson Co.*, 488 U.S. at 492, 109 S.Ct. 706. But if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal protection principles.”

The court found that “Defendants have not established that the loan-forgiveness program targets a specific episode of past or present discrimination. Defendants point to statistical and anecdotal evidence of a history of discrimination within the agricultural industry.... But Defendants cannot rely on a ‘generalized assertion that there has been past discrimination in an entire industry’ to establish a compelling interest.” *Citing, J.A. Croson Co.*, 488 U.S. at 498; *see also Parents Involved*, 551 U.S. at 731, (plurality opinion) (“remedying past societal discrimination does not justify race-conscious government action”). The court pointed out “Defendants’ evidence of more recent discrimination includes assertions that the vast majority of funding from more recent agriculture subsidies and pandemic relief efforts did not reach minority farmers and statistical disparities.”

The court concluded that: “Aside from a summary of statistical disparities, Defendants have no evidence of intentional discrimination by the USDA in the implementation of the recent agriculture subsidies and pandemic relief efforts.” “An observation that prior, race-neutral relief efforts failed to reach minorities is no evidence at all that the government enacted or administered those policies in

a discriminatory way.” *Citing, Vitolo*, 2021 WL 2172181, at *5. The court held “Defendants have failed to establish that it has a compelling interest in remedying the effects of past and present discrimination through the distribution of benefits on the basis of racial classifications.”

In addition, the court found “Defendants have not established that the remedy is narrowly tailored. To do so, the government must show “serious, good faith consideration of workable race-neutral alternatives.” *Citing, Grutter v. Bollinger*, 539 U.S. 306, 339, (2003). Defendants contend that Congress has unsuccessfully implemented race-neutral alternatives for decades, but the court concluded, “they have not shown that Congress engaged “in a genuine effort to determine whether alternative policies could address the alleged harm” here. *Citing, Vitolo*, 2021 WL 2172181, at *6.

The court stated: “The obvious response to a government agency that claims it continues to discriminate against farmers because of their race or national origin is to direct it to stop: it is not to direct it to intentionally discriminate against others on the basis of their race and national origin.”

The court found “Congress can implement race-neutral programs to help farmers and ranchers in need of financial assistance, such as requiring individual determinations of disadvantaged status or giving priority to loans of farmers and ranchers that were left out of the previous pandemic relief funding. It can also provide better outreach, education, and other resources. But it cannot discriminate on the basis of race.” On this record, the court held, “Defendants have not established that the loan forgiveness program under Section 1005 is narrowly tailored and furthers compelling government interests.”

Conclusion. The court found a nationwide injunction is appropriate in this case. “To ensure that Plaintiffs receive complete relief and that similarly-situated nonparties are protected, a universal temporary restraining order in this case is proper.”

The court on July 6, 2021 issued an order that stayed the Plaintiffs’ motion for a preliminary injunction, holding that the District Court in *Wynn v. Vilsack* (M.D. Fla. June 23, 2021), Case No. 3:21-cv-514-MMH-JRK, U.S. District Court, Middle District of Fla. (*see below*), granted the Plaintiffs a nationwide injunction, which thus rendered the need for an injunction in this case as not necessary; but the court left open the possibility of reconsidering the motion depending on the results of the *Wynn* case. For the same reason, the court dissolved the temporary restraining order.

Subsequently, the Defendants filed a motion to stay proceedings, and the court granted the motion on August 20, 2021, requiring the Defendants to file a status report every six months on the progress of the *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.) case, which was a class action.

As a result of the federal government’s recent repeal of ARPA Section 1005 and the subsequent dismissal of the related class action in *Miller v. Vilsack*, the parties filed a Stipulation of Dismissal, and the case in September 2022 was dismissed without prejudice by the Court.

- v. ***Wynn v. Vilsack*** (M.D. Fla. June 23, 2021), 2021 WL 2580678, Case No. 3:21-cv-514-MMH-JRK, U.S. District Court, Middle District of Fla. In *Wynn v. Vilsack* (M.D. Fla. June 23, 2021), 2021 WL 2580678, Case No. 3:21-cv-514-MMH-JRK, U.S. District Court, Middle District of Fla., which is virtually the same case as the *Faust v. Vilsack*, 2021 WL 2409729 (June 10, 2021) case in District Court in Wisconsin, the court granted the Plaintiffs’ motion for preliminary injunction holding: “Defendants

Thomas J. Vilsack, in his official capacity as U.S. Secretary of Agriculture and Zach Ducheneaux, in his official capacity as Administrator, Farm Service Agency ... are immediately enjoined from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of the American Rescue Plan Act of 2021 until further order from the Court.”

The court in *Faust* granted the Plaintiffs’ motion for temporary restraining order for similar reasons and, as discussed below, in an order issued on July 6, 2021, stayed a motion for preliminary injunction and dissolved the temporary restraining order as not necessary based on the *Wynn* holding imposing a nationwide injunction.

Background. In *Wynn*, Plaintiff challenges Section 1005 of the ARPA, which provides debt relief to “socially disadvantaged farmers and ranchers” (SDFRs). (Doc 1; Complaint). Specifically, Section 1005(a)(2) authorizes the Secretary of Agriculture to pay up to 120 percent of the indebtedness, as of January 1, 2021, of an SDFR’s direct FSA loans and any farm loan guaranteed by the Secretary (collectively, farm loans). Section 1005 incorporates 7 USC § 2279’s definition of an SDFR as “a farmer or rancher who is a member of a socially disadvantaged group.” 7 USC § 2279(a)(5). A “socially disadvantaged group” is defined as “a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities.” 7 USC § 2279(a)(6). Racial or ethnic groups that categorically qualify as socially disadvantaged are “Black, American Indian/Alaskan Native, Hispanic, Asian, and Pacific Islander.” See also U.S. Dep’t of Agric., American Rescue Plan Debt Payments, <https://www.farmers.gov/americanrescueplan> (last visited June 22, 2021). White or Caucasian farmers and ranchers do not.

Plaintiff is a white farmer in Jennings, Florida, who has qualifying farm loans but is ineligible for debt relief under Section 1005 solely because of his race. He sues Thomas J. Vilsack, the current Secretary of Agriculture, and Zach Ducheneaux, the administrator of the USDA and head of the FSA, in their official capacities. In his two-count complaint, Plaintiff alleges Section 1005 violates the equal protection component of the Fifth Amendment’s Due Process Clause (Count I) and, by extension, is not in accordance with the law such that its implementation should be prohibited by the Administrative Procedure Act (APA) (Count II). Plaintiff seeks (1) a declaratory judgment that Section 1005’s provision limiting debt relief to SDFRs violates the law, (2) a preliminary and permanent injunction prohibiting the enforcement of Section 1005, either in whole or in part, (3) nominal damages, and (4) attorneys’ fees and costs.

Strict scrutiny. The court, similar to the court in *Faust*, applied the strict scrutiny test and held that on the record presented, the court expresses serious concerns over whether the government will be able to establish a strong basis in evidence warranting the implementation of Section 1005’s race-based remedial action. The statistical and anecdotal evidence presented, the court stated, appears insufficient.

Compelling governmental interest. The Government stated that its “compelling interest in relieving debt of [SDFRs] is two-fold: to remedy the well-documented history of discrimination against minority farmers in USDA loan (and other) programs and prevent public funds from being allocated in a way that perpetuates the effects of discrimination. In cases applying strict scrutiny, the court said the Eleventh Circuit has instructed:

In practice, the interest that is alleged in support of racial preferences is almost always the same—remediating past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government’s interest, but rather the adequacy of the evidence of discrimination offered to show that interest. *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1564 (11th Cir. 1994) (citations omitted).

Thus, the court found that to survive strict scrutiny, the government must show a strong basis in evidence for its conclusion that past racial discrimination warrants a race-based remedy. *Id.* at 1565. The law on how a governmental entity can establish the requisite need for a race-based remedial program has evolved over time. In *Eng’g Contractors Ass’n of S. Fla. v. Metro. Dade Cnty.*, the court noted the Eleventh Circuit summarized the kinds of evidence that would and would not be indicative of a need for remedial action in the local construction industry. 122 F.3d 895, 906-07 (11th Cir. 1997). The court explained: 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. However, a governmental entity can 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. Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence.

Here, to establish the requisite evidence of discrimination, the court stated the Government relies on substantial legislative history, testimony given by experts at various congressional committee meetings, reports prepared at Congress’ request regarding discrimination in USDA programs, and floor statements made by supporters of Section 1005 in Congress. Based on the historical evidence of discrimination, Congress took remedial measures to correct USDA’s past discrimination against SDFRs.

Due to the significant remedial measures previously taken by Congress, for purposes of this case, the court pointed out that historical evidence does little to address the need for continued remediation through Section 1005. Rather, for the Government to show that additional remedial action is warranted, it must present evidence either that the prior remedial measures failed to adequately remedy the harm caused by USDA’s past discrimination or that the Government remains a “passive participant” in discrimination in USDA loans and programs. See *Eng’g Contractors*, 122 F.3d at 911. The court found that this is where the evidence of continued discrimination becomes crucial, and may be inadequate.

The government contends its prior measures were insufficient to remedy the effects of past discrimination, but the court found the actual evidentiary support for the inadequacy of past remedial measures is limited and largely conclusory. Where a race-neutral basis for a statistical disparity can be shown, the court concluded it can give that statistical evidence less weight. *Eng’g Contractors*, 122 F.3d at 923. Here, the statistical discrepancies presented by the government, the court found, can be explained by non-race related factors—farm size and crops grown—and the Court finds it unlikely that this evidence, standing alone, would constitute a strong basis for the need for a race-based remedial program.

On the record presented here, the court expressed “serious concerns over whether the Government will be able to establish a strong basis in evidence warranting the implementation of Section 1005’s

race-based remedial action. The statistical and anecdotal evidence presented appears less substantial than that deemed insufficient in *Eng'g Contractors*, which included detailed statistics regarding the governmental entity's hiring of minority-owned businesses for government construction projects; marketplace data on the financial performance of minority and nonminority contractors; and two studies by experts. *Id.* at 912.”

The court said to the extent remedial action is warranted based on the current evidentiary showing, it would likely be directed to the need to address the barriers identified in the Government Accountability Office (GAO) Reports such as providing incentives or guarantees to commercial lenders to make loans to SDFRs, increasing outreach to SDFRs regarding the availability of USDA programs, ensuring SDFRs have equal access to the same financial tools as nonminority farmers, and efforts to standardize the way USDA services SDFR loans so that it comports with the level of service provided to white farmers.

The court held that nevertheless, at this stage of the proceedings, it need not determine whether the government ultimately will be able to establish a compelling need for this broad, race-based remedial legislation. This is because, assuming the government's evidence establishes the existence of a compelling governmental interest warranting some form of race-based relief, the court found Plaintiff has convincingly shown that the relief provided by Section 1005 is not narrowly tailored to serve that interest.

Narrowly tailoring. Even if the government establishes a compelling governmental interest to enact Section 1005, the court stated Plaintiff has shown a substantial likelihood of success on his claim that, as written, the law violates his right to equal protection because it is not narrowly tailored to serve that interest. “The essence of the ‘narrowly tailored’ inquiry is the notion that explicitly racial preferences ... must be only a ‘last resort’ option.” *Eng'g Contractors*, 122 F.3d at 926.

In determining whether a race-conscious remedy is appropriate, the court noted the Supreme Court instructs courts to examine several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.” *U.S. v. Paradise*, 480 U.S. 149, 171 (1987).

The court found that the necessity of debt relief to the group targeted by Section 1005, as opposed to a remedial program that more narrowly addresses the discrimination that has been documented by the government, is anything but evident. More importantly, the court stated Section 1005's rigid, categorical, race-based qualification for relief is the antithesis of flexibility. The debt relief provision applies strictly on racial grounds irrespective of any other factor. Every person who identifies him or herself as falling within a socially disadvantaged group who has a qualifying farm loan with an outstanding balance as of January 1, 2021, receives up to 120 percent debt relief—and no one else receives any debt relief.

Regardless of farm size, an SDFR receives up to 120 percent debt relief. And regardless of whether an SDFR is having the most profitable year ever and not remotely in danger of foreclosure, that SDFR receives up to 120 percent debt relief. Yet, the court said, a small white farmer who is on the brink of foreclosure can do nothing to qualify for debt relief. Race or ethnicity is the sole, inflexible factor that determines the availability of relief provided by the government under Section 1005.

The Government cited the Eleventh Circuit decision in *Cone Corp. v. Hillsborough Cnty. (Cone Corp.)*, 908 F.2d 908, 910 (11th Cir. 1990). The court in *Cone Corp* pointed to several critical factors that distinguished the county’s MBE program in that case from that rejected in *Croson*:

“(1) the county had tried to implement a less restrictive MBE program for six years without success; (2) the MBE participation goals were flexible in part because they took into account project-specific data when setting goals; (3) the program was also flexible because it provided race-neutral means by which a low bidder who failed to meet a program goal could obtain a waiver; and (4) unlike the program rejected in *Croson*, the county’s program did not benefit “groups against whom there may have been no discrimination,” instead its MBE program “target[ed] its benefits to those MBEs most likely to have been discriminated against” *Id.* at 916-17.

The court found that “Section 1005’s inflexible, automatic award of up to 120 percent debt relief only to SDFRs stands in stark contrast to the flexible, project by project Cone Corp. MBE program.”

The court noted that in *Cone Corp.*, although the MBE program included a minority participation goal, the county “would grant a waiver if qualified minority businesses were uninterested, unavailable, or significantly more expensive than non-minority businesses.” In this way, the court in *Cone Corp.* observed the county’s MBE program “had been carefully crafted to minimize the burden on innocent third parties.” (*citing Cone Corp.*, 908 F.2d at 911).

The court concluded the “120 percent debt relief program is untethered to an attempt to remedy any specific instance of past discrimination. And unlike the Cone Corp. MBE program, Section 1005 is absolutely rigid in the relief it awards and the recipients of that relief and provides no waiver or exception by which an individual who is not a member of a socially disadvantaged group can qualify. In this way, Section 1005 is far more similar to the remedial schemes found not to be narrowly tailored in *Croson* and other similar cases.”

Additionally, on this record, the court found it appears that Section 1005 simultaneously manages to be both overinclusive and underinclusive. “It appears to be overinclusive in that it will provide debt relief to SDFRs who may never have been discriminated against or faced any pandemic-related hardship.” The court found “Section 1005 also appears to be underinclusive in that, as mentioned above, it fails to provide any relief to those who suffered the brunt of the discrimination identified by the Government. It provides no remedy at all for an SDFR who was unable to obtain a farm loan due to discriminatory practices or who no longer has qualifying farm loans as a result of prior discrimination.”

Finally, the court concluded there is little evidence that the government gave serious consideration to, or tried, race-neutral alternatives to Section 1005. “The Government recounts the remedial programs Congress previously implemented that allegedly have failed to remedy USDA’s discrimination against SDFRs However, almost all of the programs identified by the Government were not race-neutral programs; they were race-based programs that targeted things like SDFR outreach efforts, improving SDFR representation on local USDA committees, and providing class-wide relief to SDFRs who were victims of discrimination. The main relevant race-neutral program the Government referenced was the first round of pandemic relief, which did go disproportionately to White farmers.” However, the court stated, “the underlying cause of the statistical discrepancy may be disparities in farm size or crops grown, rather than race.”

Thus, on the current record, in addition to showing that Section 1005 is inflexible and both overinclusive and underinclusive, the court held Plaintiff is likely to show that Congress “failed to give serious good faith consideration to the use of race and ethnicity-neutral measures” to achieve the compelling interest supporting Section 1005. *Ensley Branch*, 122 F.3d at 927. Congress does not appear to have turned to the race-based remedy in Section 1005 as a “last resort,” but instead appears to have chosen it as an expedient and overly simplistic, but not narrowly tailored, approach to addressing prior and ongoing discrimination at USDA.

Having considered all of the pertinent factors associated with the narrow tailoring analysis and the record presented by the parties, the court is not persuaded that the government will be able to establish that Section 1005 is narrowly tailored to serve its compelling governmental interest. The court holds “it appears to create an inflexible, race-based discriminatory program that is not tailored to make the individuals who experienced discrimination whole, increase participation among SDFRs in USDA programs, or irradicate the evils of discrimination that remain following Congress’ prior efforts to remedy the same.” Therefore, the court holds that Plaintiff has established a strong likelihood of showing that Section 1005 violates his right to equal protection under the law because it is not narrowly tailored to remedy a compelling governmental interest.

Conclusion. Defendants Thomas J. Vilsack, in his official capacity as U.S. Secretary of Agriculture, and Zach Ducheneaux, in his official capacity as Administrator, Farm Service Agency, their agents, employees and all others acting in concert with them, who receive actual notice of this order by personal service or otherwise, are immediately enjoined from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of the American Rescue Plan Act of 2021 until further order from the Court.

The Defendants filed a motion to stay proceedings and a motion to stay administratively timely deadlines. The court on August 2, 2021 denied the motion to stay proceedings.

As a result of the federal government’s recent repeal of ARPA Section 1005 in September 2022 and the subsequent dismissal of the related Class Action in *Miller v. Vilsack*, the parties have filed a stipulation of dismissal, and the case was dismissed in September 2022 by the court.

The Plaintiffs are seeking attorneys fees and costs of the litigation, which request is pending at the time of this report.

vi. *Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al.*, 2023 WL 4633481 (E.D. Tenn. July 19, 2023), U.S. District Court, E.D. Tennessee, 2:20-cv-00041-DCLC-CRW.

Plaintiff, a small business contractor, recently filed this complaint in Federal District Court in Tennessee against the USDA, SBA, et al. challenging the federal Section 8(a) program, and it appears as applied to a particular industry that provide administrative and/or technical support to USDA offices that implement the Natural Resources Conservation Service (NRCS), an agency of the USDA.

Plaintiff, a non-qualified Section 8(a) Program contractor, alleges the contracts it used to bid on have been set aside for a Section 8(a) contractor. Plaintiff thus claims it is not able to compete for contracts that it could in the past.

Plaintiff alleges that neither the SBA or the USDA has evidence that any racial or ethnic group is underrepresented in the administrative and/or technical support service industry in which it competes, and there is no evidence that any underrepresentation was a consequence of discrimination by the federal government or that the government was a passive participant in discrimination.

Plaintiff claims that the Section 8(a) Program discriminates on the basis of race, and that the SBA and USDA do not have a compelling governmental interest to support the discrimination in the operation of the Section 8(a) Program. In addition, Plaintiff asserts that even if defendants had a compelling governmental interest, the Section 8(a) Program as operated by defendants is not narrowly tailored to meet any such interest.

Thus, Plaintiffs allege defendants' race discrimination in the Section 8(a) Program violates the Fifth Amendment to the U.S. Constitution. Plaintiff seeks a declaratory judgment that defendants are violating the Fifth Amendment, 42 USC Section 1981, injunctive relief precluding defendants from reserving certain NRCS contracts for the Section 8(a) Program, monetary damages, and other relief.

The defendants filed a motion to dismiss asserting inter alia that the court does not have jurisdiction. Plaintiff has filed written discovery, which was stayed pending the outcome of the motion to dismiss.

The court on March 31, 2021 issued a memorandum opinion and order granting in part and denying in part the motion to dismiss. The court held that plaintiffs had standing to challenge the constitutionality of the Section 8(a) Program as violating the Fifth Amendment, and held plaintiff's claim that the Section 8(a) Program is unconstitutional because it discriminates on the basis of race is sufficient to state a claim. The court also granted in part defendants' motion to dismiss, holding that plaintiff's 42 USC Section 1981 claims are dismissed as that section does not apply to federal agencies. Thus, the case proceeds on the merits of the constitutionality of the Section 8(a) Program.

The court on April 9, 2021 entered a scheduling order providing that defendants shall file an Answer by April 28, 2021 and set a bench trial for Oct. 11, 2022 with dispositive motions due by June 6, 2022. Defendants filed their answer to the complaint on April 28, 2021. Plaintiffs on May 20, 2021 filed a motion to amend/revise complaint, Defendants filed their response to motion to amend on June 4, 2021 and Plaintiffs filed on June 8, 2021 their reply to the response. The motion was denied by the court.

Dispositive motions for summary judgment have been filed by the parties in June and July 2022.

December 8, 2022 order requesting parties to address whether Supreme Court's decision expected in June 2023 would impact this case. The court on December 8, 2022 issued an order requesting the parties address whether a potential decision by the Supreme Court overruling the *Grutter v. Bollinger*, 539 U.S. 306 (2003) case in the pending Harvard and University of North Carolina (UNC) admission cases would impact the issues in this case and, if so, whether this matter should remain stayed until the Supreme Court releases its decision in the Harvard and UNC (SFFA) cases challenging the use of race-conscious admissions processes.

The parties filed on December 22, 2022 their responses to the court's order both agreeing that the court should not stay its decision in this case, but differing on the impact of the SFFA cases: The Federal Defendants stating a decision by SCOTUS overruling Grutter in the SFFA cases would not impact this case because they involve fundamentally different issues and legal bases for the challenged actions. The Plaintiffs responded by saying it may or may not impact this case depending on the nature of the decision by SCOTUS.

The court on May 2, 2023 issued an order denying both parties' motions to exclude expert testimony and reports by their experts.

July 19, 2023 opinion and order on motions for summary judgment. On July 19, 2023, the District Court issued its order that granted in part and denied in part Plaintiffs' motion for summary judgment and denied Defendants' motion for summary judgment.

The court stated the case concerns whether, under the Fifth Amendment's guarantee of equal protection, Defendants the USDA and SBA may use a "rebuttable presumption" of social disadvantage for certain minority groups to qualify them for inclusion in a federal program that awards government contracts on a preferred basis to businesses owned by individuals in those minority groups.

Defendant SBA also applies a rebuttable presumption of social disadvantage to individuals of certain minority groups applying to the Section 8(a) program. The rebuttable presumption treats certain minority groups as socially disadvantaged, and it applies to Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans, "and members of other groups designated from time to time by [Defendant] SBA." *Id.* To qualify for the presumption, members of those groups must hold themselves out as members of their group. Individuals who qualify for the rebuttable presumption do not have to submit evidence of social disadvantage through an individual process for those who are not members of these groups.

The court, citing Supreme Court precedent, stated that certain classifications are subject to strict scrutiny—meaning they are constitutional "only if they are [(1)] narrowly tailored measures that further [(2)] compelling governmental interests." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). When examining racial classifications, courts apply strict scrutiny. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2162 (2023); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (applying strict scrutiny to the city of Richmond's racial classification); *Adarand Constructors, Inc.*, 515 U.S. at 224 (plurality holding that racial classifications are subject to strict scrutiny).

Ultima argued that the rebuttable presumption in the Section 8(a) Program cannot survive strict scrutiny because Defendants cannot show that the rebuttable presumption is narrowly tailored to achieve a compelling governmental interest. The court addressed each prong of the strict scrutiny test, beginning with the compelling-interest prong.

Lack of a compelling governmental interest. To satisfy the compelling interest prong, the court held the government "must both identify a compelling interest and provide evidentiary support concerning the need for the proposed remedial action. *See Croson*, 488 U.S. at 498–504; *see also Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) (*citing Croson* for

the proposition that the government must establish either that it “discriminated in the past” or “was a passive participant in private industry’s discriminatory practices”). The Supreme Court has held that the government has a compelling interest in “remediating specific, identified instances of past discrimination that violated the Constitution or a statute.” *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2162). Additionally, the government must present goals that are “sufficiently coherent for purposes of strict scrutiny.” *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2166.

Defendants assert that their use of the rebuttable presumption in the Section 8(a) program is to remedy the effects of past racial discrimination in federal contracting. But, the court stated Defendant USDA admits it does not maintain goals for the Section 8(a) program. And Defendant SBA admits that it does not require agencies to have goals for the Section 8(a) Program. Defendants also do not examine whether any racial group is underrepresented in a particular industry relevant to a specific contract in the Section 8(a) Program. The court found that without stated goals for the Section 8(a) Program or an understanding of whether certain minorities are underrepresented in a particular industry, Defendants cannot measure the utility of the rebuttable presumption in remedying the effects of past racial discrimination. In such circumstances, the court said, Defendants’ use of the rebuttable presumption “cannot be subjected to meaningful judicial review.” The lack of any stated goals for Defendants’ continued use of the rebuttable presumption, the court concluded does not support Defendants’ stated interest in “remediating specific, identified instances of past discrimination[.]” *Quoting Students for Fair Admissions, Inc.*, 143 S. Ct. at 2162. If the rebuttable presumption were a tool to remediate specific instances of past discrimination, the court noted, Defendants should be able to tie the use of that presumption to a goal within the Section 8(a) Program.

The court stated the Sixth Circuit addressed a challenge similar to the one Ultima raises here in *Vitolo*, 999 F.3d at 361 (6th Cir. 2021). The court said: “The Sixth Circuit held that “[t]he government has a compelling interest in remedying past discrimination only when three criteria are met.” *Id.* at 361. First, the government’s policy must “target a specific episode of past discrimination [and] cannot rest on a generalized assertion that there has been past discrimination in an entire industry.” *Id.* (quoting *J.A. Croson Co.*, 488 U.S. at 498–99).”

The court found that: “Defendants do not identify a specific instance of discrimination which they seek to address with the use of the rebuttable presumption. Defendants instead rely on the disparities faced by MBEs nationally as sufficient to justify the use of a presumption that certain minorities are socially disadvantaged. ...” “[A]n effort to alleviate the effects of societal discrimination is not a compelling interest,” and the court concluded Defendants’ reliance on national statistics shows societal discrimination rather than a specific instance.

Second, the court pointed out that the Sixth Circuit explained that the government must support its asserted compelling interest with “evidence of *intentional* discrimination in the past.” *Vitolo*, 999 F.3d at 361 (quoting *J.A. Croson Co.*, 488 U.S. at 503) (emphasis in original). According to the Sixth Circuit, the court noted, “statistical disparities alone are insufficient but can be used with other evidence to establish intentional discrimination. “The Sixth Circuit, the court said, reasoned that when the government uses a race-based policy, it must operate with precision and support the policy with “data that suggest intentional discrimination.” *Id.* The court also stated that the Sixth Circuit further reasoned that evidence of general social disparities are insufficient because “there

are too many variables to support inferences of intentional discrimination” when there are multiple decision makers “behind the disparity.” *Id.* at 362.

Here, the court concluded, Defendants primarily offer evidence of national disparities across different industries. They do not offer further evidence to show that those disparities are tied to specific actions, decisions, or programs that would support an inference of intentional discrimination that the use of the rebuttable presumption allegedly addresses. Moreover, the court said that Plaintiffs’ expert noted that Defendants’ evidence did not eliminate other variables that could explain the disparities on which they rely. Defendants cannot affirmatively link those disparities to intentional discrimination because they also cannot eliminate all variables that could account for the disparities. The court stated that the Sixth Circuit in *Vitolo* did not equivocate, cautioning that “broad statistical disparities ... are not nearly enough” to show intentional discrimination. *Id.*

Third, the court pointed out, the Sixth Circuit reasoned that the government must show that it participated in the past discrimination it seeks to remedy, such as by demonstrating it acted as a “passive participant in a system of racial exclusion practiced by elements of [a] local ... industry[.]” *Id.* (quoting *J.A. Croson Co.*, 488 U.S. at 492) (internal quotations omitted). It explained that the government must identify “prior discrimination by the governmental unit involved” or “passive participation in a system of racial exclusion.” *Id.* (quoting *J.A. Croson Co.*, 488 U.S. at 492) (alteration adopted).

The court noted that additionally, in her opinion in *J.A. Croson Co.*, Justice O’Connor reasoned that the government could show passive participation in discrimination by compiling evidence of marketplace discrimination and then linking its spending practices to private discrimination. *J.A. Croson Co.*, 488 U.S. at 492 (O’Connor, J., joined by Rehnquist, C.J., and White, J).

Although the Court does not doubt the persistence of racial barriers to the formation and success of MBEs, Defendants’ evidence does not show that the government was a passive participant in such discrimination in the relevant industries in which Ultima operates. As evidence of passive participation, Defendants note that Congress found MBEs lacked access to “capital, bonding, and business opportunities” because of discrimination. Defendants further note that Congress found that MBEs faced “outright blatant discrimination directed at disadvantaged and minority business people by majority companies, financial institutions, and government at every level.” Those examples, however, relate broadly to the federal government’s actions in different areas of the national economy. They do not show that the federal government allowed discrimination to occur in the industries relevant to Ultima.

The court found that because the court must determine whether the use of racial classifications is supported with precise evidence, “examples of the federal government’s passive participation in areas other than the relevant industries do not support Defendants’ use of the rebuttable presumption here. *See Vitolo*, 999 F.3d at 361.” Accordingly, the court held that Defendants have failed to show a compelling interest for their use of the rebuttable presumption as applied to Ultima. Even if Defendants could establish a compelling interest, the court found the rebuttable presumption is not narrowly tailored to serve the asserted interest.

Rebuttable presumption is not narrowly tailored. To determine whether the government's use of a racial classification is narrowly tailored, the court examines several factors, including the necessity for the race-based relief, the efficacy of alternative remedies, the flexibility and duration of the relief, the relationship of the numerical goals to the relevant labor market, and the impact of the relief on the rights of third parties. The court noted the Supreme Court in *Croson* held that courts also should consider whether the governmental entity considered race-neutral alternatives prior to adopting a program that uses racial classifications, the program does not presume discrimination against certain minority groups and, 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.

a. Whether the Section 8(a) program is flexible and limited in duration. The court states that the Sixth Circuit in *Vitolo* noted, “[because] proving someone else has *never* experienced racial or ethnic discrimination is virtually impossible, this ‘presumption’ is dispositive.” *Vitolo*, 999 F.3d at 363 (emphasis in original). Individuals who do not receive the presumption must show both economic disadvantage *and* discrimination that have negatively impacted their advancement in the business world and caused them to suffer chronic and substantial social disadvantage. In effect, the court said, individuals who do not receive the presumption must put forth double the effort to qualify for the Section 8(a) program.

The court cites to the decision in *Drabik*, in which the Sixth Circuit held that as an aspect of narrow tailoring, a race-conscious government program “must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate.” *Drabik*, 214 F.3d at 737–38 (quoting *Adarand*, 515 U.S. at 238). The court then points out that recently, the Supreme Court reaffirmed that racially conscious government programs must have a “logical end point.” *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2170 (quoting *Grutter*, 539 U.S. at 342).

It is noteworthy that the court in footnote 8 states the following: “The facts in *Students for Fair Admissions, Inc.* concerned college admissions programs, but its reasoning is not limited to just those programs. See *Adarand Constructors, Inc.*, 515 U.S. at 215 (applying the reasoning in *Bolling*, 347 U.S. at 497, which discussed school desegregation, to a federal program designed to provide highway contracts to disadvantaged business enterprises).”

Defendants concede, the court stated, that “the 8(a) program has no termination date,” necessarily meaning there is no temporal limit on the use of the rebuttable presumption. The court found that such a “boundless use of a racial classification exceeds the concept of narrow tailoring as explained by Sixth Circuit and Supreme Court precedents.”

b. Whether the Section 8(a) program is necessary. Defendants acknowledge that the program lacks a remedial objective. The court found that the lack of a specific objective shows that Defendants are not using the rebuttable presumption in a narrow or precise manner. And the Sixth Circuit has held, according to the court, that Defendants must present “the most exact connection between justification and classification. Here, the court said, Defendants admit that they do not have any specific objectives linked to their use of the rebuttable presumption, and such unbridled discretion counsels against a racial classification being narrowly tailored.

c. Whether the Section 8(a) program is both over and underinclusive. Defendant SBA determines which groups receive the rebuttable presumption of social disadvantage. Some of those

groups match the groups listed in the statute enacting the Section 8(a) Program. But, the court found that Defendant SBA has added more groups since that time that appear underinclusive when compared with groups that do not receive the rebuttable presumption.

The court stated that Defendants' "arbitrary line drawing for who qualifies for the rebuttable presumption shows that the "categories are themselves imprecise in many ways." *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2167. Thus, the court held that the determination of which groups of Americans are presumptively disadvantaged compared with others "necessarily leads to such a determination being underinclusive because certain groups that could qualify will be left out of the presumption."

Conversely, the court found the rebuttable presumption "sweeps broadly by including anyone from the specified minority groups, regardless of the industry in which they operate." The court said that Defendant SBA is not making specific determinations as to whether certain groups in certain industries have faced discrimination. The court noted that it instead applies Congress's nationwide findings to all members of the designated minority groups. Thus, the court held that such "an application of the presumption proves overinclusive by failing to consider the individual applicant to the 8(a) program and the industries in which they operate."

d. Whether Defendants considered race-neutral alternatives to the rebuttable presumption.

For a policy to survive narrow-tailoring analysis, the court stated the government must show "serious, good faith consideration of workable race-neutral alternatives" to promote the stated interest but need not exhaust every conceivable race-neutral alternative. *Grutter*, 539 U.S. at 333, 339 (citing *Croson*, 488 U.S. at 507). But, the court said that in *Vitolo*, "the Sixth Circuit reasoned that 'a court must not uphold a race-conscious policy unless it is "satisfied that no workable race-neutral alternative" would achieve the compelling interest.'" *Vitolo*, 999 F.3d at 362 (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013)).

The court found that Defendant SBA has not revisited the use of the rebuttable presumption since 1986 and insists that the presumption remains workable under the Supreme Court's precedents. The court held that because of Defendant SBA's "failure to review race-neutral alternatives in the wake of the Supreme Court's precedents, the Court cannot conclude that "no workable race-neutral alternative would achieve the compelling interest.'" *Vitolo*, 999 F.3d at 362.

e. Whether the rebuttable presumption impacts third parties. The court rejected Defendants' assertion that the rebuttable presumption presents only a slight burden on third parties and Ultima because a minor amount of all national federal contracting dollars is eligible for small businesses. Ultima operates within a specific set of industries and the Mississippi contract, as well as others like it, represent a substantial amount of revenue. The court found that national statistics do not lessen the burden that the rebuttable presumption places on Ultima. Defendants, the court held, have failed to show that the use of the rebuttable presumption in the Section 8(a) Program is narrowly tailored.

Conclusion. The court held as follows: Ultima's Motion for Summary Judgment is granted in part and denied in part, and Defendants' Motion for Summary Judgment is denied. The Court declared that Defendants' use of the rebuttable presumption violates Ultima's Fifth Amendment right to equal protection of the law. The court ordered that Defendants are enjoined from using the rebuttable presumption of social disadvantage in administering Defendant SBA's Section 8(a) Program. The

court reserved ruling on any further remedy subject to a hearing on that issue. The court scheduled a hearing on the issue of any potential further remedies is set for August 31, 2023.

vii. **Mark One Electric Company, Inc. v. City of Kansas City, Missouri**, 2022 WL 3350525 (8th Cir. 2022). In 2020, the court in *Mark Smith* stated that Kansas City began restricting participation in its Minority Business Enterprises and Women’s Business Enterprises Program to those entities whose owners satisfied a personal net worth limitation. Mark One Electric Co., a woman-owned business whose owner’s personal net worth exceeded the limit, appealed the dismissal of its lawsuit challenging the Kansas City Program as unconstitutional because of the personal net worth limitation. The court held that under its precedent, the program’s personal net worth limitation is a valid narrow tailoring measure, and therefore the court affirmed the District Court’s dismissal.

Background. In 2016, the court pointed out that the City conducted a disparity study to determine whether the MBE/WBE Program followed best practices for affirmative action programs and whether the program would survive constitutional scrutiny. The 2016 Disparity Study analyzed data from 2008 to 2013 and provided quantitative and qualitative evidence of race and gender discrimination. The court said the study concluded that the City had a compelling interest in continuing the program because “minorities and women continue to suffer discriminatory barriers to full and fair access to [Kansas City] and private sector contracts.”

The study also provided recommendations to ensure the program would be narrowly tailored, including: adding a personal net worth limitation like the net worth cap in the USDOT DBE Program.

The court stated the City enacted a new version of the MBE/WBE Program based on the 2016 Disparity Study on October 25, 2018. The amended program incorporated a personal net worth limitation, as recommended by the study, which would require an entity to establish that its “owner’s or, for businesses with multiple owners, each individual owner’s personal net worth is equal to or less than the permissible personal net worth amount determined by the U.S. Department of Transportation to be applicable to its DBE program.” See Kan. City, Mo. Code of General Ordinances ch. 3, art. IV, § 3-421(a)(34), (47) (2021).

Suit challenging the personal net worth limitation. On the day after the personal net worth limitation took effect, the court said, that Mark One Electric initiated an action against the City under 42 USC § 1983, challenging the personal net worth limitation. Mark One had been certified as a WBE since 1996, but based on the new personal net worth threshold, it would lose its certification despite otherwise meeting the requirements of the WBE program.

Mark One, the court noted, acknowledged that, based on the 2016 Disparity Study, there was a strong basis in evidence for the City to take remedial action, but alleged the study’s recommendation that the City consider adding a personal net worth limitation was not supported by either qualitative or quantitative analysis. Mark One, the court stated, claimed that the personal net worth limitation is not narrowly tailored to remedy past discrimination and that the program as a whole is not narrowly tailored because of the personal net worth limitation.

The court pointed out that Mark One asserted, “[T]he City has adopted an arbitrary and capricious re-definition of who qualifies as a women [sic] or minority and seeks to remedy a discrimination of which there is no evidence.” According to Mark One, the personal net worth limitation is “not

specifically and narrowly framed to accomplish the city’s purpose,” and therefore the program is unconstitutional.

The City moved to dismiss the complaint, arguing that the personal net worth limitation is a valid measure to narrowly tailor the MBE/WBE Program. The District Court granted the City’s motion, finding that the personal net worth limitation was permissible as a matter of law.

Strict scrutiny applied. The court found that race-based affirmative action programs designed to remediate the effects of discrimination toward minority-owned subcontractors, such as Kansas City’s, are subject to strict scrutiny, meaning that the program is constitutional “only if [it is] narrowly tailored to further compelling governmental interests.” (*Citing Sherbrooke Turf, Inc. v. Minn. Dep’t of Transp.*, 345 F.3d 964, 968–69 (8th Cir. 2003) (*quoting Grutter v. Bollinger*, 539 U.S. 306, 326,(2003)). The court pointed out that although Mark One is a woman-owned business and not a minority-owned business, neither party contests review of the program under the strictest scrutiny.

The court stated the legal standard: “To survive strict scrutiny, the government must first articulate a legislative goal that is properly considered a compelling government interest,” such as stopping perpetuation of racial discrimination and remediating the effects of past discrimination in government contracting. (*Citing Sherbrooke Turf*, 345 F.3d at 969.) The City must “demonstrate a ‘strong basis in the evidence’ supporting its conclusion that race-based remedial action [is] necessary to further that interest.” *Id.* (*Citing City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500, (1989)). The court found that Mark One does not dispute that the City has a compelling interest in remedying the effects of race and gender discrimination on City contract opportunities for minority- and women-owned businesses. And Mark One, the court said, has conceded the 2016 Disparity Study provides a strong basis in evidence for the MBE/WBE program to further that interest.

Narrow tailoring, rational basis, and the personal net worth limitation. Second, the City’s program must be narrowly tailored, which requires that “the means chosen to accomplish the government’s asserted purpose are specifically and narrowly framed to accomplish that purpose.” *Id. citing Sherbrooke*, at 971. The Plaintiff, according to the court, has the burden to establish that an affirmative action program is not narrowly tailored. In determining whether a race-conscious remedy is narrowly tailored, the court held it looks at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties.” (*Citing Sherbrook*, at 971, and *United States v. Paradise*, 480 U.S. 149, 171, 187, (1987).)

The court stated that Mark One attacked the personal net worth limitation from two angles. Mark One first argued that the personal net worth limitation in the City’s program should be independently assessed under strict scrutiny, separately from the program as a whole, and asks the court to find the provision unenforceable through the program’s severability clause.

Under strict scrutiny, Mark One argued, the personal net worth limitation is unconstitutional in its own right because it was implemented by the City without a strong basis in evidence and excludes a subset of women and minorities based on a classification unrelated to the discrimination MBEs and WBEs face.

The court found that Mark One offers no authority for the premise that an individual narrow tailoring measure which differentiates between individuals or businesses based on a non-suspect classification, such as net worth, is subject to strict scrutiny in isolation. The court pointed out the MBE/WBE program as a whole must be premised on a strong basis in evidence under strict scrutiny review. But, the court held the City is not required to provide a separate individual strong basis in evidence for the personal net worth limitation because this limitation, on its own, is subject only to rational basis review.

Mark One also challenged the overall narrow tailoring of the MBE/WBE program, claiming that the personal net worth limitation makes the program unconstitutional because it excludes MBEs and WBEs that have experienced discrimination. The court held that under its precedent, this argument is unavailing. The court said that it has previously found the USDOT DBE personal net worth limitation—the limitation the City adopted for the program—to be a valid narrow tailoring measure that ensures flexibility in an affirmative action program and reduces the impact on third parties by introducing a race- and gender-neutral requirement for eligibility. *See Sherbrooke Turf*, 345 F.3d at 972–73 (finding the federal DBE program narrowly tailored on its face in part because “wealthy minority owners and wealthy minority-owned firms are excluded” through the personal net worth limitation, so “race is made relevant in the program, but it is not a determinative factor”).

The court found that Mark One had not plausibly alleged that the \$1.32 million personal net worth limitation in the City’s MBE/WBE Program is different, or serves a distinguishable purpose, from the personal net worth limitation in the federal program such that it is not likewise a valid narrow tailoring measure here.

Mark One claimed that its exclusion from the program despite its status as a woman-owned business shows that the program is unlawful. The court noted that it did not minimize the fact that individuals and businesses may experience race- and gender-based discrimination in the marketplace regardless of wealth, and that a minority- or women-owned enterprise may be excluded from the program based solely on the owner’s personal net worth, despite having experienced discrimination in its trade or industry and regardless of the revenue of the enterprise itself or the financial status of any of its minority and women employees.

But, the court found that the City does not have a constitutional obligation to make its program as broad as may be legally permissible, so long as it directs its resources in a rational manner not motivated by a discriminatory purpose.

Though Mark One argued that the personal net worth limitation is “arbitrary and capricious because the *city chose to discriminate against* the very minorities and women its [MBE]/WBE Program was designed to help,” the court stated there was no allegation in the operative complaint that the City was motivated by a discriminatory purpose when it implemented the personal net worth limitation.

Conclusion. The court concluded that under *Sherbrooke Turf*, 345 F.3d at 972-73, the City may choose to add this limitation in its program as a rational, race- and gender-neutral narrow tailoring measure.

viii. Nuziard, et al. v. MBDA, et al., 2023 WL 3869323 (N.D. Tex. June 5, 2023), U.S. District Court for the N.D. of Texas, Fort Worth Division, Case No. 4:23-cv-00278. Complaint filed March 20, 2023.

On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act (Infrastructure Act), creating the newest federal agency: the Minority Business Development Agency (MBDA). Plaintiffs allege this agency is dedicated to helping only certain businesses based on race or ethnicity.

Plaintiffs assert that because it relies on racial and ethnic classifications to help some individuals, but not others, the MBDA violates the Constitution's core requirement of equal treatment under the law.

Plaintiffs allege they are small businesses interested in finding new ways to grow their business and would value the advice, grants, consulting services, access to programs, and other benefits offered by the MBDA. But, Plaintiffs assert that agency will not help them because of their race.

The MBDA's statutes, regulations, and website all speak a clear message of discrimination: Defendants refuse to help white business owners like Plaintiffs, as well as many other businesses owned by other non-favored ethnicities.

Plaintiffs claim that they therefore seek an order declaring the MBDA to be unconstitutional and an injunction prohibiting Defendants from discriminating against business owners based on race or ethnicity.

Plaintiffs seek the following Relief:

A. Enter a judgment declaring that the Minority Business Development Agency is unconstitutional and in violation of 5 USC § 706(2)(B) to the extent it provides Business Center Program services or other benefits and services based on race or ethnicity; and

B. Enter a preliminary and then permanent injunction prohibiting Defendants from imposing the racial and ethnic classifications defined in 15 USC § 9501 and implemented in 15 USC §§ 9511, 9512, 9522, 9523, 9524, and 15 CFR § 1400.1 and/or as otherwise applied to the MBDA Business Center Program and other MBDA programs and services, and additionally enjoining Defendants from using the term "minority" to advertise or reference their statutorily authorized programs and services.

Plaintiffs filed a motion for preliminary injunction and defendants have replied. The court held a hearing on May 12, 2023.

June 5, 2023 order and opinion. The court issued an order and opinion on June 5, 2023 as follows:

The Constitution demands equal treatment under the law. Any racial classification subjecting a person to unequal treatment is subject to strict scrutiny. To withstand such scrutiny, the government must show that the racial classification is narrowly tailored to a compelling government interest. In this case, the MBDA's business center program provides services to certain races and ethnicities but not to others. The court held that "because the Government has not shown that doing so is narrowly tailored to a compelling government interest, it is preliminary enjoined from providing unequal treatment to Plaintiffs."

a. Defendants lack a compelling interest. Defendants contend that it has a compelling interest in remedying the effects of past discrimination faced by minority-owned businesses.

The court stated that the government may establish a compelling interest in remedying racial discrimination if three criteria are met: “(1) the policy must target a specific episode of past discrimination, not simply relying on generalized assertions of past discrimination in an industry; (2) there must be evidence of past intentional discrimination, not simply statistical disparities; and (3) the government must have participated in the past discrimination it now seeks to remedy.” *Miller v. Vilsack*, No. 4:21-CV-0595-O, 2021 WL 11115194, at *8 (N.D. Tex. July 1, 2021) (O’Connor, J.) (citing *Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021) (summarizing U.S. Supreme Court precedents)). The court found the government’s asserted compelling interest meets none of these requirements.

First, the court said that the government “points generally to societal discrimination against minority business owners.” *Vitolo*, 999 F.3d at 361. Defendants, the court stated, point to congressional testimony on the effects of redlining, the G.I. Bill, and Jim Crow laws on Black wealth accumulation as evidence of a specific episode of discrimination. But, the court noted the program does not target Black wealth accumulation. It targets some minority business owners. Defendants, the court found, also identify no specific episode of discrimination for any of the other preferred races or ethnicities. Instead, the court concluded, they point to the effects of societal discrimination on minority business owners. But “an effort to alleviate the effects of societal discrimination is not a compelling interest.” *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996).

Second, the court held the “Government fails to offer evidence of past intentional discrimination. The Government offers no evidence of discrimination faced by some preferred races and ethnicities. And for those it does, the Government relies on studies showing broad statistical disparities with business loans, supply chain networks, and contracting among some minorities.” These studies, according to the court, do not involve all of Defendants’ preferred minorities or every type of business. But even if they did, the court said: “statistical disparities don’t cut it.” (quoting *Vitolo*, 999 F.3d at 361).

Because the court concluded: “when it comes to general social disparities, there are simply too many variables to support inferences of intentional discrimination.” (quoting *Vitolo*, 999 F.3d at 362. “While the Court is mindful of these statistical disparities and expert conclusions based on those disparities, [d]efining these sorts of injuries as “identified discrimination” would give ... governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.” (quoting *Greer’s Ranch Cafe*, 540 F. Supp. 3d at 650 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989)).

Third, the court found the government “has not shown that it participated in the discrimination it seeks to remedy.” (quoting *Vitolo*, 999 F.3d at 361). The court pointed out that the government can show that it participated in the discrimination it seeks to remedy either actively or passively. Defendants, the court said, however, provide no argument on how they participated in the discrimination it seeks to remedy.

The court noted that “perhaps the argument could be made that the Government passively discriminated by failing to address the economic inequities among minority business owners. But to

be a passive participant, it must be a participant. *See Croson*, 488 U.S. at 492 (government awarding contracts to those who engaged in private discrimination).” But, the court held there is no evidence that the government passively participated by “financ[ing] the evil of private prejudice” faced by minority-owned businesses.

In sum, the court found: “the Government has failed to show that the Program targets a specific episode of discrimination, offer evidence of past intentional discrimination, or explain how it participated in discrimination against minority business owners. The Government thus lacks a compelling interest in remedying the effects of past discrimination faced by some minority-owned businesses.”

b. The program is not narrowly tailored. Even if the government had shown a compelling state interest in remedying some specific episode of discrimination, the court held the program is not narrowly tailored to further that interest for at least two reasons. First, the court stated the government has not shown “that ‘less sweeping alternatives—particularly race neutral-ones—have been considered and tried.’ *Walker*, 169 F.3d at 983. ... This requires the government to show that ‘no workable race-neutral alternative’ would achieve the compelling interest. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013).”

Defendants contend that: “absent race-based remedies, ‘the needle did not move’ in efforts to remedy the effects of discrimination on the success outcomes of minority business owners.” To support this statement, the court said: “Defendants rely on a single review of various disparity studies. See U.S. Dep’t of Commerce, Minority Business Development Agency, Contracting Barriers and Factors Affecting Minority Business Enterprise: A Review of Existing Disparity Studies (Dec. 2016).”

But this review, the court found, “cuts against the Government. It ‘emphasize[s] the need for both race-neutral and race-conscious remedial efforts’ to move the needle and states that the disparity studies ‘fail to detail the extent to which agencies have actually implemented and measured the success or failure of these recommendation.’ ... Thus, the review of contracting disparities Defendants rely on does not show that race-neutral alternatives ‘have been considered and tried.’ See *Walker*, 169 F.3d at 983. Nor has the Government shown a ‘serious, good faith consideration of workable race-neutral alternatives’ in any other business context. See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).”

Second, the court concluded, the program is not narrowly tailored “because it is underinclusive and overinclusive in its use of racial and ethnic classification. *See Croson*, 488 U.S. at 507–08; *Gratz*, 539 U.S. at 273–75. It is underinclusive because it arbitrarily excludes many minority-owned business owners—such as those from the Middle East, North Africa, and North Asia. For example, the court noted, it excludes those who trace their ancestry to Afghanistan, Iran, Iraq, and Libya. But it includes those from China, Japan, Pakistan, and India. The Program is also underinclusive, the court found, because it excludes every minority business owner who owns less than 51 percent of their business. “This scattershot approach does not conform to the narrow tailoring strict scrutiny requires.” (quoting *Vitolo*, 999 F.3d at 364).

The program, the court stated, is also overinclusive. “It helps individuals who may have never been discriminated against. *See Croson*, 488 U.S. at 506–08 (holding that a minority business plan is

overinclusive because it includes ethnicities in which there is no evidence of discrimination).” And, the court said that it “also helps all business owners, not just those in which disparities have been shown.”

The program, the court found, is thus not narrowly tailored to the government’s asserted interest.

Because the government has not shown a compelling interest or a narrowly tailored remedy under strict scrutiny, the court held that Plaintiffs are likely to succeed on the merits.

Conclusion. The court granted Plaintiffs’ motion for preliminary injunction and enjoined Defendants, the Wisconsin MBDA Business Center, the Orlando MBDA Business Center, the Dallas-Fort Worth MBDA Business Center, and the officers, agents, servants, and employees, and anyone acting in active concert or participation with them from imposing the racial and ethnic classifications defined in 15 USC § 9501 and implemented in 15 USC §§ 9511, 9512, 9522, 9523, 9524, and 15 CFR § 1400.1 against Plaintiffs or otherwise considering or using Plaintiffs’ race or ethnicity in determining whether they can receive access to the Center’s services and benefits.

July 25, 2023 scheduling order. The court on July 25, 2023, set the case for trial in April 2024, and established dates for discovery by the end of November 2023 and for motions by the end of October 2023.

This list of pending and recent cases is not exhaustive, but in addition to the cases analyzed and referenced above, these cases may potentially have an impact on the study and implementation of MBE/WBE/DBE programs, related legislation, implementation of the Federal DBE Program by state and local governments and public authorities and agencies, and other types of programs impacting participation of MBE/WBE/DBEs/Social and Economic Disadvantaged Businesses.

It is noteworthy that there were other recent cases similar to *Faust v. Vilsack*, 21-cv.-548 (E.D. Wis.) and *Wynn v. Vilsack*, 3:21-cv-514 (M.D. Fla.) cited and discussed above, including a class action filed in *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.), and separate lawsuits seeking to enjoin USDA officials from implementing loan-forgiveness program for farmers and ranchers under Section 1005 of the ARPA by asserting eligibility to participate in program based solely on racial classifications violated equal protection. *Carpenter v. Vilsack*, 21-cv-103-F (D. Wyo.); *Holman v. Vilsack*, 1:21-cv-1085 (W.D. Tenn.); *Kent v. Vilsack*, 3:21-cv-540 (S.D. Ill.); *McKinney v. Vilsack*, 2:21-cv-212 (E.D. Tex.); *Joyner v. Vilsack*, 1:21-cv-1089 (W.D. Tenn.); *Dunlap v. Vilsack*, 2:21-cv-942 (D. Or.); *Rogers v. Vilsack*, 1:21-cv-1779 (D. Colo.); *Tiegs v. Vilsack*, 3:21-cv-147 (D.N.D.); *Nuest v. Vilsack*, 21-cv-1572 (D. Minn.). Many of these cases had granted the Federal Defendants motions to stay pending resolution of the of the class challenge to Section 1005 of the ARPA in the *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.) class-action litigation.

As a result of the federal government’s recent repeal of ARPA Section 1005 and the subsequent dismissal of the related class action in *Miller v. Vilsack*, the parties in many of these cases have filed stipulations of dismissal, and the cases in September 2022 have been dismissed by the courts. Certain of these cases are pending based on the Plaintiffs having filed motions for attorneys fees and costs of the litigation.

Ongoing review. The above represents a summary of the legal framework pertinent to the study and implementation of DBE/MBE/WBE, or race-, ethnicity-, or gender-neutral programs, the Federal DBE

Program, and the implementation of the Federal DBE Program by state and local government recipients of federal funds. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve.

APPENDIX C.

Quantitative Analyses of Marketplace Conditions

BBC Research & Consulting (BBC) conducted quantitative analyses of marketplace conditions in Clark County to assess whether persons of color (POCs); women; veterans; individuals who identify as lesbian, gay, bisexual, transgender, queer, intersex, or asexual (LGBTQ+); and the businesses they own face any barriers in the local construction, professional services, and goods and other services industries. We examined marketplace conditions in four primary areas:

- **Human capital**, to assess whether POCs, women, veterans, or individuals who identify as LGBTQ+ face barriers related to education, employment, or gaining relevant work experience;
- **Financial capital**, to assess whether POCs, women, veterans, or individuals who identify as LGBTQ+ face barriers related to wages, homeownership, personal wealth, or financing;
- **Business ownership**, to assess whether POCs, women, veterans, or individuals who identify as LGBTQ+ own businesses at rates comparable to other individuals; and
- **Business success**, to assess whether POC-, woman-, veteran, and LGBTQ+-owned businesses have outcomes similar to those of other businesses.

Appendix C presents a series of figures and tables that show results from those analyses. We highlight statistically significant results and results that demonstrate marketplace barriers for relevant race, gender, and LGBTQ+ groups. Key results and their implications are presented in Chapter 3.

Figure C-1.
Percentage of all workers 25 and older with at least a four-year degree, Clark County, 2017-2021

Note:

** Denotes that the difference in proportions between the POC group and white Americans (or between women and men) is statistically significant at the 95% confidence level.

"MENA American" includes Middle Eastern and North African Americans.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

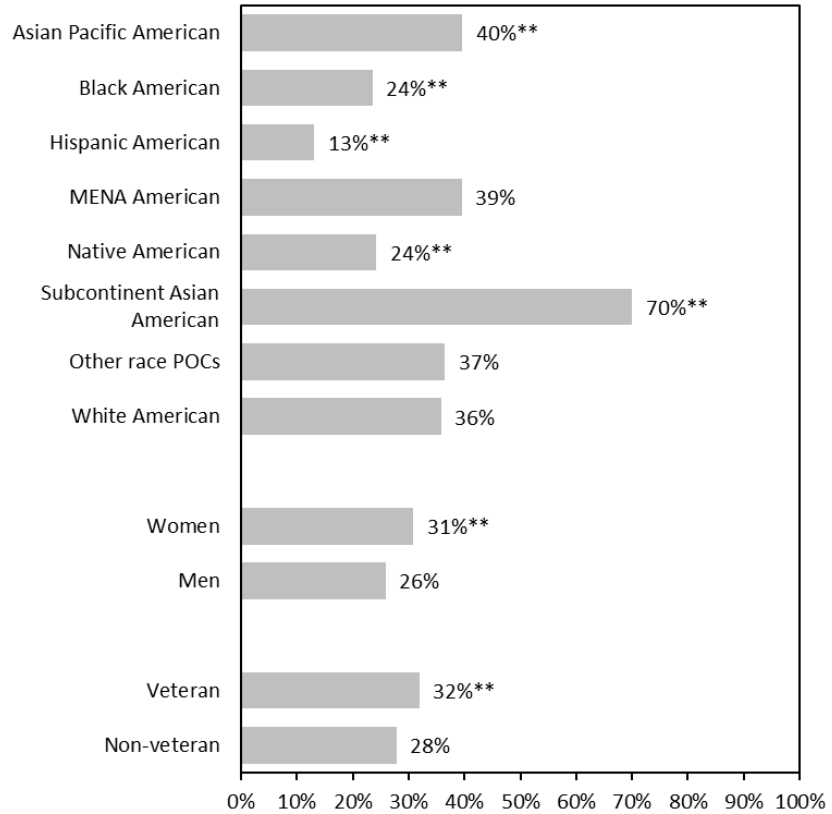


Figure C-1 indicates that, compared to white American workers (36%), Black American (24%), Hispanic American (13%), and Native American (24%) workers in Clark County are substantially less likely to have four-year college degrees.

Figure C-2.
Predictors of college completion, Clark County, 2017-2021

Note:

The regression included 39,607 observations.

** Denotes statistical significance at the 95% confidence level.

The referent for each set of categorical variables is as follows: white Americans for the race variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Age	0.0100 **
Age-squared	-0.0001 **
Disabled	-0.2570 **
Speaks English well	0.6882 **
Asian Pacific American	0.1144 **
Black American	-0.3760 **
Hispanic American	-0.6665 **
MENA American	0.1082
Native American	-0.4076 **
Subcontinent Asian American	0.9448 **
Other race POC	-0.0026
Women	0.1470 **
Veteran	0.1244 **
Constant	-1.2945 **

Figure C-2 indicates that, in Clark County, Black Americans, Hispanic Americans, and Native Americans are less likely to complete college compared to white Americans, even after statistically accounting for other personal factors.

Figure C-3.
Demographic characteristics of workers in study-related industries and all industries, Clark County, 2017-2021

Group	All Industries (n=49,422)	Construction (n=3,305)	Professional Services (n=1,940)	Goods and Other Services (n=1,351)
Race/ethnicity				
Asian Pacific American	11.6 %	2.6 % **	10.8 %	5.7 % **
Black American	12.4 %	5.6 % **	12.8 %	15.9 % **
Hispanic American	31.7 %	52.2 % **	16.3 % **	42.4 % **
MENA American	1.0 %	0.3 % **	1.5 %	0.2 % **
Native American	1.5 %	1.2 %	1.2 %	1.3 %
Subcontinent Asian American	0.8 %	0.3 % **	2.1 % **	0.1 % **
Other race POCs	0.9 %	0.7 %	1.5 %	0.9 %
Total minority	59.9 %	62.7 %	46.1 %	66.5 %
White American	40.1 %	37.3 % **	53.9 % **	33.5 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Gender				
Women	46.1 %	10.0 % **	34.6 % **	37.8 % **
Men	53.9 %	90.0 % **	65.4 % **	62.2 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Veteran Status				
Veteran	5.8 %	5.5 %	9.4 % **	9.4 % **
Non-veteran	94.2 %	94.5 %	90.6 % **	90.6 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %

Note: ** Denotes that the difference in proportions between workers in each study-related industry and workers in all industries is statistically significant at the 95% confidence level.

Source: BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-3 indicates that, compared to all industries considered together:

- Smaller percentages of Asian Pacific Americans (2.6%), Black Americans (5.6%), Middle Eastern and North African (MENA) Americans (0.3%), and Subcontinent Asian Americans (0.3%) work in the construction industry. In addition, a smaller percentage of women (10%) work in the construction industry. Moreover, of women who work in the construction industry, 40 percent work in office and administration occupations compared to 1 percent of men.
- A smaller percentage of Hispanic Americans (16.3%) work in the professional services industry. In addition, a smaller percentage of women (34.6%) work in the professional services industry.
- Smaller percentages of Asian Pacific Americans (5.7%), Black Americans (15.9%), MENA Americans (0.2%), and Subcontinent Asian Americans (0.1%) work in the goods and other services industry. In addition, a smaller percentage of women (37.8%) work in the goods and other services industry.

**Figure C-4.
Unemployment rates, Clark
County, 2017-2021**

Note:

*, ** Denotes that the difference in proportions between the POC group and white Americans (or between women and men) is statistically significant at the 90% and 95% confidence levels, respectively.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

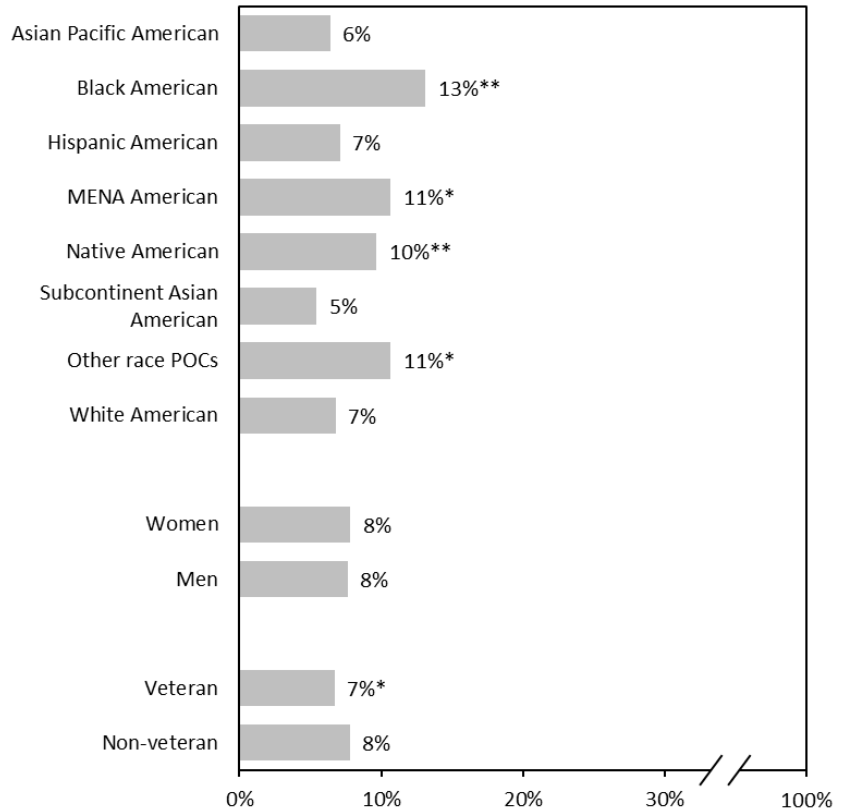


Figure C-4 indicates that Black Americans (13%), MENA Americans (11%), Native Americans (10%), and other race POC Americans (11%) exhibit greater unemployment rates than white Americans (7%) in Clark County.

**Figure C-5.
Predictors of unemployment,
Clark County, 2017-2021**

Note:

The regression included 44,521 observations.

** Denotes statistical significance at the 95% confidence level.

The referent for each set of categorical variables variable is as follows: high school diploma for the education variables and white Americans for the race variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Age	-0.0292 **
Age-squared	0.0003 **
Married	-0.2094 **
Disabled	0.3030 **
Number of children in household	0.0193
Number of people over 65 in household	0.1372 **
Speaks English well	0.1605 **
Less than high school education	0.0309
Some college	-0.1112 **
Four-year degree	-0.1917 **
Advanced degree	-0.3597 **
Asian Pacific American	-0.0313
Black American	0.3063 **
Hispanic American	-0.0609
MENA American	0.2481 **
Native American	0.1735 **
Subcontinent Asian American	0.0748
Other race POC	0.1825
Women	0.0632 **
Veteran	-0.0613
Extraction and agriculture	-0.2676
Construction	-0.5407 **
Wholesale trade	-0.7011 **
Retail trade	-0.6465 **
Transportation, warehouse, & information	-0.5572 **
Professional services	-0.5117 **
Education	-0.8940 **
Health care	-0.9342 **
Other services	-0.5469 **
Public administration and social services	-0.8093 **
Constant	-0.3579 **

Figure C-5 indicates that Black Americans, MENA Americans, and Native Americans are more likely to be unemployed compared to white Americans, even after statistically accounting for other personal factors. In addition, women are more likely to be unemployed relative to men, even after statistically accounting for other personal characteristics.

**Figure C-6.
Percentage of non-owner
workers who worked as
managers or supervisors in
each study-related industry,
Clark County, 2017-2021**

Note:

*, ** Denotes that the difference in proportions between the POC group and white Americans (or between women and men) is statistically significant at the 90% and 95% confidence level, respectively.

† Denotes significant differences in proportions not reported due to small sample size.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

Group	Construction	Professional Services	Goods and Other Services
Race/ethnicity			
Asian Pacific American	3.6 % **	4.3 %	0.9 %
Black American	7.0 % *	1.9 % *	0.7 % **
Hispanic American	3.6 % **	1.6 % **	2.6 %
MENA American	0.0 % †	0.0 % †	0.0 % †
Native American	3.5 % **	7.3 %	0.0 % †
Subcontinent Asian American	16.7 % †	0.0 %	0.0 % †
Other race POCs	20.2 % †	42.9 % †	0.0 % †
White American	12.9 %	4.5 %	2.9 %
Gender			
Women	4.3 % **	1.8 % **	1.8 %
Men	7.7 %	5.4 %	2.4 %
Veteran Status			
Veteran	13.2 % **	5.6 %	0.5 % **
Non-veteran	7.0 %	3.9 %	2.4 %
All individuals	7.3 %	4.1 %	2.2 %

Figure C-6 indicates that:

- Smaller percentages of Asian Pacific Americans (3.6%), Black Americans (7.0%), Hispanic Americans (3.6%), and Native Americans (3.5%) than white Americans (12.9%) work as managers or supervisors in the Clark County construction industry. In addition, a smaller percentage of women (4.3%) than men (7.7%) work as managers or supervisors in the Clark County construction industry.
- Smaller percentages of Black Americans (1.9%) and Hispanic Americans (1.6%) than white Americans (4.5%) work as managers or supervisors in the Clark County professional services industry. In addition, a smaller percentage of women (1.8%) than men (5.4%) work as managers or supervisors in the Clark County professional services industry.
- Smaller percentages of Black Americans (0.7%) than white Americans (2.9%) work as managers or supervisors in the Clark County goods and other services industry.

**Figure C-7.
Predictors of management in
construction, Clark County, 2017-2021**

Note:

The regression included 2,371 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

† MENA American omitted due to a perfect correlation with the dependent variable.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and white Americans for the race variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa>.

Variable	Coefficient
Constant	-3.8422 **
Age	0.0371
Age-squared	-0.0002
Married	-0.0402
Disabled	0.0449
Number of children in household	0.0822
Number of people over 65 in household	-0.1248
Part time	-0.2002
Speaks English well	1.1290 **
Less than high school education	-0.2234
Some college	0.5324 **
Four-year degree	1.0646 **
Advanced degree	0.6113 *
Asian Pacific American	-0.3956
Black American	-0.3105
Hispanic American	-0.1327
MENA American	0.0000 †
Native American	-0.4806
Subcontinent Asian American	1.9615 **
Other race POC	0.8728
Women	-0.5627 **
Veteran	-0.0278

Figure C-7 indicates that women are less likely to work as managers or supervisors in the Clark County construction industry relative to men, even after statistically accounting for other personal characteristics.

**Figure C-8.
Predictors of management in professional services, Clark County, 2017-2021**

Note:

The regression included 1,118 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

† Disabled, Speaks English well, Less than high school education, MENA American, and Subcontinent Asian American omitted due to perfect correlations with the dependent variable.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and white Americans for the race variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-2.1152 **
Age	0.0018
Age-squared	0.0001
Married	0.3687 *
Disabled	0.0000 †
Number of children in household	0.1376
Number of people over 65 in household	0.1288
Part time	-0.9776 *
Speaks English well	0.0000 †
Less than high school education	0.0000 †
Some college	-0.2458
Four-year degree	-0.1159
Advanced degree	0.0959
Asian Pacific American	0.2567
Black American	-0.1966
Hispanic American	-0.1264
MENA American	0.0000 †
Native American	0.3744
Subcontinent Asian American	0.0000 †
Other race POC	-0.5636
Women	-0.4998 **
Veteran	-0.1099

Figure C-8 indicates that women are less likely to work as managers or supervisors in the Clark County professional services industry relative to men, even after statistically accounting for other personal characteristics.

**Figure C-9.
Predictors of management in goods and other services, Clark County, 2017-2021**

Note:

The regression included 684 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

† Speaks English well, Less than high school education, MENA American, Native American, Subcontinent Asian American, and Other race POC omitted due to perfect correlations with the dependent variable.

The referent for each set of categorical variables variable is as follows: high school diploma for the education variables and white Americans for the race variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-3.2128 **
Age	0.0471 *
Age-squared	-0.0004
Married	0.1496
Disabled	-0.1970
Number of children in household	0.0136
Number of people over 65 in household	-0.3278 **
Part time	-0.5060 **
Speaks English well	0.2417
Less than high school education	-0.4418 *
Some college	0.0509
Four-year degree	0.5664 **
Advanced degree	0.4094 **
Asian Pacific American	-0.2974 **
Black American	-0.2740
Hispanic American	-0.4943 **
Native American	-0.1765
Subcontinent Asian American	-0.1189
Other race POC	-0.2880
Women	-0.1080

Figure C-9 indicates that Asian Pacific Americans and Hispanic Americans are less likely to work as managers or supervisors in the Clark County goods and other services industry compared to white Americans, even after statistically accounting for other personal factors.

**Figure C-10.
Mean annual wages,
Clark County, 2017-2021**

Note:

The sample universe is all non-institutionalized, employed individuals aged 25-64 that are not in school, the military, or self-employed.

*, ** Denotes statistically significant differences from white Americans (for POC groups), from men (for women), and from non-veterans (for veterans) at the 90% and 95% confidence level, respectively.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

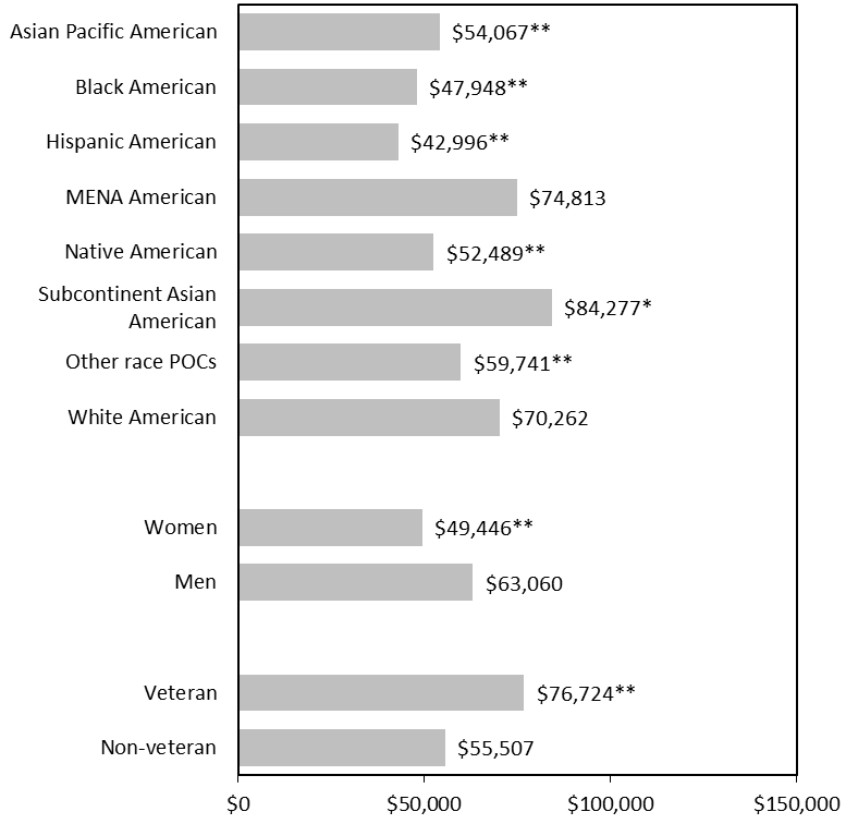


Figure C-10 indicates that Asian Pacific American (\$54,067), Black American (\$47,948), Hispanic American (\$42,996), Native American (\$52,489), and other race POC (\$59,741) workers in Clark County earn substantially less in wages than white American workers (\$70,262). In addition, women (\$49,446) earn substantially less than men (\$63,060) in Clark County.

**Figure C-11.
Predictors of annual wages (regression),
Clark County, 2017-2021**

Notes:

The regression includes 24,080 observations.

The sample universe is all non-institutionalized, employed individuals aged 25-64 that are not in school, the military, or self-employed.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

** Denotes statistical significance at the 95% confidence level.

The referent for each set of categorical variables is as follows: white Americans for the race variables, high school diploma for the education variables, manufacturing for industry variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	10823.340 **
Asian Pacific American	0.855 **
Black American	0.818 **
Hispanic American	0.855 **
MENA American	0.932
Native American	0.826 **
Subcontinent Asian American	0.944
Other race POCs	0.906
Women	0.841 **
Less than high school education	0.889 **
Some college	1.122 **
Four-year degree	1.407 **
Advanced degree	2.000 **
Disabled	0.792 **
Veteran	1.062 **
Speaks English well	1.260 **
Age	1.052 **
Age-squared	1.000 **
Married	1.120 **
Children	1.004
Number of people over 65 in household	0.894 **
Public sector worker	1.225 **
Manager	1.330 **
Part time worker	0.428 **
Extraction and agriculture	1.008
Construction	1.137 **
Wholesale trade	1.073
Retail trade	0.782 **
Transportation, warehouse, & information	0.962
Professional services	1.076 **
Education	0.642 **
Health care	1.119 **
Other services	0.885 **
Public administration and social services	0.919 **

Figure C-11 indicates that, compared to white American workers in Clark County, Asian Pacific Americans, Black Americans, Hispanic Americans, and Native American workers earn less in annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being a Black American worker is associated with making approximately \$0.82 for every dollar a white American worker makes, all else being equal.) In addition, compared to men workers in Clark County, women workers earn less in annual wages, even after accounting for various other personal characteristics.

Figure C-12.
Median family net worth
(in thousands) in the United
States, 2019

Note:
 2019 dollars.

Source:
 Federal Reserve Survey of Consumer Finances
 data 2019.

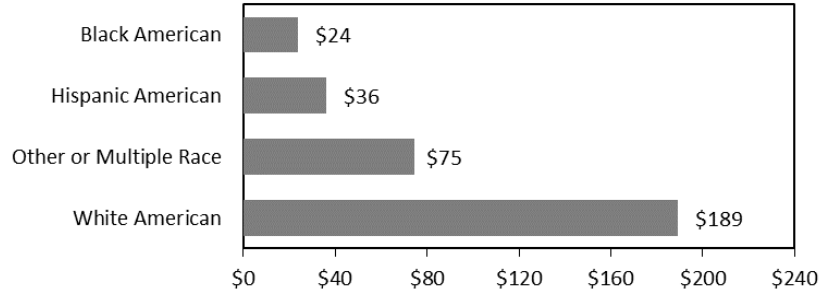


Figure C-12 indicates that Black American (\$24,000), Hispanic American (\$36,000), and other or multiple race Americans (\$75,000) in the United States have a lower median net worth than white Americans (\$189,000).

Figure C-13.
Home ownership rates, Clark
County, 2017-2021

Note:
 The sample universe is all households.
 ** Denotes statistically significant differences
 from white Americans at the 95% confidence
 level.

Source:
 BBC from 2017-2021 ACS 5% Public Use
 Microdata sample. The raw data extract was
 obtained through the IPUMS program of the
 MN Population Center:
<http://usa.ipums.org/usa/>.

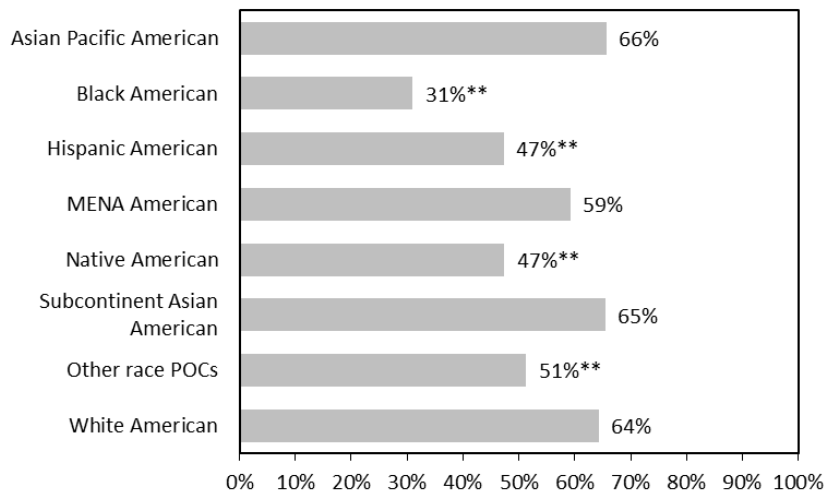


Figure C-13 indicates that Black Americans (31%), Hispanic Americans (47%), Native Americans (47%), and other race POCs (51%) in Clark County exhibit homeownership rates less than that of white Americans (64%).

Figure C-14.
Median home values, Clark County, 2017-2021

Note:

The sample universe is all owner-occupied housing units.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

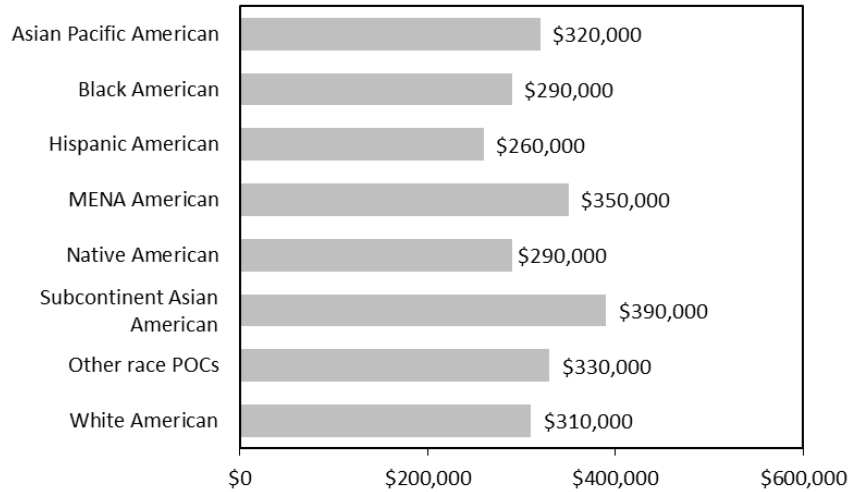


Figure C-14 indicates that, in Clark County, Black American (\$290,000), Hispanic American (\$260,000), and Native American (\$290,000) homeowners own homes that, on average, are worth less than those of white American homeowners (\$310,000).

Figure C-15.
Denial rates of conventional purchase loans for high-income households, Clark County, 2022

Note:

High-income borrowers are those households with 120% or more of the HUD/FFIEC area median family income (MFI). The MFI data are calculated by the FFIEC.

Source:

FFIEC HMDA data 2022. The raw data extract was obtained from the Federal Financial Institutions Examination Council's HMDA data tool: <https://ffiec.cfpb.gov/data-browser/>.

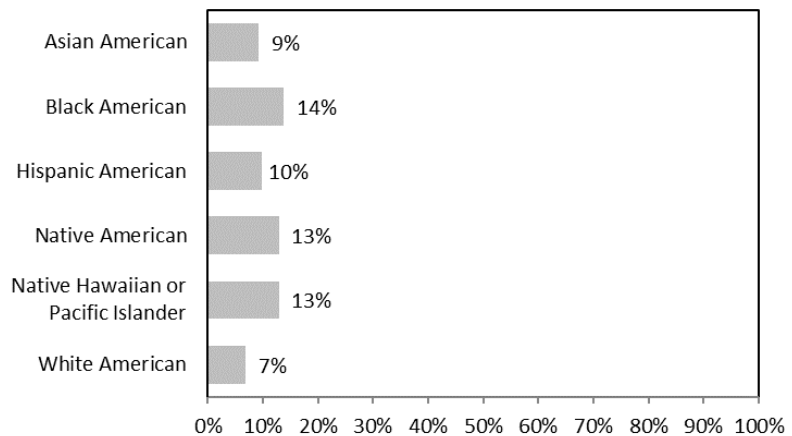


Figure C-15 indicates that Asian Americans (9%), Black Americans (14%), Hispanic Americans (10%), Native Americans (13%), and Native Hawaiian or Pacific Islanders (13%) in Clark County are denied home loans at greater rates than white Americans (7%).

Figure C-16.
Loan, line of credit, and
cash advance denial rates,
United States, 2021

Source:
 BBC from 2021 Small Business Credit
 Survey.

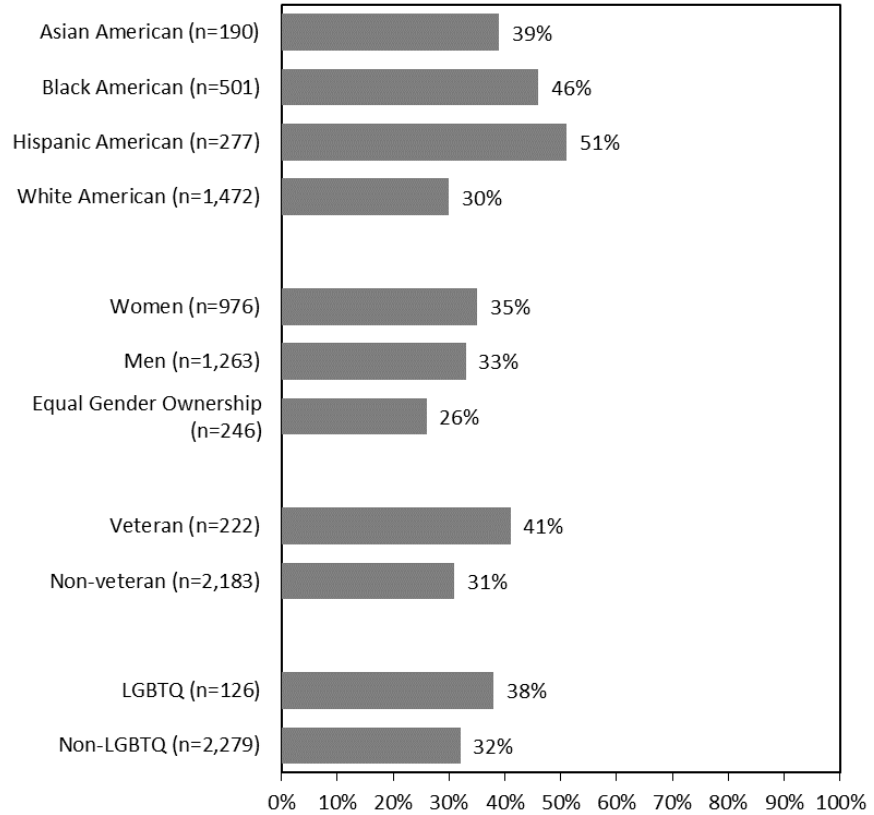


Figure C-16 indicates that Asian Pacific American- (39%), Black American- (46%), and Hispanic American- (51%) owned businesses in the United States are denied loans at greater rates than white American-owned businesses (30%). In addition, woman-owned businesses (35%) are denied loans at greater rates than businesses owned by men (33%).

Figure C-17.
Businesses that did not
apply for loans due to fear
of denial, United States,
2021

Source:
 BBC from 2021 Small Business Credit
 Survey.

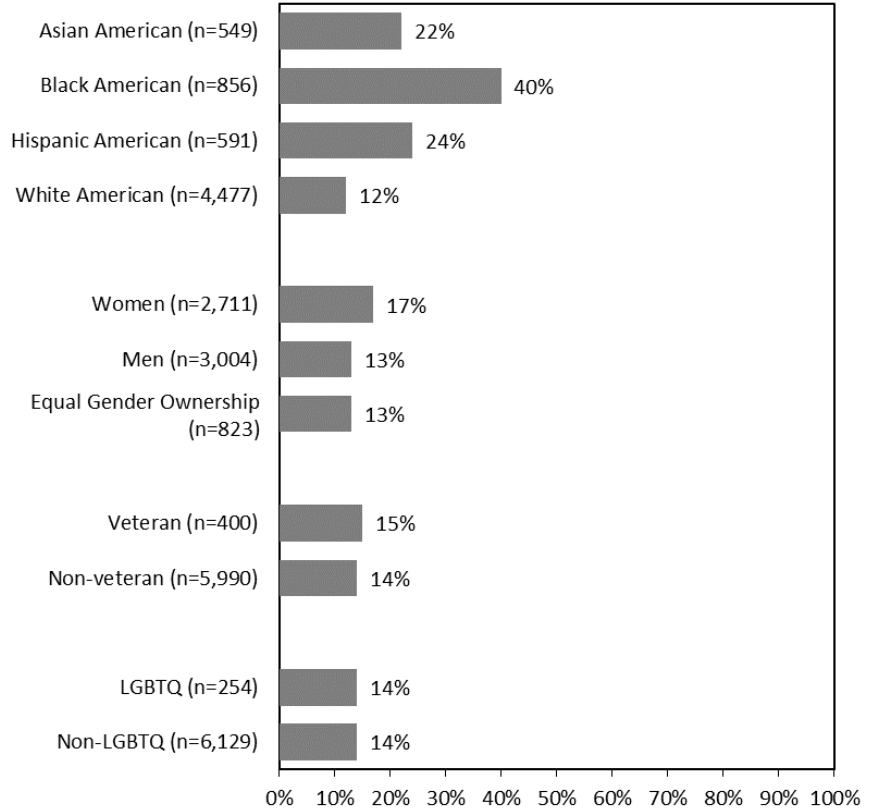


Figure C-17 indicates that Asian American- (22%), Black American- (40%), and Hispanic American- (24%) owned businesses in the United States are more likely than white American-owned businesses (12%) to not apply for loans due to a fear of denial. In addition, woman-owned businesses (17%) are more likely than businesses owned by men (13%) to not apply for loans due to a fear of denial.

Figure C-18.
Owner demographic characteristics of businesses in study-related industries and all industries, Las Vegas-Henderson-Paradise Metropolitan Statistical Area (MSA), 2018

Las Vegas-Henderson-Paradise, NV Metro Area	All Industries (225,252)	Construction (12,778)	Professional Services (31,205)	Non-prof. services, goods, and supplies (4,764)
Race/ethnicity				
POC	42.2 %	S %	26.1 % **	28.1 % **
White American	52.7 %	53.4 %	67.2 % **	59.8 % **
Equally POC/White American	0.9 %	D %	0.9 %	D %
Gender				
Women	38.5 %	10.4 % **	33.1 % **	26.2 % **
Men	52.6 %	83.0 % **	57.8 % **	57.0 %
Equally Men/Women	4.5 %	4.3 %	3.8 % *	6.7 %
Veteran Status				
Veteran	5.8 %	S %	7.2 % **	5.0 % *
Nonveteran	89.3 %	91.0 %	86.2 % **	83.4 %
Equally veteran/nonveteran	S %	D %	0.6 %	D %

Note: *, ** Denotes that the difference in proportions between businesses in each study-related industry and businesses in all industries is statistically significant at the 90% and 95% confidence level, respectively.

S Denotes proportion not reported because data did not meet US Census publication standards.

D Denotes proportion not reported to avoid disclosing data for individual companies.

Source: BBC from 2018 Nonemployer Statistics by Demographics series: Statistics for Employer and Nonemployer Firms.

Figure C-18 indicates that, compared to all industries considered together:

- A smaller percentage of construction businesses are owned by women (10.4%) in the Las Vegas-Henderson-Paradise MSA.
- A smaller percentage of professional services businesses are owned by POCs (26.1%) in the Las Vegas-Henderson-Paradise MSA. In addition, a smaller percentage of professional services businesses are owned by women (33.1%) in the Las Vegas-Henderson-Paradise MSA.
- A smaller percentage of goods and other services businesses are owned by POCs (28.1%) in the Las Vegas-Henderson-Paradise MSA. In addition, a smaller percentage of goods and other services businesses are owned by women (26.2%) in the Las Vegas-Henderson-Paradise MSA.

Figure C-19.
Self-employment rates in study-related industries, Clark County, 2017-2021

Group	Construction	Professional Services	Goods and Other Services
Race/ethnicity			
Asian Pacific American	17.9 %	11.7 % **	10.5 %
Black American	7.5 % **	7.4 % **	7.6 % **
Hispanic American	9.5 % *	16.0 % **	16.2 %
Native American	9.3 %	2.7 % **	14.0 % †
MENA American	14.4 % †	57.2 % **	10.7 % †
Subcontinent Asian American	18.9 % †	14.0 %	0.0 % †
Other race POC	14.7 % †	22.2 % †	16.3 % †
White American	12.2 %	22.7 %	17.5 %
Gender			
Women	7.8 % **	14.7 % **	20.6 % **
Men	11.0 %	20.6 %	11.5 %
Veteran Status			
Veteran	11.6 %	15.6 %	4.6 % **
Non-veteran	10.6 %	18.9 %	16.0 %
All individuals	10.7 %	18.6 %	14.9 %

Note: *, ** Denotes that the difference in proportions between the POC group and white Americans, or between women and men is statistically significant at the 90% and 95% confidence level, respectively.

† Denotes significant differences in proportions not reported due to small sample size.

"MENA American" includes Middle Eastern and North African Americans.

Source: BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-19 indicates that in Clark County:

- Black Americans (7.5%) and Hispanic Americans (9.5%) own construction businesses at rates less than that of white Americans (12.2%), and women (7.8%) own construction businesses at a rate less than that of men (11.0%).
- Asian Pacific Americans (11.7%), Black Americans (7.4%), Hispanic Americans (16.0%), and Native Americans (2.7%) own professional services businesses at rates less than that of white Americans (22.7%), and women (14.7%) own professional services businesses at a rate less than that of men (20.6%).
- Black Americans (7.6%) own goods and other services businesses at a rate less than that of white Americans (17.5%).

Figure C-20.
Predictors of business ownership in
construction (regression), Clark County,
2017-2021

Note:

The regression included 2,807 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and white Americans for the race variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa>.

Variable	Coefficient
Constant	-2.1459 **
Age	0.0292
Age-squared	-0.0001
Married	-0.0292
Disabled	0.1171
Number of children in household	0.0178
Number of people over 65 in household	0.0506
Owns home	0.0115
Home value (\$000s)	0.0002 *
Monthly mortgage payment (\$000s)	-0.0483
Interest and dividend income (\$000s)	0.0062
Income of spouse or partner (\$000s)	-0.0006
Speaks English well	-0.0450
Less than high school education	-0.0588
Some college	-0.0295
Four-year degree	-0.0468
Advanced degree	0.1068
Asian Pacific American	0.3332 *
Black American	-0.2777
Hispanic American	-0.0911
MENA American	0.5150
Native American	-0.1277
Subcontinent Asian American	0.8323
Other race POC	0.3361
Women	-0.3571 **
Veteran	-0.1816

Figure C-20 indicates that women are less likely to own construction businesses in Clark County relative to men, even after statistically accounting for other personal characteristics.

**Figure C-21.
Predictors of business ownership in
professional services (regression), Clark
County, 2017-2021**

Note:

The regression included 1,684 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and white Americans for the race variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-0.9960
Age	-0.0015
Age-squared	0.0002
Married	0.0098
Disabled	0.1737
Number of children in household	-0.0112
Number of people over 65 in household	0.0448
Owns home	-0.4083 **
Home value (\$000s)	0.0002
Monthly mortgage payment (\$000s)	0.1102 *
Interest and dividend income (\$000s)	-0.0019
Income of spouse or partner (\$000s)	0.0011
Speaks English well	-0.2673
Less than high school education	-0.2754
Some college	0.2981 *
Four-year degree	0.2252
Advanced degree	0.1967
Asian Pacific American	-0.4716 **
Black American	-0.7781 **
Hispanic American	-0.1153
MENA American	0.9101 **
Native American	-1.0296
Subcontinent Asian American	-0.2443
Other race POC	0.5973
Women	-0.2363 *
Veteran	-0.4911 **

Figure C-21 indicates that Asian Pacific Americans and Black Americans are less likely to own professional services businesses in Clark County compared to white Americans, even after statistically accounting for other personal factors. Women are also less likely to own professional services businesses relative to men, even after statistically accounting for other personal factors.

Figure C-22.
Predictors of business ownership in goods and other services (regression), Clark County, 2017-2021

Note:

The regression included 1,124 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and white Americans for the race variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-2.8425 **
Age	0.0436
Age-squared	-0.0003
Married	0.2858 *
Disabled	-0.1920
Number of children in household	-0.0617
Number of people over 65 in household	-0.1376
Owens home	0.4467 **
Home value (\$000s)	0.0002 *
Monthly mortgage payment (\$000s)	-0.1025
Interest and dividend income (\$000s)	0.0088 **
Income of spouse or partner (\$000s)	-0.0018
Speaks English well	0.3316 *
Less than high school education	-0.0559
Some college	0.1193
Four-year degree	-0.0001
Advanced degree	-0.6384
Asian Pacific American	-0.0376
Black American	-0.1478
Hispanic American	0.0691
MENA American	-0.1532
Native American	-0.3245
Subcontinent Asian American	0.0000 †
Other race POC	-0.1562
Women	0.3669 **
Veteran	-0.7452 *

Figure C-22 indicates that no groups of POCs, women, or veterans are less likely to own goods and other services businesses in Clark County compared to white Americans, men, or non-veterans, respectively, after statistically accounting for other personal factors.

Figure C-23.
Disparities in business ownership rates for Clark County construction workers, 2017-2021

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
White women	6.1%	12.7%	48

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) values of the dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-23 indicates that white women working in construction in Clark County own businesses at a rate that is 48 percent that of similarly situated white men.

Figure C-24.
Disparities in business ownership rates for Clark County professional services workers, 2017-2021

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Asian Pacific American	10.7%	20.5%	52
Black American	6.7%	22.2%	30
White women	18.2%	25.1%	72

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) values of the dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC from 2017-2021 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-24 indicates that Asian Pacific Americans, Black Americans, and white women working in professional services in Clark County own businesses at rates that are 52 percent, 30 percent, and 72 percent, respectively, that of similarly situated white men.

Figure C-25.
Businesses in poor financial condition in the United States, 2021

Source:
 BBC from 2021 Small Business Credit Survey.

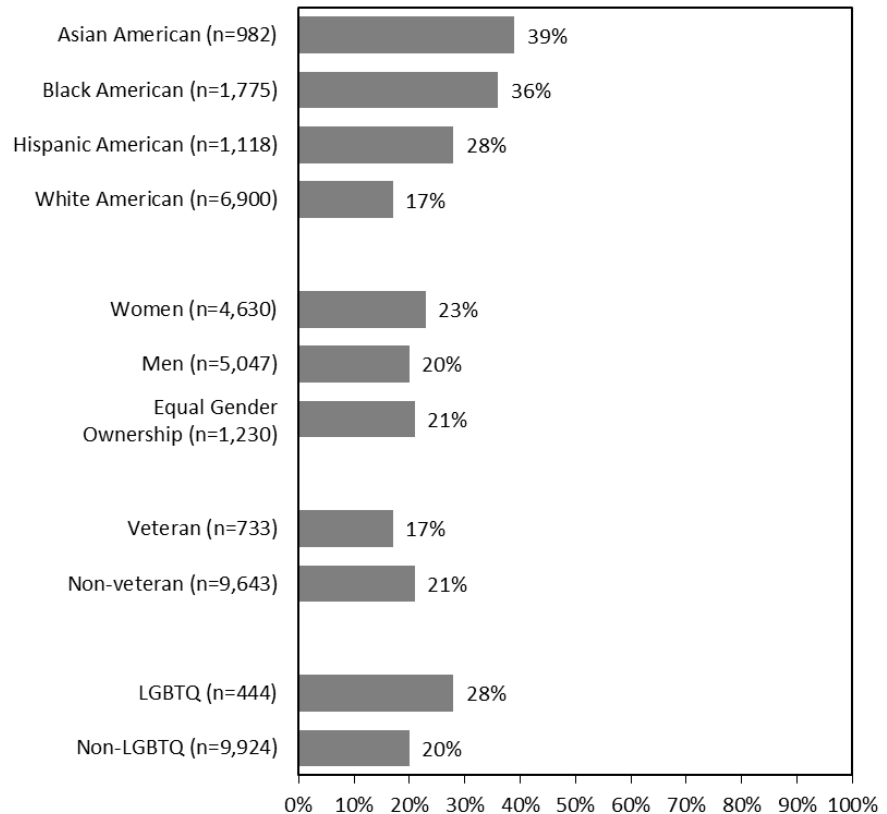


Figure C-25 indicates that, nationally, Asian American- (39%), Black American- (36%), and Hispanic American-owned businesses (28%) are more likely than white American-owned businesses (17%) to report being in poor financial condition. In addition, woman-owned businesses (23%) are more likely to report being in poor financial condition than businesses owned by men (20%).

Figure C-26.
Mean annual business receipts
(in thousands), Clark County

Note:

Includes employer firms. Does not include publicly-traded companies or other firms not classifiable by race and gender.

Source:

BBC from 2017 Annual Business Survey.

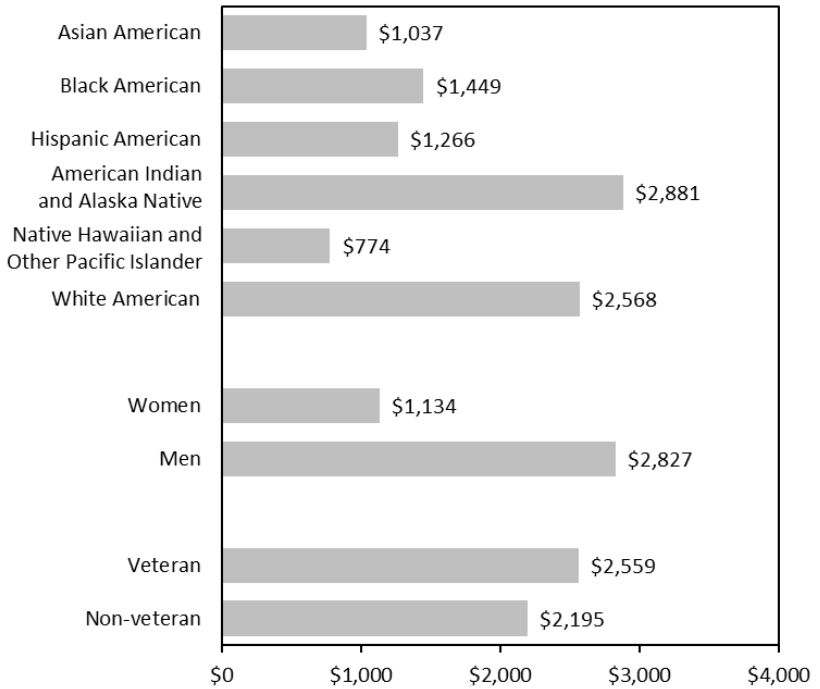


Figure C-26 indicates that Asian American-, Black American-, Hispanic American-, and Native Hawaiian and other Pacific Islander-owned businesses in Clark County have mean annual business receipts less than that of white American-owned businesses (\$2.6 million). In addition, woman-owned businesses (\$1.1 million) have mean annual business receipts less than that of businesses owned by men (\$2.8 million).

Figure C-27.
Mean annual business owner earnings, Clark County, 2017-2021

Note:

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2021 dollars.

** Denotes statistically significant differences from white Americans (for POC groups) and from men (for women) at the 95% confidence level.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

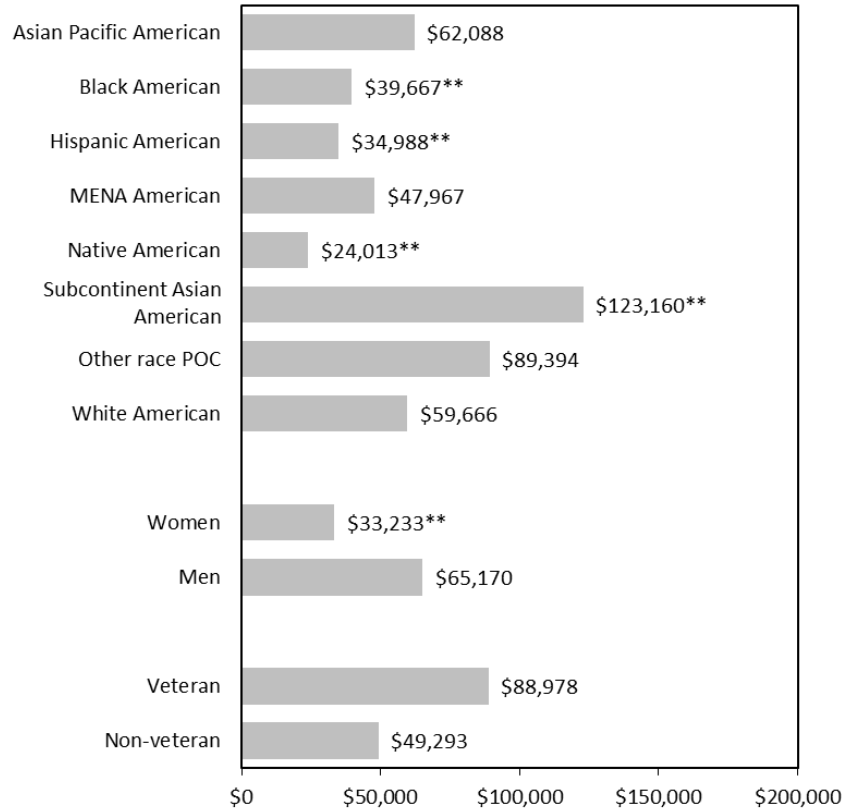


Figure C-27 indicates that, in Clark County, Black American (\$39,667), Hispanic American (\$34,988), and Native American (\$24,013) business owners earn less on average than white American business owners (\$59,666). In addition, woman business owners (\$33,233) earn less on average than male business owners (\$65,170).

**Figure C-28.
Predictors of business owner earnings
(regression), Clark County, 2017-2021**

Notes:

The regression includes 2,399 observations.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The sample universe is business owners 16 years old or older who reported positive earnings.

** Denotes statistical significance at the 95% confidence level.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and white American for the race variables.

Source:

BBC from 2017-2021 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	2,149.275 **
Age	1.103 **
Age-squared	0.999 **
Married	0.988
Speaks English well	1.174
Disabled	0.509 **
Less than high school	1.046
Some college	1.083
Four-year degree	1.284
Advanced degree	2.604 **
Asian Pacific American	1.008
Black American	0.783
Hispanic American	0.952
MENA American	0.851
Native American	0.727
Subcontinent Asian American	1.810 **
Other race POC	0.876
Women	0.531 **
Veteran	1.196

Figure C-28 indicates that woman business owners earn less than man business owners in Clark County, even after accounting for various personal characteristics.

APPENDIX D.

Availability Analysis Approach

BBC Research & Consulting (BBC) used a custom census approach to estimate the availability of businesses located in Clark County, Nevada for the construction, professional services, and non-professional services and supplies prime contracts and subcontracts the Regional Transportation Commission of Southern Nevada (RTC) awards. Appendix D expands on the information presented in Chapter 5 to further describe:

- A. Availability data;
- B. Representative businesses;
- C. Availability survey instrument; and
- D. Survey execution.

A. Availability Data

BBC partnered with Davis Research to conduct telephone and online surveys with hundreds of businesses throughout the relevant geographic market area (RGMA), which we identified as Clark County, Nevada. Davis Research surveyed businesses with locations in the RGMA that perform work in fields closely related to the types of contracts and procurements RTC awarded between July 1, 2017, and June 30, 2022 (i.e., the study period). We began the survey process by determining the work specializations, or subindustries, relevant to each prime contract and subcontract RTC awarded during the study period and identifying 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries. We then compiled information about local businesses D&B listed as having their primary lines of business within those work specializations, and Davis Research attempted surveys with each business multiple times on different days of the business week and at different times of the business day to maximize response rates. In total, the study team attempted to contact 7,015 local businesses that perform work relevant to RTC's contracting and procurement. We were able to successfully contact 1,434 of those businesses, 878 of which completed availability surveys.

B. Representative Businesses

The objective of the availability analysis was not to collect information about every business operating in the RGMA but instead was to collect information from a large, unbiased subset of local businesses that appropriately represented the entire relevant business population. That approach allowed BBC to estimate the availability of person of color (POC)-; woman-; veteran-; and lesbian, gay, bisexual, transgender, queer, and other sexual or gender orientations (LGBTQ+)-owned businesses for RTC work in an accurate, statistically valid manner.¹ In addition, we did not design the survey effort to contact every local business possibly performing construction, professional services, or non-professional

¹ "Woman-owned businesses" refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

services or supplies work. Instead, we reviewed the relevant prime contract and subcontract dollars RTC awarded during the study period, determined the types of work most relevant to those projects, and limited our survey efforts to those businesses that perform work consistent with those work types. Figure D-1 lists 8-digit work specialization codes within construction, professional services, and non-professional services and supplies most related to the relevant contract and procurement dollars RTC awarded during the study period, which BBC included as part of the availability analysis. We grouped those specializations into distinct subindustries, which are shown as headings in Figure D-1.

C. Availability Survey Instrument

BBC created an availability survey instrument to collect extensive information from relevant businesses located in the RGMA. As an example, the instrument the study team used with construction businesses is presented at the end of Appendix D. BBC modified the construction survey instrument slightly for use with businesses working in professional services and non-professional services and supplies to reflect terms more commonly used in those industries and to collect information specifically relevant to those industries.² (For example, BBC substituted the words “prime contractor” and “subcontractor” with “prime consultant” and “subconsultant” when surveying professional services businesses.)

1. Survey structure. The availability survey included 14 sections, and Davis Research attempted to cover all sections with each business the firm successfully contacted.

a. Identification of purpose. The surveys began by identifying RTC, as well as Harry Reid International Airport (LAS), as the survey sponsors and describing the purpose of the study. (e.g., “LAS and RTC are conducting a disparity study to assess barriers that businesses might face in the local marketplace. As part of that research, LAS and RTC want to understand the availability of different types of businesses for the contracts and procurements they award. We are conducting a survey to collect information about businesses qualified and interested in performing construction-related work for government and other public agencies, entities, and offices in Southern Nevada.”)

b. Verification of correct business name. The surveyor verified he or she had reached the correct business. If the business was not correct, surveyors asked if the respondent knew how to contact the correct business. Davis Research then followed up with the correct business based on the new contact information if the business representative provided it (see areas “X” and “Y” of the survey).

c. Verification of for-profit business status. The surveyor asked whether the entity was a for-profit business as opposed to a government or nonprofit organization (Question A1). Surveyors continued the survey only with those entities that responded “yes” to that question.

d. Verification of active business status. The surveyor asked whether the entity was in business and operational (Question A2). Surveyors continued the survey only with those entities that responded “yes” to that question.

e. Confirmation of primary lines of work. Businesses confirmed their primary lines of work according to D&B (Question A3a). If D&B’s work specialization codes were incorrect, they described their primary lines of work (Question A3b). Businesses were also asked to identify other types of work they perform

² BBC also developed e-mail versions of the survey instruments for businesses that preferred to complete the survey online.

beyond their primary lines of work (Question A3c). BBC coded information on primary lines of work and additional types of work (if any) into appropriate 8-digit D&B work specialization codes.

f. Locations and affiliations. The surveyor asked participants if their businesses had other locations (Question A4) and if their businesses were subsidiaries or affiliates of other businesses (Questions A5 through A6).

g. Willingness and ability to work. The surveyor asked businesses whether they were willing and able to work in various roles (Questions B1-B3).

h. Interest in future work. The surveyor asked businesses about their interest in future prime contract and subcontract work with RTC or other government agencies (Question B4).

i. Geographic area. The surveyor asked businesses whether they could serve customers in Clark County (Question C1).

j. Capacity. The surveyor asked businesses about the values of the largest prime contracts and subcontracts they can perform as well as the maximum volume of work they can perform at any given time (Questions D1 and D2).

k. Ownership. The surveyor asked whether businesses were at least 51 percent owned and controlled by POCs or women (Questions E1 and E2). If businesses indicated they were POC-owned, they were also asked about the race of the business' owner(s) (Question E3). The surveyor also asked whether businesses were at least 51 percent owned and controlled by veterans of the United States military (Question E4) or by individuals that identify as lesbian, gay, bisexual, transgender, queer, or other sexual or gender orientations (Question E5). BBC confirmed that information through several other data sources, including:

- RTC contract and vendor data;
- The Nevada Unified Certification Program directory;
- D&B business listings and other business information sources;
- Information from other available certification directories and business lists; and
- Business websites and other secondary research.

l. Business revenue. The surveyor asked questions about businesses' sizes in terms of their revenues and number of employees across all their locations (Questions F1 through F4).

m. Potential barriers in the marketplace. The surveyor asked an open-ended question about their experiences working with RTC and other local government agencies as well as general insights about conditions in the local marketplace (Questions G1a and G1b). In addition, the survey included a question asking whether respondents would be willing to participate in follow-up interviews about conditions in the local marketplace, which BBC used to recruit participants for in-depth interviews (Question G2).

n. Contact information. The survey concluded with questions about the participant's name, position, and contact information (Questions H1 through H3).

**Figure D-1.
Subindustries included in the availability analysis**

Industry Code	Industry Description	Industry Code	Industry Description
Construction			
Building construction		Electrical equipment and supplies	
15410000	Industrial buildings and warehouses	36259904	Control equipment, electric
15419905	Industrial buildings, new construction	36439904	Lightning protection equipment
15419909	Renovation, remodeling and repairs: industrial buildings	36480100	Outdoor lighting equipment
15420100	Commercial and office building contractors	36480110	Street lighting fixtures
15420101	Commercial and office building, new construction	36690200	Transportation signaling devices
15420103	Commercial and office buildings, renovation and repair	36690201	Highway signals, electric
15420302	Service station construction	36690206	Traffic signals, electric
15420400	Specialized public building contractors	36740103	Light emitting diodes
17910000	Structural steel erection	36799908	Liquid crystal displays (LCD)
		36990000	Electrical equipment and supplies
		39930100	Electric signs
Concrete work and materials		39930102	Scoreboards, electric
14420000	Construction sand and gravel	50460106	Signs, electrical
16110206	Sidewalk construction	50630000	Electrical apparatus and equipment
17410100	Foundation and retaining wall construction	50630205	Electrical construction materials
17710103	Gunite contractor	50630206	Electrical supplies
17710200	Curb and sidewalk contractors	50630300	Wire and cable
17710201	Curb construction	50630304	Electronic wire and cable
17710202	Sidewalk contractor	50630403	Lighting fixtures, commercial and industrial
17719900	Concrete work	50630504	Signaling equipment, electrical
17719901	Concrete pumping	50650300	Electronic parts
17959901	Concrete Breaking For Streets and Highways	57190202	Lighting fixtures
17999917	Fountain installation		
29510000	Asphalt paving mixtures and blocks	Electrical work	
29510201	Asphalt and asphaltic paving mixtures (not from refineries)	17310000	Electrical work
32730000	Ready-mixed concrete	17319903	General electrical contractor
50320100	Paving materials		
50320101	Asphalt mixture		
50320102	Paving mixtures		

Figure D-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Construction (continued)			
Excavation, drilling, wrecking, and demolition		Highway, street, and bridge construction (continued)	
17940000	Excavation work	16110202	Concrete construction: roads, highways, sidewalks,
17950000	Wrecking and demolition work	16110204	Highway and street paving contractor
17959902	Demolition, buildings and other structures	16110205	Resurfacing contractor
17990900	Building site preparation	16119901	General contractor, highway and street construction
		16119902	Highway and street maintenance
		16220000	Bridge, tunnel, and elevated highway construction
		16229901	Bridge construction
		16290000	Heavy construction
		17710301	Blacktop (asphalt) work
Fencing, guardrails, barriers, and signs		Landscape services	
16110100	Highway signs and guardrails	07110000	Soil preparation services
16110101	Guardrail construction, highways	07829902	Highway lawn and garden maintenance services
16110102	Highway and street sign installation	07829903	Landscape contractors
17999912	Fence construction	07830105	Tree trimming services for public utility lines
		07839902	Removal services, bush and tree
Heavy construction equipment rental		Other construction materials	
35310000	Construction machinery	32310302	Reflector glass beads, for highway signs or reflectors
35319901	Aerial work platforms: hydraulic/elec. truck/carrier mounted	36690203	Pedestrian traffic control equipment
35319902	Airport construction machinery	50990304	Reflective road markers
35319908	Road construction and maintenance machinery	73599912	Work zone traffic equipment (flags, cones, barrels, etc.)
50820000	Construction and mining machinery	08510101	Forest management plans, preparation of
50820100	Road construction equipment	17990800	Decontamination services
50820102	Road construction and maintenance machinery	17990801	Asbestos removal and encapsulation
50820304	Excavating machinery and equipment	49590302	Environmental cleanup services
73530000	Heavy construction equipment rental	73899921	Flagging service (traffic control)
73539900	Heavy construction equipment rental	87449904	Environmental remediation
73539901	Cranes and aerial lift equipment, rental or leasing		
73539902	Earth moving equipment, rental or leasing		
Highway, street, and bridge construction			
16110000	Highway and street construction		
16110200	Surfacing and paving		
16110201	Airport runway construction		

Figure D-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Construction (continued)			
Painting, striping, marking, and weatherproofing		Plumbing and HVAC (continued)	
17210200	Commercial painting	17110404	Ventilation and duct work contractor
17210201	Exterior commercial painting contractor		
17210300	Industrial painting	Vertical building trades	
17210302	Bridge painting	17619903	Sheet metal work
17210303	Pavement marking contractor		
17210400	Wallcovering contractors	Water, sewer, and utility lines	
17210401	Commercial wallcovering contractor	16230000	Water, sewer, and utility lines
17990608	Paint and wallpaper stripping	16230300	Water and sewer line construction
		16230303	Water main construction
Plumbing and HVAC		16239904	Pipeline construction, nsk
17110301	Fire sprinkler system installation	16239906	Underground utilities contractor
17110401	Mechanical contractor		
Professional services			
Advertising, marketing and public relations		Business services and consulting	
73119901	Advertising consultant	87429902	Business management consultant
73129901	Billboard advertising	87429904	General management consultant
73890300	Advertising, promotional, and trade show services	87480300	Communications consulting
73890309	Trade show arrangement		
79410200	Stadium event operator services	Construction management	
79410202	Sports field or stadium operator, promoting sports	73899907	Contractors' disbursement control
87430000	Public relations services	87419902	Construction management
87439903	Public relations and publicity	87420402	Construction project management consultant
Architectural and design services		Engineering	
73891801	Design, commercial and industrial	87110000	Engineering services
87120000	Architectural services	87110400	Construction and civil engineering

Figure D-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Professional services (continued)			
Engineering (continued)		Surveying and mapmaking	
87110401	Building construction consultant	87130000	Surveying services
87110402	Civil engineering		
87119905	Electrical or electronic engineering	Testing and inspection	
87120100	Architectural engineering	73890200	Inspection and testing services
87120101	Architectural engineering	73890204	Commodities sampling
		73890205	Commodity inspection
		73890209	Pipeline and power line inspection service
Human resources and job training services		73890211	Sewer inspection service
73610000	Employment agencies	73899960	Estimating service, construction
73610100	Placement agencies	87340200	Product testing laboratories
73610102	Labor contractors (employment agency)	87340202	Product certification, safety or performance
73639903	Engineering help service	87340203	Product testing laboratory, safety or performance
87420201	Compensation and benefits planning consultant	87340300	Pollution testing
87420206	Training and development consultant	87340301	Hazardous waste testing
IT and data services		Transportation planning and environmental services	
73710100	Custom computer programming services	73890201	Air pollution measuring service
73730102	Systems engineering, computer related	87110101	Pollution control engineering
73730200	Systems integration services	87310302	Environmental research
73749902	Data processing service	87420410	Transportation consultant
73780000	Computer maintenance and repair	87480200	Urban planning and consulting services
73790100	Computer related maintenance services	87480201	City planning
87480400	Systems analysis and engineering consulting services	87480204	Traffic consultant
Other professional services		87489905	Environmental consultant
87210100	Auditing services	89990702	Geophysical consultant
87210200	Accounting services, except auditing	89990703	Natural resource preservation service
87330201	Archeological expeditions		

Figure D-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Non-professional services and supplies			
Automobiles		Industrial equipment and machinery	
50120208	Trucks, commercial	30520300	Rubber belting
55110000	New and used car dealers	35890201	Car washing machinery
55119901	Automobiles, new and used	35990000	Industrial machinery
Cleaning and janitorial services		50840000	Industrial machinery and equipment
73490101	Building cleaning service	50840505	Industrial machine parts
73499902	Cleaning service, industrial or commercial	50840900	Processing and packaging equipment
26760104	Toilet paper: made from purchased paper	50840905	Packaging machinery and equipment
50840901	Cleaning equipment, high pressure, sand or steam	50840907	Pneumatic tools and equipment
50870300	Cleaning and maintenance equipment and supplies	50849905	Hydraulic systems equipment and supplies
50870304	Janitors' supplies	50850000	Industrial supplies
51690400	Specialty cleaning and sanitation preparations	50850202	Packing, industrial
51690402	Sanitation preparations	50850303	Valves and fittings
Communications equipment		50850500	Bearings, bushings, wheels, and gears
36630000	Radio and t.v. communications equipment	50850501	Bearings
36630100	Radio broadcasting and communications equipment	50850502	Gears
50650200	Communication equipment	50859904	Filters, industrial
57319907	Radios, two-way, citizens band, weather, short-wave, etc.	76990500	Industrial equipment services
59990602	Communication equipment	Office equipment and supplies	
59990605	Mobile telephones and equipment	25220102	Chairs, office: padded or plain: except wood
Elevator goods and services		26310300	Container, packaging, and boxboard
17919903	Elevator front installation, metal	50210100	Office and public building furniture
17969901	Elevator installation and conversion	50440200	Copying equipment
35350000	Conveyors and conveying equipment	51120000	Stationery and office supplies
50840801	Conveyor systems	59439902	Office forms and supplies
76992501	Elevators: inspection, service, and repair	Other goods	
		25420000	Partitions and fixtures, except wood
		26760000	Sanitary paper products

Figure D-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Non-professional services and supplies (continued)			
Other goods (continued)		Petroleum and petroleum products (continued)	
26760100	Towels, napkins, and tissue paper products	51720203	Gasoline
26760103	Napkins, paper: made from purchased paper	51720205	Service station supplies, petroleum
26760105	Towels, paper: made from purchased paper	51729902	Fuel oil
47830000	Packing and crating	51729905	Petroleum brokers
51910102	Fertilizer and fertilizer materials	59830000	Fuel oil dealers
73590702	Furniture rental	59840000	Liquefied petroleum gas dealers
		59849902	Liquefied petroleum gas, delivered to customers' p
Other services		Printing, copying, and mailing	
49530200	Refuse collection and disposal services	27520100	Offset and photolithographic printing
49530201	Garbage: collecting, destroying, and processing	27520103	Photolithographic printing
58120305	Delicatessen (eating places)	27520300	Business form and card printing, lithographic
58120314	Snack bar	27540200	Business form and card printing, gravure
58120502	Restaurant, family: independent	27590000	Commercial printing
58129905	Commissary restaurant		
58129906	Contract food services		
Petroleum and petroleum products		Security guard services	
28690400	Fuels	73810100	Guard services
29110100	Gases and liquefied petroleum gases	73810101	Armored car services
29110302	Diesel fuels	73810104	Protective services, guard
51710000	Petroleum bulk stations and terminals	73810105	Security guard service
51719901	Petroleum bulk stations		
51719902	Petroleum terminals	Security systems	
51720000	Petroleum products	36690100	Emergency alarms
51720100	Gases	36690101	Burglar alarm apparatus, electric
51720102	Gases, liquefied petroleum (propane)	36690102	Fire alarm apparatus, electric
51720200	Engine fuels and oils	36690103	Fire detection systems, electric
51720202	Diesel fuel	36690104	Metal detectors
		36990501	Electric fence chargers

Figure D-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Non-professional services and supplies (continued)			
Security systems (continued)		Uniforms and apparel (continued)	
36990502	Security control equipment and systems	23260202	Industrial garments, men's and boys'
50630500	Electric alarms and signaling equipment	23379901	Uniforms, except athletic: women's, misses', and juniors'
50630501	Alarm systems	31439905	Work shoes, men's
50630502	Burglar alarm systems	51360000	Men's and boy's clothing
50650403	Closed circuit TV	51360603	Uniforms, men's and boys'
50659903	Security control equipment and systems	51360604	Work clothing, men's and boys'
59990100	Alarm and safety equipment stores	51379905	Uniforms, women's and children's
59990101	Alarm signal systems	56619903	Men's boots
Security systems services		56990100	Uniforms and work clothing
17310400	Safety and security specialization	56990102	Uniforms
17310402	Closed circuit television installation	56990103	Work clothing
48419902	Closed circuit television services	72130204	Uniform supply
73820000	Security systems services	72180203	Industrial uniform supply
73829900	Security systems services	72180206	Work clothing supply
73829901	Burglar alarm maintenance and monitoring	Vehicle repair services	
73829903	Protective devices, security	75320300	Customizing services, nonfactory basis
Uniforms and apparel		75349903	Tire repair shop
23110300	Men's and boys' uniforms	75380101	Diesel engine repair: automotive
23110303	Policemen's uniforms: made from purchased material	75380104	Truck engine repair, except industrial
23260000	Men's and boy's work clothing	75389902	General truck repair
23260100	Work uniforms	75490100	Automotive maintenance services
23260101	Medical and hospital uniforms, men's		

D. Survey Execution

Davis Research conducted all availability surveys between March and October 2023. The firm attempted to survey the owner, manager, or other officer of each business that could provide accurate responses to survey questions.

1. Businesses the study team successfully contacted. Figure D-2 presents the disposition of the 7,015 businesses the study team attempted to contact for availability surveys and how that number resulted in the 1,434 businesses the study team was able to successfully contact.

Figure D-2.
Disposition of attempts to contact businesses for availability surveys

Source:
BBC availability analysis.

	Number of businesses
Beginning list	7,015
Less duplicate phone numbers	135
Less non-working phone numbers	743
Less wrong number/business	352
Unique business listings with working phone numbers	5,785
Less no answer	2,823
Less could not reach responsible staff member	1,519
Less language barrier	9
Businesses successfully contacted	1,434

a. Non-working or wrong phone numbers. Some of the business listings BBC purchased from D&B and Davis Research attempted to contact were:

- Duplicate phone numbers (135 listings);
- Non-working phone numbers (743 listings); or
- Wrong numbers for the desired businesses (352 listings).

Some non-working phone numbers and wrong numbers resulted from businesses going out of business or changing their names and phone numbers between the time D&B listed them and the time the study team attempted to contact them.

b. Working phone numbers. As shown in Figure D-2, there were 5,785 businesses with working phone numbers Davis Research attempted to contact. They were unsuccessful in contacting many of those businesses for various reasons:

- The firm could not reach anyone after multiple attempts for 2,823 businesses.
- The firm could not reach a responsible staff member after multiple attempts for 1,519 businesses.
- The firm could not conduct the availability survey due to language barriers for nine businesses.

Thus, Davis Research was able to successfully contact 1,434 businesses.

2. Businesses included in the availability database. Figure D-3 presents the disposition of the 1,434 businesses Davis Research successfully contacted and how that number resulted in the 727 businesses BBC considered potentially available for RTC work.

a. Businesses not interested in discussing availability for RTC work. Of the 1,434 businesses the study team successfully contacted, 556 businesses were not interested in discussing their availability for RTC (or LAS) work. In total, 878 successfully contacted businesses completed availability surveys.

Figure D-3.
Disposition of successfully contacted businesses

Source:
BBC availability analysis.

	Number of Establishments
Businesses successfully contacted	1,434
Less businesses not interested in discussing availability for work	556
Businesses that completed surveys	878
Less no longer in business	7
Less not a for-profit business	8
Less no interest in future work	85
Less line of work outside of study scope	25
Less cannot perform work in Clark County	2
Less multiple locations of same business	24
Businesses potentially available for RTC work	727

b. Businesses available for RTC work. BBC deemed only a portion of the businesses that completed availability surveys as potentially available for the prime contracts and subcontracts RTC (and LAS) awarded during the study period. We excluded many of the businesses that completed surveys from the availability database for various reasons:

- BBC excluded seven businesses that indicated they were no longer in business.
- We excluded eight businesses that indicated they were not-for-profit businesses.
- BBC excluded 85 businesses that reported they were not interested in contracting opportunities with RTC or other government organizations.
- We excluded 25 businesses that reported primary lines of work outside the study scope.
- We excluded two businesses that reported they were not able to perform work in Clark County.
- Twenty-four survey participants represented different locations of the same businesses. Prior to analyzing results, BBC combined responses from multiple locations of the same business into a single data record according to several rules:
 - If any of the participants reported bidding or working on a contract or procurement within a particular subindustry, we considered the business to be interested in participating in contracts and procurements in that subindustry.
 - BBC combined the different roles of work (i.e., prime contractor or subcontractor) different participants representing the same business reported into a single response. For example, if one participant reported that the business works as a prime contractor and another participant reported that the business works as a subcontractor, then BBC considered the business as available for both prime contracts and subcontracts.

- BBC considered the largest project any participants representing the same business reported being able to perform as the business' capacity (i.e., the largest project for which the business could be considered available).

After those exclusions, BBC compiled a database of 724 businesses we considered potentially available for RTC (and LAS) work.

AVAILABILITY SURVEY INSTRUMENT

Construction

Hello. My name is [INTERVIEWER NAME] from Davis Research, calling on behalf of the Harry Reid International Airport (LAS) and the Regional Transportation Commission of Southern Nevada (RTC). This is not a sales call. LAS and RTC are conducting a disparity study to assess barriers that businesses might face in the local marketplace. As part of that research, LAS and RTC want to understand the *availability* of different types of businesses for the contracts and procurements they award. We are conducting a survey to collect information about businesses qualified and interested in performing construction-related work for government and other public agencies, entities, and offices in Southern Nevada.

The survey is designed only to gather information and will have no impact on present or future work opportunities with LAS and RTC. Your participation in the survey would be very valuable to the process, and it should only take 15 minutes to complete.

Whom can I speak with to gather information about your business' characteristics and potential interest in working with government and other public agencies, entities, and offices in Southern Nevada?

[AFTER REACHING AN APPROPRIATELY SENIOR STAFF MEMBER, THE INTERVIEWER SHOULD RE-INTRODUCE THE PURPOSE OF THE SURVEY AND BEGIN WITH QUESTIONS.]

[IF ASKED, THE INFORMATION DEVELOPED IN THE SURVEYS WILL RESULT IN DATA ON BUSINESSES QUALIFIED AND INTERESTED IN WORKING WITH GOVERNMENT AND OTHER PUBLIC AGENCIES, ENTITIES, AND OFFICES IN THE REGION AND WILL INFORM VARIOUS ANALYSES AS PART OF THE RESEARCH.]

Please answer each question as honestly and accurately as possible so LAS and RTC can develop a realistic understanding of the businesses potentially available for government and other public agency work in Southern Nevada.

X1. I have a few basic questions about your business and the type of work you do. Can you confirm this is [BUSINESS NAME]?

1=Correct business [SKIP TO Y4]

2=Incorrect business

99=Refused [TERMINATE]

Y1. What is the name of this business?

1=Verbatim

Y2. Is [NEW BUSINESS NAME] associated with [OLD BUSINESS NAME] in any way?

1=Yes, same owner doing business under a different name

2=Yes, can give information about new business

3=Business bought/sold/changed ownership

98=No, does not have information [TERMINATE]

99=Refused to give information [TERMINATE]

Y3. Do you work for [NEW BUSINESS NAME]?

1=Yes

2=No [TERMINATE]

Y4. Can you give me the address for [BUSINESS NAME/NEW BUSINESS NAME]?

[NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT]:

. STREET ADDRESS

. CITY

. STATE

. ZIP

1=[VERBATIM]

A1. Let me confirm [BUSINESS NAME/NEW BUSINESS NAME] is a for-profit business, as opposed to a non-profit organization, a foundation, or government office. Is that correct?

1=Yes, a for-profit business

2=No, other [TERMINATE]

A2. Is your company in business and operational?

1=Yes

2=No [TERMINATE]

A3a. Let me also confirm what kind of business this is. The information we have from Dun & Bradstreet indicates your main line of work is [SIC DESCRIPTION]. Is that correct?

[NOTE TO INTERVIEWER – IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES INFORMATION ON BUSINESSES THROUGHOUT THE COUNTRY]

1=Yes [SKIP TO A3c]

2=No

98=Don't know

99=Refused

A3b. What would you say is the main line of work at [BUSINESS NAME/NEW BUSINESS NAME]?

[NOTE TO INTERVIEWER – IF RESPONDENT INDICATES BUSINESS' MAIN LINE OF WORK IS "GENERAL CONSTRUCTION" OR "GENERAL CONTRACTOR," PROBE TO FIND OUT MORE DETAIL ABOUT TYPES OF WORK THEY PERFORM.]

1=VERBATIM

A3c. What other types of work, if any, does your business perform?

1=VERBATIM

97=(NONE)

A4. Is this the sole location of your business, or do you have offices in other locations?

1=Sole location

2=Have other locations

98=Don't know

99=Refused

A5. Is your business a subsidiary or affiliate of another business?

1=Independent [SKIP TO B1]

2=Subsidiary or affiliate of another business

98=Don't know [SKIP TO B1]

99=Refused [SKIP TO B1]

A6. What is the name of the parent company?

1=VERBATIM

98=Don't know

99=Refused

A prime or general contractor is a business that contracts directly with the project owner. In contrast, a subcontractor is a business that contracts with a prime or general contractor as part of a larger project. Some businesses work in both roles on different projects. Based on these definitions:

B1. Is your business willing and able to work as a prime contractor or general contractor?

- 1=Yes
- 2=No
- 98=Don't know
- 99=Refused

B2. Is your business willing and able to work as a subcontractor?

- 1=Yes
- 2=No
- 98=Don't know
- 99=Refused

B3. What about as a supplier? Is your business willing and able to supply construction materials or goods?

- 1=Yes
- 2=No
- 98=Don't know
- 99=Refused

B4. I'm also interested in the sectors in which your business works. Specifically, is your business interested in performing work on projects for government or other public agencies, entities, or offices in Southern Nevada?

- 1=Yes
- 2=No
- 98=Don't know
- 99=Refused

[NOTE TO INTERVIEWER: IF ASKED, EXAMPLES INCLUDE STATES, CITIES, COUNTIES, PUBLIC SCHOOLS AND UNIVERSITIES, TRANSPORTATION ORGANIZATIONS, AND OTHERS]

Now, I want to ask you about the geographic areas your business works within Southern Nevada. Please think about the geographic areas in which your business is able to perform work or serve customers as you answer the following question.

C1. Is your company able to work in Clark County, Nevada?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

Now I'd like to ask you a few questions about the size of work your business is able to compete for or perform.

D1. What is the largest prime contract, subcontract, or other piece of work your company is able to compete for or perform?

1=VERBATIM

[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY]

1=\$100,000 or less

2=More than \$100,000 to \$250,000

3=More than \$250,000 to \$500,000

4=More than \$500,000 to \$1 million

5=More than \$1 million to \$2 million

6=More than \$2 million to \$5 million

7=More than \$5 million to \$10 million

8=More than \$10 million to \$20 million

9=More than \$20 million to \$50 million

10=More than \$50 million to \$100 million

11= More than \$100 million to \$200 million

12=Greater than \$200 million

97=(NONE)

98=(DON'T KNOW)

99=(REFUSED)

D2. Approximately what is the maximum volume of work your business can take on or perform at any given time?

1=VERBATIM

[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY.]

[NOTE TO INTERVIEWER – FOR EXAMPLE, IS THERE SOME AMOUNT OF TOTAL WORK THAT IF YOUR FIRM OBTAINED IT, YOU WOULD HAVE TO START TURNING DOWN ADDITIONAL WORK BECAUSE YOU SIMPLY COULDN'T TAKE ON ANYMORE?]

1=\$100,000 or less

2=More than \$100,000 to \$250,000

3=More than \$250,000 to \$500,000

4=More than \$500,000 to \$1 million

5=More than \$1 million to \$2 million

6=More than \$2 million to \$5 million

7=More than \$5 million to \$10 million

8=More than \$10 million to \$20 million

9=More than \$20 million to \$50 million

10=More than \$50 million to \$100 million

11= More than \$100 million to \$200 million

12=Greater than \$200 million

97=(NONE)

98=(DON'T KNOW)

99=(REFUSED)

My next questions are about the ownership of your business.

E1. A business is defined as a woman-owned business if more than half—that is, 51 percent or more—of the ownership and control of daily management and operations is by individuals who identify as women. By this definition, is [BUSINESS NAME/NEW BUSINESS NAME] a woman-owned business?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

E2. A business is defined as a person of color-, or POC-owned business if more than half—that is, 51 percent or more—of the ownership and control of daily management and operations is by individuals who identify as Asian, Black, Hispanic, Native American, or another non-white race or ethnicity. By this definition, is [BUSINESS NAME/NEW BUSINESS NAME] a POC-owned business?

1=Yes

2=No [SKIP TO E4]

98=(DON'T KNOW) [SKIP TO E4]

99=(REFUSED) [SKIP TO E4]

E3. Which of the following best represents the race/ethnicity of the business' owner(s)?

1=Black American

2=Asian Pacific American (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong)

3=Hispanic or Latin American (persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race)

4=Native American (American Indians, Alaska Natives, Aleuts, or Native Hawaiians)

5=Subcontinent Asian American (persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka)

6=Middle Eastern or North African (persons whose origins are from Algeria, Bahrain, Comoros, Djibouti, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestinian Authority, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, United Arab Emirates, or Yemen)

7=(OTHER - SPECIFY) _____

98=(DON'T KNOW)

99=(REFUSED)

E4. A business is defined as veteran-owned business if more than half—that is, 51 percent or more—of the ownership and control of daily management and operations is by veterans of the United States military. By this definition, is [BUSINESS NAME/NEW BUSINESS NAME] a veteran-owned business?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

E5. A business is defined as an LGBTQ+-owned business if more than half—that is, 51 percent or more—of the ownership and control of daily management and operations is by people that identify as Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, or Asexual. By this definition, is [BUSINESS NAME/NEW BUSINESS NAME] an LGBTQ+-owned business?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

Now I want to ask you a few questions about your business' size.

F1. Dun & Bradstreet indicates that your business has about [number] employees across all its locations. Is that an accurate estimate of the number of employees who work at your business, including both full-time and part-time employees?

1=Yes [SKIP TO F3]

2=No

98=Don't know [SKIP TO F3]

99=Refused [SKIP TO F3]

F2. About how many employees work at your business, including both full-time and part-time employees, across all your locations?

1=VERBATIM

[NOTE TO INTERVIEWER – READ CATEGORIES IF NECESSARY]

1=100 employees or fewer

2=101-150 employees

3=151-200 employees

4=201-250 employees

5=251-500 employees

6=501-750 employees

7=751-1,000 employees

8=1,001-1,250 employees

9=1,251-1,500 employees

10=1,501 or more employees

F3. Dun & Bradstreet lists the average annual gross revenue of your business, including all your locations, to be [dollar amount]. Is that an accurate estimate of your business' annual gross revenue?

1=Yes [SKIP TO G1a]

2=No

98=Don't know [SKIP TO G1a]

99=Refused [SKIP TO G1a]

F4. What is an accurate estimate of your company's annual gross revenue, including all of your locations?

1=VERBATIM

[READ LIST IF NECESSARY]

1=\$1 Million or less

2=More than \$1 Million to \$3 Million

3=More than \$3 Million to \$6 Million

4=More than \$6 Million to \$8 Million

5=More than \$8 Million to \$12 Million

6=More than \$12 Million to \$16 Million

7= More than \$16 Million to \$19 Million

8= More than \$19 Million to \$22 Million

9= More than \$22 Million to \$28 Million

10=More than \$28 Million

98= (DON'T KNOW)

99= (REFUSED)

G1a. We're interested in whether your business has experienced barriers or difficulties related to working with, or attempting to work with, LAS, RTC, or other government or public agencies, entities, or offices in Southern Nevada. Do you have any thoughts to share?

1=VERBATIM [PROBE FOR COMPLETE THOUGHTS]

97=(NOTHING/NONE/NO COMMENTS)

G1b. Do you have any additional thoughts to share regarding general marketplace conditions in Southern Nevada, being successful in your industry, or obtaining work?

1=VERBATIM [PROBE FOR COMPLETE THOUGHTS]

97=(NOTHING/NONE/NO COMMENTS)

G2. Would you be willing to participate in a follow-up interview about any of those topics?

1=Yes

2=No

Just a few final questions.

H1. What is your name?

1=VERBATIM

H2. What is your position at [BUSINESS NAME/NEW BUSINESS NAME]?

- 1=Receptionist
- 2=Owner
- 3=Manager
- 4=CFO
- 5=CEO
- 6=Assistant to Owner/CEO
- 7=Sales manager
- 8=Office manager
- 9=President
- 9=(OTHER - SPECIFY) _____
- 99=(REFUSED)

H3. At what email address can you be reached?

- 1= VERBATIM

Thank you very much for your participation. If you have any questions or concerns, please contact:

Amy Shaw

Commercial Business Development Manager
Harry Reid International Airport
(t) 702-261-5123
(e) amy@lasairport.com

Tonita Brown

Senior Purchasing & Contracts Analyst / DBE Liaison Officer
Regional Transportation Commission of Southern Nevada
(t) 702-676-1507
(e) brownt@rtcsnv.com

If you have any questions for the disparity study project team or wish to submit written questions, comments, or insights on the Southern Nevada marketplace, please email LASRTCDisparityStudy@bbcresearch.com.

APPENDIX E.

Disparity Analysis Results Tables

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation, or *utilization*, of person of color (POC)- and woman-owned businesses in construction, professional services, and non-professional services and supplies prime contracts and subcontracts the Regional Transportation Commission of Southern Nevada (RTC) awarded between July 1, 2017 and June 30, 2022 (the study period) with the percentage of contract and procurement dollars one might expect RTC to award to those businesses based on their availability for that work.¹ Appendix E presents results from the disparity analysis for relevant business groups and various sets of projects RTC awarded during the study period.

A. Format and Information

Each table in Appendix E presents disparity analysis results for a different set of projects. For example, Figure E-1 presents disparity analysis results for all relevant projects RTC awarded during the study period. A review of Figure E-1 introduces the calculations and format of all disparity analysis tables in Appendix E. Figure E-1 presents information about each relevant business group in separate rows:

- “All businesses” in row (1) pertains to information about all businesses regardless of the race/ethnicity or gender of their owners.
- Row (2) presents results for all POC- and woman-owned businesses considered together, regardless of whether they were certified as Disadvantaged Business Enterprises (DBEs).
- Row (3) presents results for all non-Hispanic white woman-owned businesses, regardless of whether they were certified as DBEs.
- Row (4) presents results for all POC-owned businesses, regardless of whether they were certified as DBEs.
- Rows (5) through (9) present results for businesses of each relevant race/ethnic group, regardless of whether they were certified as DBEs.
- Rows (10) through (17) present utilization analysis results for businesses of each relevant race/ethnic and gender group that were certified as DBEs.

1. Utilization analysis results. Each results table includes the same columns of information:

- Column (a) presents the total number of prime contracts and subcontracts (contract elements) BBC analyzed as part of the set. As shown in row (1) of column (a) of Figure E-1, BBC analyzed 927 contract elements RTC awarded during the study period. The values presented in column (a) represent the number of contract elements in which businesses of each group participated. For

¹ “Woman-owned businesses” refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

example, as shown in row (6) of column (a), Black American-owned businesses participated in 22 prime contracts and subcontracts RTC awarded during the study period.

- Column (b) presents the dollars (in thousands) associated with the set of contract elements. As shown in row (1) of column (b) of Figure E-1, BBC examined approximately \$222 million that was associated with the 927 relevant contract elements RTC awarded during the study period. The value presented in column (b) for each individual business group represents the dollars RTC awarded to businesses of that particular group on the set of contract elements. For example, as shown in row (6) of column (b), RTC awarded approximately \$4.7 million of its prime contract and subcontract dollars to Black American-owned businesses during the study period.
- Column (c) presents the participation of each business group as a percentage of total dollars associated with the set of contract elements. BBC calculated each percentage in column (c) by dividing the dollars going to a particular group in column (b) by the total dollars associated with the set of contract elements shown in row (1) of column (b), and then expressing the result as a percentage. For example, for Black American-owned businesses, the study team divided \$4.7 million by \$222 million and multiplied by 100 for a result of 2.1 percent, as shown in row (6) of column (c).

2. Availability results. Column (d) of Figure E-1 presents the availability of each relevant group for all the contract elements BBC analyzed as part of the project set. Availability represents the percentage of dollars one might expect RTC to award to businesses of a particular group based on their specific characteristics and the characteristics of the contract elements included in a particular set of projects. Availability estimates, which are represented as percentages of the total dollars associated with the project set, serve as benchmarks against which to compare the participation of specific groups in those projects. For example, as shown in row (6) of column (d), the availability of Black American-owned businesses for RTC work is 5.9 percent. That is, one might expect RTC to award 5.9 percent of relevant contract dollars to Black American-owned businesses based on their availability for that work.

3. Disparity indices. BBC calculated a disparity index, or ratio, for each relevant race/ethnic and gender group, which compares the participation of POC- and woman-owned businesses in agency work to their estimated availability for that work. Column (e) of Figure E-1 presents the disparity index for each group. For example, as reported in row (6) of column (e), the disparity index for Black American-owned businesses was 36.4, indicating that RTC awarded approximately \$0.36 to Black American-owned businesses for every dollar one might expect RTC to award to those businesses based on their availability for that work. For disparity indices exceeding 200, BBC reported an index of “200+.” When there was no participation and no availability for a particular group for a particular set of projects, BBC reported a disparity index of “100,” indicating parity.

B. Index and Tables

The table of contents presents an index of the sets of projects for which BBC analyzed disparity analysis results. In addition, the heading of each table in Appendix E provides a description of the subset of projects BBC analyzed for that particular set of projects.

Table of Contents

Table	Organization	Characteristics						Goals	Potential DBE
		Time period	Contract area	Contract role	Contract size	Funding Source			
E-1	RTC	07/01/17 - 06/30/22	All industries	Prime contracts and subcontracts	N/A	All funding sources	N/A	N/A	
E-2	RTC	07/01/17 - 12/31/20	All industries	Prime contracts and subcontracts	N/A	All funding sources	N/A	N/A	
E-3	RTC	01/01/21 - 06/30/22	All industries	Prime contracts and subcontracts	N/A	All funding sources	N/A	N/A	
E-4	RTC	07/01/17 - 06/30/22	Construction	Prime contracts and subcontracts	N/A	All funding sources	N/A	N/A	
E-5	RTC	07/01/17 - 06/30/22	Professional services	Prime contracts and subcontracts	N/A	All funding sources	N/A	N/A	
E-6	RTC	07/01/17 - 06/30/22	Non-professional services and supplies	Prime contracts and subcontracts	N/A	All funding sources	N/A	N/A	
E-7	RTC	07/01/17 - 06/30/22	All industries	Prime contracts	N/A	All funding sources	N/A	N/A	
E-8	RTC	07/01/17 - 06/30/22	All industries	Subcontracts	N/A	All funding sources	N/A	N/A	
E-9	RTC	07/01/17 - 06/30/22	All industries	Prime contracts	Large Prime	All funding sources	N/A	N/A	
E-10	RTC	07/01/17 - 06/30/22	All industries	Prime contracts	Small Prime	All funding sources	N/A	N/A	
E-11	RTC	07/01/17 - 06/30/22	All industries	Prime contracts and subcontracts	N/A	USDOT	N/A	N/A	
E-12	RTC	07/01/17 - 06/30/22	All industries	Prime contracts and subcontracts	N/A	Non-USDOT	N/A	N/A	
E-13	RTC	07/01/17 - 06/30/22	All industries	Prime contracts and subcontracts	N/A	All funding sources	Yes	N/A	
E-14	RTC	07/01/17 - 06/30/22	All industries	Prime contracts and subcontracts	N/A	All funding sources	No	N/A	
E-15	RTC	07/01/17 - 06/30/22	All industries	Prime contracts and subcontracts	N/A	All funding sources	N/A	Potential DBE	
E-16	RTC	07/01/17 - 06/30/22	Construction	Prime contracts and subcontracts	N/A	All funding sources	N/A	Potential DBE	
E-17	RTC	07/01/17 - 06/30/22	Professional services	Prime contracts and subcontracts	N/A	All funding sources	N/A	Potential DBE	
E-18	RTC	07/01/17 - 06/30/22	Non-professional services and supplies	Prime contracts and subcontracts	N/A	All funding sources	N/A	Potential DBE	

Figure E-1.
Time period: 07/01/2017 - 06/30/2022
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	927	\$222,299			
(2) POC- and woman-owned businesses	191	\$45,095	20.3	36.3	55.9
(3) White woman-owned	75	\$7,422	3.3	11.6	28.8
(4) POC-owned	116	\$37,673	16.9	24.7	68.6
(5) Asian Pacific American-owned	7	\$1,441	0.6	6.9	9.4
(6) Black American-owned	22	\$4,737	2.1	5.9	36.4
(7) Hispanic American-owned	76	\$31,302	14.1	7.4	191.5
(8) Native American-owned	5	\$114	0.1	4.3	1.2
(9) Subcontinent Asian American-owned	6	\$80	0.0	0.3	14.0
(10) POC-owned or woman-owned DBE	88	\$37,397	16.8		
(11) White woman-owned DBE	25	\$2,714	1.2		
(12) POC-owned DBE	63	\$34,683	15.6		
(13) Asian Pacific American-owned DBE	2	\$1,171	0.5		
(14) Black American-owned DBE	18	\$4,219	1.9		
(15) Hispanic American-owned DBE	42	\$29,263	13.2		
(16) Native American-owned DBE	0	\$0	0.0		
(17) Subcontinent Asian American-owned DBE	1	\$30	0.0		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-2.
Time period: 07/01/2017 - 12/31/2020
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	721	\$207,792			
(2) POC- and woman-owned businesses	154	\$42,898	20.6	36.2	57.0
(3) White woman-owned	60	\$6,991	3.4	11.7	28.9
(4) POC-owned	94	\$35,907	17.3	24.6	70.3
(5) Asian Pacific American-owned	7	\$1,441	0.7	7.1	9.8
(6) Black American-owned	16	\$4,485	2.2	5.7	37.7
(7) Hispanic American-owned	62	\$29,845	14.4	7.1	200+
(8) Native American-owned	3	\$57	0.0	4.5	0.6
(9) Subcontinent Asian American-owned	6	\$80	0.0	0.2	16.5
(10) POC-owned or woman-owned DBE	74	\$36,912	17.8		
(11) White woman-owned DBE	20	\$2,530	1.2		
(12) POC-owned DBE	54	\$34,382	16.5		
(13) Asian Pacific American-owned DBE	2	\$1,171	0.6		
(14) Black American-owned DBE	13	\$3,985	1.9		
(15) Hispanic American-owned DBE	38	\$29,196	14.1		
(16) Native American-owned DBE	0	\$0	0.0		
(17) Subcontinent Asian American-owned DBE	1	\$30	0.0		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-3.
Time period: 01/01/2021 - 06/30/2022
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	206	\$14,507			
(2) POC- and woman-owned businesses	37	\$2,197	15.1	37.2	40.7
(3) White woman-owned	15	\$431	3.0	10.8	27.6
(4) POC-owned	22	\$1,766	12.2	26.4	46.1
(5) Asian Pacific American-owned	0	\$0	0.0	5.0	0.0
(6) Black American-owned	6	\$252	1.7	7.6	23.0
(7) Hispanic American-owned	14	\$1,457	10.0	11.3	89.1
(8) Native American-owned	2	\$57	0.4	2.0	19.8
(9) Subcontinent Asian American-owned	0	\$0	0.0	0.6	0.0
(10) POC-owned or woman-owned DBE	14	\$485	3.3		
(11) White woman-owned DBE	5	\$184	1.3		
(12) POC-owned DBE	9	\$301	2.1		
(13) Asian Pacific American-owned DBE	0	\$0	0.0		
(14) Black American-owned DBE	5	\$234	1.6		
(15) Hispanic American-owned DBE	4	\$67	0.5		
(16) Native American-owned DBE	0	\$0	0.0		
(17) Subcontinent Asian American-owned DBE	0	\$0	0.0		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-4.
Time period: 07/01/2017 - 06/30/2022
Contract area: Construction
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	380	\$50,146			
(2) POC- and woman-owned businesses	81	\$11,822	23.6	30.1	78.4
(3) White woman-owned	28	\$2,680	5.3	6.6	81.6
(4) POC-owned	53	\$9,142	18.2	23.5	77.6
(5) Asian Pacific American-owned	4	\$240	0.5	3.3	14.6
(6) Black American-owned	5	\$1,552	3.1	4.5	69.0
(7) Hispanic American-owned	36	\$7,187	14.3	13.3	108.1
(8) Native American-owned	5	\$114	0.2	2.3	9.9
(9) Subcontinent Asian American-owned	3	\$49	0.1	0.2	47.7
(10) POC-owned or woman-owned DBE	30	\$9,785	19.5		
(11) White woman-owned DBE	13	\$2,472	4.9		
(12) POC-owned DBE	17	\$7,313	14.6		
(13) Asian Pacific American-owned DBE	0	\$0	0.0		
(14) Black American-owned DBE	3	\$1,057	2.1		
(15) Hispanic American-owned DBE	14	\$6,256	12.5		
(16) Native American-owned DBE	0	\$0	0.0		
(17) Subcontinent Asian American-owned DBE	0	\$0	0.0		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-5.
Time period: 07/01/2017 - 06/30/2022
Contract area: Professional services
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	232	\$51,763			
(2) POC- and woman-owned businesses	50	\$2,463	4.8	34.1	14.0
(3) White woman-owned	20	\$496	1.0	8.0	12.0
(4) POC-owned	30	\$1,968	3.8	26.1	14.6
(5) Asian Pacific American-owned	3	\$1,200	2.3	6.7	34.5
(6) Black American-owned	12	\$396	0.8	10.9	7.0
(7) Hispanic American-owned	13	\$341	0.7	7.0	9.4
(8) Native American-owned	0	\$0	0.0	0.6	0.0
(9) Subcontinent Asian American-owned	2	\$30	0.1	0.9	6.4
(10) POC-owned or woman-owned DBE	33	\$2,062	4.0		
(11) White woman-owned DBE	12	\$242	0.5		
(12) POC-owned DBE	21	\$1,820	3.5		
(13) Asian Pacific American-owned DBE	2	\$1,171	2.3		
(14) Black American-owned DBE	10	\$374	0.7		
(15) Hispanic American-owned DBE	8	\$246	0.5		
(16) Native American-owned DBE	0	\$0	0.0		
(17) Subcontinent Asian American-owned DBE	1	\$30	0.1		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-6.
Time period: 07/01/2017 - 06/30/2022
Contract area: Non-professional services and supplies
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	315	\$120,390			
(2) POC- and woman-owned businesses	60	\$30,810	25.6	39.9	64.2
(3) White woman-owned	27	\$4,246	3.5	15.3	23.1
(4) POC-owned	33	\$26,563	22.1	24.6	89.7
(5) Asian Pacific American-owned	0	\$0	0.0	8.5	0.0
(6) Black American-owned	5	\$2,788	2.3	4.2	54.7
(7) Hispanic American-owned	27	\$23,775	19.7	5.1	200+
(8) Native American-owned	0	\$0	0.0	6.8	0.0
(9) Subcontinent Asian American-owned	1	\$0	0.0	0.0	200+
(10) POC-owned or woman-owned DBE	25	\$25,550	21.2		
(11) White woman-owned DBE	0	\$0	0.0		
(12) POC-owned DBE	25	\$25,550	21.2		
(13) Asian Pacific American-owned DBE	0	\$0	0.0		
(14) Black American-owned DBE	5	\$2,788	2.3		
(15) Hispanic American-owned DBE	20	\$22,762	18.9		
(16) Native American-owned DBE	0	\$0	0.0		
(17) Subcontinent Asian American-owned DBE	0	\$0	0.0		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-7.
Time period: 07/01/2017 - 06/30/2022
Contract area: All industries
Contract role: Prime contracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	780	\$184,750			
(2) POC- and woman-owned businesses	149	\$28,819	15.6	36.3	42.9
(3) White woman-owned	54	\$5,547	3.0	11.3	26.6
(4) POC-owned	95	\$23,272	12.6	25.1	50.3
(5) Asian Pacific American-owned	5	\$490	0.3	7.5	3.5
(6) Black American-owned	18	\$4,165	2.3	5.9	38.0
(7) Hispanic American-owned	63	\$18,453	10.0	6.8	146.2
(8) Native American-owned	5	\$114	0.1	4.6	1.3
(9) Subcontinent Asian American-owned	4	\$50	0.0	0.2	12.2
(10) POC-owned or woman-owned DBE	61	\$22,022	11.9		
(11) White woman-owned DBE	11	\$1,127	0.6		
(12) POC-owned DBE	50	\$20,896	11.3		
(13) Asian Pacific American-owned DBE	1	\$250	0.1		
(14) Black American-owned DBE	16	\$4,142	2.2		
(15) Hispanic American-owned DBE	33	\$16,504	8.9		
(16) Native American-owned DBE	0	\$0	0.0		
(17) Subcontinent Asian American-owned DBE	0	\$0	0.0		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-8.
Time period: 07/01/2017 - 06/30/2022
Contract area: All industries
Contract role: Subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	147	\$37,549			
(2) POC- and woman-owned businesses	42	\$16,276	43.3	36.1	119.9
(3) White woman-owned	21	\$1,875	5.0	13.2	37.9
(4) POC-owned	21	\$14,401	38.4	23.0	167.0
(5) Asian Pacific American-owned	2	\$951	2.5	4.1	61.2
(6) Black American-owned	4	\$572	1.5	5.4	28.0
(7) Hispanic American-owned	13	\$12,849	34.2	9.9	200+
(8) Native American-owned	0	\$0	0.0	3.0	0.0
(9) Subcontinent Asian American-owned	2	\$30	0.1	0.4	18.5
(10) POC-owned or woman-owned DBE	27	\$15,375	40.9		
(11) White woman-owned DBE	14	\$1,588	4.2		
(12) POC-owned DBE	13	\$13,787	36.7		
(13) Asian Pacific American-owned DBE	1	\$921	2.5		
(14) Black American-owned DBE	2	\$77	0.2		
(15) Hispanic American-owned DBE	9	\$12,760	34.0		
(16) Native American-owned DBE	0	\$0	0.0		
(17) Subcontinent Asian American-owned DBE	1	\$30	0.1		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-9.
Time period: 07/01/2017 - 06/30/2022
Contract area: All industries
Contract role: Prime contracts
Funding source: All funding sources

Large contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	103	\$154,053			
(2) POC- and woman-owned businesses	24	\$21,746	14.1	36.4	38.8
(3) White woman-owned	8	\$4,496	2.9	11.9	24.6
(4) POC-owned	16	\$17,250	11.2	24.5	45.6
(5) Asian Pacific American-owned	0	\$0	0.0	8.0	0.0
(6) Black American-owned	2	\$2,687	1.7	5.7	30.6
(7) Hispanic American-owned	14	\$14,563	9.5	5.6	168.4
(8) Native American-owned	0	\$0	0.0	5.1	0.0
(9) Subcontinent Asian American-owned	0	\$0	0.0	0.1	0.0
(10) POC-owned or woman-owned DBE	16	\$16,805	10.9		
(11) White woman-owned DBE	1	\$455	0.3		
(12) POC-owned DBE	15	\$16,350	10.6		
(13) Asian Pacific American-owned DBE	0	\$0	0.0		
(14) Black American-owned DBE	2	\$2,687	1.7		
(15) Hispanic American-owned DBE	13	\$13,663	8.9		
(16) Native American-owned DBE	0	\$0	0.0		
(17) Subcontinent Asian American-owned DBE	0	\$0	0.0		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-10.
Time period: 07/01/2017 - 06/30/2022
Contract area: All industries
Contract role: Prime contracts
Funding source: All funding sources

Small contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	677	\$30,697			
(2) POC- and woman-owned businesses	125	\$7,073	23.0	36.0	64.0
(3) White woman-owned	46	\$1,051	3.4	8.3	41.4
(4) POC-owned	79	\$6,022	19.6	27.7	70.7
(5) Asian Pacific American-owned	5	\$490	1.6	4.7	33.9
(6) Black American-owned	16	\$1,478	4.8	7.1	67.5
(7) Hispanic American-owned	49	\$3,890	12.7	12.9	97.9
(8) Native American-owned	5	\$114	0.4	2.0	18.9
(9) Subcontinent Asian American-owned	4	\$50	0.2	1.0	16.2
(10) POC-owned or woman-owned DBE	45	\$5,217	17.0		
(11) White woman-owned DBE	10	\$671	2.2		
(12) POC-owned DBE	35	\$4,546	14.8		
(13) Asian Pacific American-owned DBE	1	\$250	0.8		
(14) Black American-owned DBE	14	\$1,455	4.7		
(15) Hispanic American-owned DBE	20	\$2,841	9.3		
(16) Native American-owned DBE	0	\$0	0.0		
(17) Subcontinent Asian American-owned DBE	0	\$0	0.0		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-11.
Time period: 07/01/2017 - 06/30/2022
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: USDOT

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	131	\$48,860			
(2) POC- and woman-owned businesses	32	\$9,252	18.9	29.7	63.8
(3) White woman-owned	16	\$2,423	5.0	7.8	63.3
(4) POC-owned	16	\$6,829	14.0	21.9	63.9
(5) Asian Pacific American-owned	0	\$0	0.0	3.9	0.0
(6) Black American-owned	5	\$1,536	3.1	5.6	56.5
(7) Hispanic American-owned	10	\$5,263	10.8	10.4	103.8
(8) Native American-owned	0	\$0	0.0	1.9	0.0
(9) Subcontinent Asian American-owned	1	\$30	0.1	0.1	51.4
(10) POC-owned or woman-owned DBE	23	\$8,582	17.6		
(11) White woman-owned DBE	11	\$2,296	4.7		
(12) POC-owned DBE	12	\$6,286	12.9		
(13) Asian Pacific American-owned DBE	0	\$0	0.0		
(14) Black American-owned DBE	3	\$1,042	2.1		
(15) Hispanic American-owned DBE	8	\$5,215	10.7		
(16) Native American-owned DBE	0	\$0	0.0		
(17) Subcontinent Asian American-owned DBE	1	\$30	0.1		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-12.
Time period: 07/01/2017 - 06/30/2022
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: Non-USDOT

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	796	\$173,439			
(2) POC- and woman-owned businesses	159	\$35,843	20.7	38.2	54.1
(3) White woman-owned	59	\$4,999	2.9	12.7	22.8
(4) POC-owned	100	\$30,844	17.8	25.5	69.7
(5) Asian Pacific American-owned	7	\$1,441	0.8	7.8	10.7
(6) Black American-owned	17	\$3,200	1.8	5.9	31.1
(7) Hispanic American-owned	66	\$26,040	15.0	6.5	200+
(8) Native American-owned	5	\$114	0.1	5.0	1.3
(9) Subcontinent Asian American-owned	5	\$50	0.0	0.3	9.8
(10) POC-owned or woman-owned DBE	65	\$28,815	16.6		
(11) White woman-owned DBE	14	\$418	0.2		
(12) POC-owned DBE	51	\$28,397	16.4		
(13) Asian Pacific American-owned DBE	2	\$1,171	0.7		
(14) Black American-owned DBE	15	\$3,177	1.8		
(15) Hispanic American-owned DBE	34	\$24,049	13.9		
(16) Native American-owned DBE	0	\$0	0.0		
(17) Subcontinent Asian American-owned DBE	0	\$0	0.0		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-13.
Time period: 07/01/2017 - 06/30/2022
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

DBE Goal

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	130	\$48,858			
(2) POC- and woman-owned businesses	32	\$9,252	18.9	29.7	63.8
(3) White woman-owned	16	\$2,423	5.0	7.8	63.3
(4) POC-owned	16	\$6,829	14.0	21.9	63.9
(5) Asian Pacific American-owned	0	\$0	0.0	3.9	0.0
(6) Black American-owned	5	\$1,536	3.1	5.6	56.5
(7) Hispanic American-owned	10	\$5,263	10.8	10.4	103.8
(8) Native American-owned	0	\$0	0.0	1.9	0.0
(9) Subcontinent Asian American-owned	1	\$30	0.1	0.1	51.4
(10) POC-owned or woman-owned DBE	23	\$8,582	17.6		
(11) White woman-owned DBE	11	\$2,296	4.7		
(12) POC-owned DBE	12	\$6,286	12.9		
(13) Asian Pacific American-owned DBE	0	\$0	0.0		
(14) Black American-owned DBE	3	\$1,042	2.1		
(15) Hispanic American-owned DBE	8	\$5,215	10.7		
(16) Native American-owned DBE	0	\$0	0.0		
(17) Subcontinent Asian American-owned DBE	1	\$30	0.1		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-14.
Time period: 07/01/2017 - 06/30/2022
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

No DBE Goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	797	\$173,441			
(2) POC- and woman-owned businesses	159	\$35,843	20.7	38.2	54.1
(3) White woman-owned	59	\$4,999	2.9	12.7	22.8
(4) POC-owned	100	\$30,844	17.8	25.5	69.7
(5) Asian Pacific American-owned	7	\$1,441	0.8	7.8	10.7
(6) Black American-owned	17	\$3,200	1.8	5.9	31.1
(7) Hispanic American-owned	66	\$26,040	15.0	6.5	200+
(8) Native American-owned	5	\$114	0.1	5.0	1.3
(9) Subcontinent Asian American-owned	5	\$50	0.0	0.3	9.8
(10) POC-owned or woman-owned DBE	65	\$28,815	16.6		
(11) White woman-owned DBE	14	\$418	0.2		
(12) POC-owned DBE	51	\$28,397	16.4		
(13) Asian Pacific American-owned DBE	2	\$1,171	0.7		
(14) Black American-owned DBE	15	\$3,177	1.8		
(15) Hispanic American-owned DBE	34	\$24,049	13.9		
(16) Native American-owned DBE	0	\$0	0.0		
(17) Subcontinent Asian American-owned DBE	0	\$0	0.0		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-15.
Time period: 07/01/2017 - 06/30/2022
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: USDOT

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	131	\$48,860			
(2) POC- and woman-owned businesses	32	\$9,252	18.9	27.1	70.0
(3) White woman-owned	16	\$2,423	5.0	6.3	78.8
(4) POC-owned	16	\$6,829	14.0	20.8	67.3
(5) Asian Pacific American-owned	0	\$0	0.0	3.4	0.0
(6) Black American-owned	5	\$1,536	3.1	5.6	56.5
(7) Hispanic American-owned	10	\$5,263	10.8	10.0	107.3
(8) Native American-owned	0	\$0	0.0	1.6	0.0
(9) Subcontinent Asian American-owned	1	\$30	0.1	0.1	52.7
(10) POC-owned or woman-owned DBE	23	\$8,582	17.6		
(11) White woman-owned DBE	11	\$2,296	4.7		
(12) POC-owned DBE	12	\$6,286	12.9		
(13) Asian Pacific American-owned DBE	0	\$0	0.0		
(14) Black American-owned DBE	3	\$1,042	2.1		
(15) Hispanic American-owned DBE	8	\$5,215	10.7		
(16) Native American-owned DBE	0	\$0	0.0		
(17) Subcontinent Asian American-owned DBE	1	\$30	0.1		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-16.
Time period: 07/01/2017 - 06/30/2022
Contract area: Construction
Contract role: Prime contracts and subcontracts
Funding source: USDOT

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	87	\$35,116			
(2) POC- and woman-owned businesses	21	\$9,004	25.6	25.3	101.2
(3) White woman-owned	10	\$2,254	6.4	5.0	129.5
(4) POC-owned	11	\$6,750	19.2	20.4	94.3
(5) Asian Pacific American-owned	0	\$0	0.0	2.2	0.0
(6) Black American-owned	4	\$1,534	4.4	4.3	101.7
(7) Hispanic American-owned	7	\$5,216	14.9	11.6	128.6
(8) Native American-owned	0	\$0	0.0	2.2	0.0
(9) Subcontinent Asian American-owned	0	\$0	0.0	0.1	0.0
(10) POC-owned or woman-owned DBE	15	\$8,447	24.1		
(11) White woman-owned DBE	7	\$2,204	6.3		
(12) POC-owned DBE	8	\$6,243	17.8		
(13) Asian Pacific American-owned DBE	0	\$0	0.0		
(14) Black American-owned DBE	2	\$1,039	3.0		
(15) Hispanic American-owned DBE	6	\$5,204	14.8		
(16) Native American-owned DBE	0	\$0	0.0		
(17) Subcontinent Asian American-owned DBE	0	\$0	0.0		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-17.
Time period: 07/01/2017 - 06/30/2022
Contract area: Professional services
Contract role: Prime contracts and subcontracts
Funding source: USDOT

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	37	\$8,340			
(2) POC- and woman-owned businesses	10	\$244	2.9	32.0	9.1
(3) White woman-owned	6	\$169	2.0	7.9	25.7
(4) POC-owned	4	\$75	0.9	24.1	3.7
(5) Asian Pacific American-owned	0	\$0	0.0	7.4	0.0
(6) Black American-owned	1	\$2	0.0	10.4	0.3
(7) Hispanic American-owned	2	\$43	0.5	5.9	8.7
(8) Native American-owned	0	\$0	0.0	0.1	0.0
(9) Subcontinent Asian American-owned	1	\$30	0.4	0.3	111.1
(10) POC-owned or woman-owned DBE	7	\$132	1.6		
(11) White woman-owned DBE	4	\$92	1.1		
(12) POC-owned DBE	3	\$40	0.5		
(13) Asian Pacific American-owned DBE	0	\$0	0.0		
(14) Black American-owned DBE	1	\$2	0.0		
(15) Hispanic American-owned DBE	1	\$8	0.1		
(16) Native American-owned DBE	0	\$0	0.0		
(17) Subcontinent Asian American-owned DBE	1	\$30	0.4		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.

Figure E-18.
Time period: 07/01/2017 - 06/30/2022
Contract area: Non-professional services and supplies
Contract role: Prime contracts and subcontracts
Funding source: USDOT

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	7	\$5,404			
(2) POC- and woman-owned businesses	1	\$3	0.1	30.5	0.2
(3) White woman-owned	0	\$0	0.0	12.5	0.0
(4) POC-owned	1	\$3	0.1	18.0	0.3
(5) Asian Pacific American-owned	0	\$0	0.0	5.0	0.0
(6) Black American-owned	0	\$0	0.0	6.4	0.0
(7) Hispanic American-owned	1	\$3	0.1	6.6	0.9
(8) Native American-owned	0	\$0	0.0	0.0	0.0
(9) Subcontinent Asian American-owned	0	\$0	0.0	0.0	100.0
(10) POC-owned or woman-owned DBE	1	\$3	0.1		
(11) White woman-owned DBE	0	\$0	0.0		
(12) POC-owned DBE	1	\$3	0.1		
(13) Asian Pacific American-owned DBE	0	\$0	0.0		
(14) Black American-owned DBE	0	\$0	0.0		
(15) Hispanic American-owned DBE	1	\$3	0.1		
(16) Native American-owned DBE	0	\$0	0.0		
(17) Subcontinent Asian American-owned DBE	0	\$0	0.0		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.