No. 15-1827

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MIDWEST FENCE CORPORATION,
a Delaware corporation,

Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT
OF TRANSPORTATION, et al.,

Defendants - Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Honorable Harry D. Leinenweber, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, ROTHE DEVELOPMENT CORPORATION, CATO INSTITUTE, AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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Appellate Court No: 15-1827

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Attorney's Signature: s/ Ralph W. Kasarda Date: June 2, 2015

Attorney's Printed Name: Ralph W. Kasarda

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

United States Constitution

Federal Regulations

Miscellaneous

Page

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant Midwest Fence Corp. (Midwest) challenges the constitutionality of the U.S. Department of Transportation's Disadvantaged Business Enterprise (DBE) program, and implementation of that program by the Illinois Department of Transportation (IDOT) and the Illinois State Toll Highway Authority (Tollway). Amici contend that Midwest should prevail on all of its claims against the United States, IDOT, and the Tollway, but limit this brief to the issues presented by IDOT's and the Tollway's use of race on state-funded contracts. IDOT and the Tollway unconstitutionally exceed the mandates of the DBE program, which applies to state highway construction contracts funded with federal money. 49 C.F.R. § 26.45. IDOT and the Tollway enforce their DBE programs even on contracts funded entirely by state money. *Midwest Fence Corp. v. United States Dep't of Transp.*, No. 10 C 5627, 2015 WL 1396376, at *2 (N.D. Ill. Mar. 24, 2015). The district court erred by holding that these programs satisfied constitutional scrutiny.

IDOT and the Tollway enforce their DBE programs in a discriminatory manner. Both agencies set individual contract goals requiring prime contractors to favor DBE subcontractors over non-DBEs. *Midwest Fence*, at *4, *5. The majority of all DBEs are owned by minorities or women, because the federal DBE regulations provide a rebuttable presumption that minorities and women are socially and economically disadvantaged and eligible for DBE certification. *Id.* at *2. White males are not entitled to the presumption. Thus, when IDOT and the Tollway require prime contractors to meet DBE subcontractor attainment goals, prime

contractors are forced to discriminate against, and grant preferences to, subcontractors on the basis of race.

The Equal Protection Clause mandates that, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. All governmental action based on race should be subjected to the most vigorous and exacting judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Here, for race-based public contracting policies to withstand strict scrutiny, IDOT and the Tollway must demonstrate that their DBE programs applied to state-funded contracts are narrowly tailored to further a compelling governmental interest. *Id.*

Neither IDOT nor the Tollway can prove the existence of widespread and systemic discrimination in the Illinois transportation construction industry that would provide a compelling interest. These agencies each rely on disparity studies whose methodologies were held to be fatally flawed by the Federal Circuit in *Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023, 1045 (Fed. Cir. 2008). Specifically, each study violates the statistical standards set in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989), by failing to account for potential differences in size, or relative capacity, of the businesses included in those studies. Without these skewed and defective studies, the agencies are left relying on two outdated studies based on data that is far too remote in time to justify current race-conscious programs. *Brunet v. City of Columbus*, 1 F.3d 390, 409 (6th Cir. 1993), *cert. denied sub nom. Brunet v. Tucker*, 510 U.S. 1164 (1994).

Further, IDOT's and the Tollway's discriminatory programs fail the narrow tailoring prong of equal protection analysis. Strict scrutiny imposes—on both IDOT and the Tollway—"the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (emphasis added). Because IDOT and the Tollway failed to make use of available and workable race-neutral measures, their programs fail strict scrutiny and must be invalidated as unconstitutional.

ARGUMENT

I

Neither IDOT Nor the Tollway Can Produce a Strong Basis in Evidence of Discrimination Sufficient to Satisfy Strict Scrutiny

Both IDOT and the Tollway inject race, sex, and ethnicity into their public contracting decisions by requiring a percentage of dollars for state-funded transportation projects be awarded to African American, Hispanic American, Native American, Asian American, and women-owned firms. *See Midwest Fence*, at *2-5 (defining DBE by race and sex, explaining contract DBE goals, and finding that IDOT and Tollway voluntarily apply the federal DBE program to state-funded contracts). All governmental action based on explicit racial classifications is subject to strict scrutiny to ensure that the personal, constitutional right to equal protection has not been infringed. *Adarand*, 515 U.S. at 227. Government may employ racial classifications only if they are narrowly tailored to further compelling governmental interests. *Id.*

Offering government jobs to Americans on account of their race is odious to the Constitution. Thus, remedying the present effects of past illegal discrimination is the only accepted compelling interest that can justify such a radical act in public contracting. *Adarand*, 515 U.S. at 237; *Croson*, 488 U.S. at 505. When a state accepts federal money to fund highway construction projects, this Court allowed a state entity implementing the congressionally mandated DBE program to rely "on the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 720-21 (7th Cir. 2007). However, whether a state's DBE program is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in that state's transportation contracting industry. *Western States Paving Co., Inc. v. Washington State Dep't of Transp.*, 407 F.3d 983, 997-98 (9th Cir. 2005). If no such discrimination is present in Illinois, then IDOT's DBE program does not serve a remedial purpose; it instead provides an unconstitutional advantage to those contractors favored on the basis of race. *Id.*

Northern Contracting does not apply to the two state programs at issue in this case. Here, both IDOT and the Tollway require prime contractors to subcontract on the basis of race and sex, even when *no* federal funds are involved. *Midwest Fence*, at *2 (IDOT and Tollway exceed the federal mandate by applying the federal DBE program to contracts funded entirely by state money.) As a consequence, both agencies are precluded from relying on the federal DBE Program as a compelling interest to justify their racial preferences on state funded contracts. This aspect of their programs is not congressionally mandated. *See* 49 C.F.R. § 26.45 (federal

DBE regulations state that DBE goals are to be expressed "as a percentage of all Federal-aid highway funds" the agency "will expend in FHWA-assisted contracts in the forthcoming three fiscal years."); *Milwaukee Cnty. Pavers Ass'n v. Fiedler*, 922 F.2d 419, 424-25 (7th Cir. 1991) (state program was vulnerable to an equal protection challenge because the state took the racial presumption in the federal regulations and applied it to programs not funded under, and therefore not governed by, the federal statute).

This Court must apply strict scrutiny in deciding whether IDOT's justification for racial preferences—its 2011 disparity study prepared by Mason Tillman Associates (MTA) (IDOT Disparity Study)—identifies the presence of discrimination in the Illinois transportation construction industry. *See Midwest Fence*, at *15 (court acknowledging the IDOT Disparity Study is the critical evidence for determining whether IDOT's racial preferences are justified).[1] A separate 2011 disparity study (Tollway Disparity Study) must also be scrutinized to determine if it justifies the Tollway's DBE program. *See id.* at *5 (Tollway's most recently completed disparity study is the 2011 study performed by MTA).[2]

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[1] Mason Tillman Associates, *Illinois Department of Transportation Disparity Study* (2011) *available at* http://www.idot.illinois.gov/Assets/uploads/files/Doing-Business/Reports/OBWD/DBE/DBEDisparityStudy.pdf (last visited May 28, 2015).

[2] Mason Tillman Associates, *Illinois State Toll Highway Authority Disparity Study* (2011), *available at* http://www.illinoistollway.com/documents/10157/15890/Final+Disparity+Study+Report (last visited May 28, 2015).

A. The MTA Disparity Studies Fail the Requirement That Such Studies Account for the "Ability" or "Relative Capacity" of Firms to Undertake Contracting Work

When the government relies on statistics to prove discrimination, a pattern of discriminatory exclusion can only be shown where "there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors . . . ." *Croson*, 488 U.S. at 509. Of the three *Croson* factors—qualified, willing, and able—courts have been most concerned about "ability," which describes a firm's capacity to perform the required work. In *Builders Ass'n of Greater Chicago v. City of Chicago*, the court explained:

> We can determine with some confidence how many construction firms there are in the Chicago area and how many are minority- or woman-owned. That establishes availability. We can determine the percentage of contract awards and contract dollars that went to those firms. That establishes use. But we know very little about their *willingness and ability*.

298 F. Supp. 2d 725, 735 (N.D. Ill. 2003) (emphasis added).

Statistical studies that do not measure a firm's capacity fail to provide a strong basis in evidence to support racial classifications. *See O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 426 (D.C. Cir. 1992) (statistical disparity did not account for the size and ability of minority firms to take on large projects); *Western States*, 407 F.3d at 1000-01 (rejecting a statistical disparity because it did not account for factors that may have affected the relative capacity of minority firms to undertake contracting work); *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 736 (6th Cir. 2000) (statistical disparities do not imply that government discriminated if they fail to account for the relative size of the firms,

either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete). The MTA disparity studies do not measure firm capacity, and cannot provide a strong basis in evidence of discrimination to support the use of race.

1. The MTA IDOT and Tollway Disparity Studies Are Deficient as a Matter of Law to Justify Contractor Preferences

The IDOT and Tollway disparity studies both omit an analysis of prime contractor firm size when attempting to measure firm capacity, a methodology held to be fatally flawed by the Federal Circuit in *Rothe*, 545 F.3d 1023. In *Rothe*, the court held that six disparity studies—including four by MTA, 545 F.3d at 1041—could not satisfy *Croson*'s "ready," "willing," and "able" standard or provide a strong basis in evidence of discrimination. 545 F.3d at 1045. The failure of the studies "to account sufficiently for potential differences in size, or relative capacity, of the businesses included in those studies" contributed to the court's decision that the need for racial preferences was unjustified. *Id.* at 1042-43. The court explained that "'qualified' firms may have substantially different capacities, and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination." *Id.* at 1043. For instance, a large firm with plants throughout the state has a larger capacity to perform contracting work than does a small firm with only one plant. *See id.* (comparing multinational firm to sole proprietor). *Rothe* suggested that another way to understand firm capacity is by comparing a small micro-brewery to Budweiser. Both are qualified to sell beer, but

they are not equally available to sell beer, because Budweiser can produce more beer. *Id.*

In *Rothe*, the four defective MTA disparity studies tried to account for the relative sizes of contracts awarded to minority-owned firms by measuring the utilization of those businesses in terms of contract-dollars directed to them. *Rothe*, 545 F.3d at 1043. But none of the studies took into account the relative sizes of the firms. *Id.* The studies only measured the availability of minority-owned firms by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id.* Such measurements do not demonstrate whether a disparity measured in dollars was due to discrimination, or whether it was because a small firm could not compete with a large one. The IDOT and Tollway Disparity Studies are flawed, because they are based on the same legally insufficient methodology.

First, the 2011 MTA IDOT and Tollway Disparity Studies assert that "[u]nder a fair and equitable system of awarding contracts, the proportion of contract dollars awarded to M/WBEs would be approximate to the proportion of available M/WBEs in the relevant market area." IDOT Disparity Study at 1-6; Tollway Disparity Study at 1-7. *Rothe* rejected that premise when it identified the same language as a fatal flaw in a MTA New York City Disparity Study. *See* 545 F.3d at 1044 (study did not measure capacity, as evidenced by study's assertion that: "Under a fair and equitable system of awarding contracts, the proportion of *contract dollars* awarded to M/WBEs would be approximate to the proportion of *available M/WBEs* in the relevant market area.") (emphasis in original).

Second, MTA's decision to limit its analysis to smaller contracts mirrors an approach that was soundly rejected by the Federal Circuit in *Rothe*, 545 F.3d at 1044. The 2011 MTA Tollway Disparity Study reported that the majority of the Tollway's construction prime contracts were valued at over $1,000,000. Tollway Disparity Study at 7-9, 7-10. Nevertheless, the analysis of competitive bid contracts was capped at $1,000,000 for construction, because MTA claimed such a cap would ensure that the contracts were within the capacity level of available M/WBEs. *Id.* Similarly, the IDOT Disparity Study was limited to contracts valued at $500,000. IDOT Disparity Study at 8-3. The *Rothe* court explained that "while these parameters may have ensured that each minority-owned business in the stud[y] met a capacity threshold—i.e., had the capacity to bid for and to complete any one contract—these parameters simply fail to account for the relative capacities of businesses to bid for more than one contract at a time." *Id.*

Although the district court in this case recognized that the IDOT and Tollway studies did not account for all nondiscriminatory factors, it relied on a nearly 30-year-old Title VII employment discrimination case to hold that the studies need not account for "all measurable variables." *Midwest Fence*, 2015 WL 1396376, at *17 (citing *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) *(per curiam))*. The lower court's reliance on *Bazemore* is misguided. The Supreme Court has "never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII." *Washington v. Davis*, 426 U.S. 229, 239 (1976). For instance, in a seminal Title VII case, *United Steelworkers of America v. Weber*, the Court noted that Title VII "was

not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments." *See United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 207 n.6 (1979). Thus, the constitutional standards for the disparity studies at issue here *must* be more strict than those for such studies in Title VII cases. Here, the disparity studies must prove discriminatory exclusion—intentional discrimination—as opposed to studies for Title VII cases. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (finding Title VII allows claims for disparate impact that do not require proof of discriminatory intent). More importantly, *Bazemore* was decided prior to *Croson*, where, as discussed above, the Court adopted a different standard for analyzing disparity studies.

MTA acknowledges *Rothe*'s requirement of an analysis of relative capacity, but wrongly claims that the addition of its peculiar regression analysis corrects any defects. *See* IDOT Disparity Study at 7-10 (claiming its regression analysis satisfies *Rothe*'s requirement that disparity studies must examine relative capacity). In *Rothe*, the court noted that MTA's defect might have been corrected through a regression analysis, but only if that analysis "determine[d] whether there was a statistically significant correlation between the *size of a firm and the share of contract-dollars awarded to it*." *Rothe*, 545 F.3d at 1044 (emphasis added). MTA does not address the substance of *Rothe*'s analysis. Instead, MTA merely states that *Rothe* "opined that a regression analysis could be used to control for relative capacity." IDOT Disparity Study at 7-10. MTA does not explain which, if any parameters, were analyzed through regression in order to correct its flawed approach. *See* IDOT Disparity Study at 11-6 (regression analysis conducted for

business ownership, business earnings, and business loan denials, but omitting analysis of size of firm and share of contract dollars); Tollway Disparity Study at 11-6 (same). MTA's approach to disparity studies is fatally flawed because MTA "fail[s] to account for the relative capacities of businesses to bid for more than one contract at a time." *Rothe*, 545 F.3d at 1044.

2. The MTA Disparity Studies Violate *Croson* by Ignoring Subcontractor Capacity

It is undisputed that the MTA Disparity Studies limit their purported analysis of capacity to prime contractors, but do not measure *subcontractor* capacity at all. Without any citation to case law, the disparity studies contain the following legal conclusion: "*Croson* does not require a measure of subcontractor capacity; therefore, it is not necessary to address capacity issues in the context of subcontractors." IDOT Disparity Study, at 7-20; Tollway Disparity Study, at 7-18. Because the Supreme Court did not limit its holding in *Croson* to prime contractors, the failure to measure subcontractor capacity is another fatal flaw in the disparity studies at issue in this case.

Croson invalidated the City of Richmond's subcontractor goals plan that required prime contractors who were awarded City construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more minority-owned businesses. *Croson*, 488 U.S. at 477. Although the plaintiff in *Croson* submitted a bid as a prime contractor, the dispute centered around Croson's inability to meet the 30 percent set-aside goal for minority subcontractors. *Id.* at 482-84. The City of Richmond argued that the set-aside goal for minority

subcontractors was justified due to a disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond. *Croson*, 488 U.S. at 501.

MTA's argument that *Croson* does not require an analysis of subcontractor capacity would only be correct if the Court had in fact accepted the City of Richmond's statistical focus on prime contractors. But it did not. *Croson* held that statistical disparities may not infer discrimination unless they compare "qualified," "willing," and "able" contractors. 488 U.S. at 509. This requirement applies to subcontractors: "Without any information on minority participation in *subcontracting*, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures." *Croson*, 488 U.S. at 502-03 (emphasis added). The Court faulted the City for not knowing how many minority-owned businesses in the relevant market were qualified to undertake prime or subcontracting work in public construction projects, or what percentage of total City construction dollars minority firms received as subcontractors on prime contracts let by the City. *Id.* at 502-503, 510. The City had to provide evidence that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities before it could take action to end the discriminatory exclusion. *Id.* at 509. But the City had no evidence that qualified minority contractors had been passed over for city contracts or subcontracts, either as a group or as individuals. *Id.* at 510.

Croson makes it clear that, if government relies on statistical disparities to infer discrimination, the relevant comparison must be 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." 488 U.S. at 509 (emphasis added). The IDOT and Tollway MTA Disparity Studies cannot justify the State's racial preferences, because they fail to account for subcontractor capacity—*Croson*'s requirement of "ability" to perform.

B. Defendants May Not Rely on the Outdated 2004 and 2006 NERA Disparity Studies to Justify Their Current Race-Conscious Programs

The district court erred by finding that the IDOT and Tollway race-conscious DBE programs were justified, in part, by outdated disparity studies. *Midwest Fence*, at *15-16 (2004 study for IDOT); *id.* at *20-21 (2006 study for Tollway). The court relied on DBE availability studies prepared in 2004 and 2006 by National Economic Research Associates (NERA). Those studies are based on data that is too remote in time to apply to current contracting programs. The 2004 NERA study prepared for IDOT was based on an analysis of contracts from fifteen to nineteen years ago (1996-2000). R. 368-11 at 8 (2004 NERA Study, Ex. K to IDOT Def.'s Motion for Summary Judgment at 8). NERA supplemented the data with material from the 2000 decennial census, which is also fifteen-years-old. *Id.* at 49 (citing the 2000 Public Use Microdata Samples). The 2006 NERA Disparity Study prepared for the Tollway is based on fifteen year old data from the 2000 decennial census, the 2002 Survey of Business Owners and Self-Employed Persons, which is thirteen years old, and contract data from ten to fifteen years old (fiscal years 2000 to 2005).[3]

[3] NERA, *Race, Sex, and Business Enterprises: Evidence from the State of Illinois and the* (continued...)

Tollway NERA Disparity Study, 4, 6, 57. The Tollway and IDOT continue to rely upon these studies to justify their ongoing use of racial preferences.

The United States Commission on Civil Rights issued a report on the use of disparity studies to prove discrimination, and concluded that data in disparity studies more than five years old is "too outdated to justify preferential awards given today." U.S. Comm'n on Civil Rights, *Disparities as Evidence of Discrimination in Federal Contracting*, at 76 (2006). Courts have refused to consider stale evidence of discrimination proffered to justify race-conscious programs. In *Brunet*, 1 F.3d at 409, *cert. denied sub nom. Brunet*, 510 U.S. 1164, the court held that where evidence is "too remote to support a compelling governmental interest to justify the affirmative action plan," it must be struck down. *Brunet* rejected an affirmative action plan providing preferential hiring to females because it relied on evidence of past discrimination that was fourteen years old. *Id.* at 409. *See Middleton v. City of Flint, Mich.*, 92 F.3d 396, 409 (6th Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997) ("evidence of past discrimination that is too remote in time will not support a claim of compelling state interest when other evidence is adduced to show the governmental body has taken serious steps in subsequent years to reverse the effects of past discrimination.") In *Rothe*, the Federal Circuit held that, with regard to disparity studies, the government may "rely on the most recently available data so long as that data is reasonably up-to-date." 545 F.3d at 1039. In

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[3] (...continued)
Chicago Metropolitan Area (2006), *available at* http://www.illinoistollway.com/documents/10157/dcef5ab6-c681-4156-a364-e8413aa4f0f1 (last visited May 28, 2015).

Hammon v. Barry, 826 F.2d 73, 76-77 (D.C. Cir. 1987), the Court of Appeals for the District of Columbia Circuit found that discriminatory conduct occurring eighteen years prior to the institution of an affirmative action plan was insufficient to justify the plan.

The 2004 and 2006 NERA studies are based on contract and census data that is from ten to nineteen years old. This evidence is too remote to justify current race- and sex-conscious programs, and thus, does not provide the required strong basis in evidence necessary to justify the racial preferences given by IDOT's and the Tollway's DBE programs. Ultimately, as a result of having only flawed (MTA) and outdated (NERA) disparity studies, neither IDOT, nor the Tollway, can prove they have compelling interests justifying discriminatory policies.

II

The IDOT and Tollway DBE Programs Fail
the Narrow Tailoring Prong of Strict Scrutiny

The IDOT and Tollway race-conscious DBE goals are unconstitutional because they are not narrowly tailored to achieve a legitimate government interest. In *Fisher*, the Court reiterated that, even if the government can establish that its implementation of racial preferences is justified by a compelling interest, there must still be a judicial determination that the race-conscious measures "meet[] strict scrutiny in [their] implementation." 133 S. Ct. at 2419-20. The most fundamental element of narrow tailoring is the consideration of race-neutral means to prevent or remedy any remaining discrimination. *United States v. Paradise*, 480 U.S. 149, 171 (1987). *See Croson*, 488 U.S. at 507 (set-aside plan not narrowly

tailored where there was no consideration of race-neutral means); *Rothe*, 545 F.3d at 1036 ("[E]ven where there is a compelling interest supported by a strong basis in evidence," the court must consider "the efficacy of alternative, race-neutral remedies."). Race-neutral alternatives are policies which can benefit all small businesses, regardless of the race, ethnicity, or gender. As the following shows, IDOT and the Tollway failed to properly consider such policies.

A. Government Must Establish That Reasonable and Workable Race-Neutral Measures Failed to Eradicate the Effects of Discrimination

The importance of race-neutral alternatives to public contracting preferences like the DBE program at issue here has been largely established by three cases: *City of Richmond v. Croson*, *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Fisher v. Univ. of Tex. at Austin*. These cases illustrate the Supreme Court's requirement that, before turning to racial preferences, government must prove that the effects of discrimination cannot be eradicated by race neutral measures. In *Croson*, the City of Richmond's minority business enterprise program was not narrowly tailored, in part, because the City failed to consider any race-neutral alternatives before imposing race-conscious goals on Richmond's public construction contracts. *See* 488 U.S. at 507. For this reason, the Court did not discuss in detail the kind of consideration that government must give to race-neutral measures before turning to race-conscious ones. *See* George La Noue & Kenneth L. Marcus, *"Serious Consideration" of Race-Neutral Alternatives in Higher Education*, 57 Cath. U. L. Rev. 991, 999 (2008) (noting that *Croson* did not elaborate on how government could satisfy the race-neutral alternatives requirement of narrow tailoring).

Some courts interpreted *Croson* to require that local governments merely "consider" race-neutral alternatives—but not exhaust them—before implementing race-conscious remedies. *See Peightal v. Metro. Dade Cnty.*, 26 F.3d 1545, 1557 (11th Cir. 1994) (An initial narrow tailoring inquiry is whether the government "considered the use of race-neutral means."); *see also Adarand*, 515 U.S. at 237 (remanding with instructions that Court of Appeals consider "whether there was '*any* consideration of the use of race neutral means'") (emphasis added).

In *Grutter v. Bollinger*, the Court signaled its increasing disapproval of racial preferences and provided clearer guidance to both courts and the government. First, the Court held that narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives." 539 U.S. at 339. In other words, the government must rigorously evaluate appropriate race-neutral policies to determine the extent to which they would remedy the effects of past discrimination. Second, the Court announced its expectation that racial classifications will not be necessary by the year 2028 (13 years from now). *See id.* at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."); *see also Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1639 (2014) (Scalia, J., concurring) (warning that "*Grutter*'s bell may soon toll"). *Grutter* mapped out a transition from race-conscious to race-neutral policies holding that public universities "can and should draw on the most promising aspects of . . . race-neutral alternatives." 539 U.S. at 342.

Fisher continued the trajectory away from race-based governmental decisionmaking, emphasizing that strict scrutiny now imposes on government "the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." 133 S. Ct. at 2420. IDOT and the Tollway must each prove that their race-based programs are necessary, and this Court owes them no deference on this matter. *Fisher*, 133 S. Ct. at 2420 (Government may not consider race if a nonracial approach could promote the substantial interest about as well and at tolerable administrative expense as racial preferences.) (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)).[4]

B. IDOT and the Tollway Cannot Demonstrate That Reasonable and Workable Race-Neutral Measures Were Tried and Failed to Eradicate the Effects of Discrimination

The federal DBE regulations require recipients of federal funds, such as IDOT, to obtain the "maximum feasible portion" of its overall DBE goal "by using race-neutral means." 49 C.F.R. § 26.51(a). Moreover, *Fisher* imposes on IDOT and the Tollway "the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." 133 S. Ct. at 2420. Neither agency can meet this burden.

The Tollway and IDOT ignored the recommendations in the 2011 MTA disparity studies that they implement certain workable race-neutral measures. The MTA

[4] The Federal DBE regulations also require that states narrowly tailor their DBE programs by using race-neutral means to ensure the greatest possible DBE participation. *See* 49 C.F.R. § 26.51(a) (Recipients of federal aid "must meet the maximum feasible portion of [their] overall goal by using race-neutral means of facilitating DBE participation.").

Tollway disparity study recommends that the Tollway establish a Small Local Business Enterprise Program, and provides seven specific measures that should be incorporated into the program. Tollway Disparity Study at 12-12 - 12-21. The disparity study further recommends seventeen other measures to assist in achieving an overall DBE participation goal. *Id.* Fourteen of those measures are race neutral. For example, the disparity study suggested implementing an expanded "unbundling" policy for contracts, establishing a direct purchase program to reduce high bond requirements, and revising insurance requirements to ensure that small contracts do not carry a disproportionately high level of coverage. *See id.* But the Tollway has not adopted many of the recommended measures. In fact, the district court found the Tollway currently offers only *four* race-neutral measures. *Midwest Fence*, at *22.

The trial court held that IDOT complied with *Fisher's* narrow tailoring requirements by engaging in a "serious, good faith consideration of workable race-neutral alternatives." *Midwest Fence*, at *19 (citing *Fisher,* 133 S. Ct. at 2420). But there is no evidence to support that conclusion. IDOT has not demonstrated that available, workable race-neutral alternatives "do not suffice," as *Fisher* requires. *Fisher*, 133 S. Ct. at 2420. MTA evaluated IDOT's program as part of its disparity study, and recommended that IDOT implement eight specific pre-award, and four post-award, race-neutral measures. IDOT Disparity Study at 12-7 - 12-11. IDOT did not do so. *See IDOT 2013-2015 Overall DBE Goal Setting Report*, at 12-

15 (listing six "Race and Gender-Neutral Initiatives").[5] Closer examination reveals that many of IDOT's race-neutral measures are not race-neutral at all. For instance, its Mentor Protege Program is offered only to DBEs. *Id.* at 12. Other purportedly race-neutral activities are "[i]ncreasing the minority representation on the Department's Engineering Selection Committee," and proposing "state legislation to implement an affirmative action scholarship program for women and minorities." *Id.* at 14.

The minimum efforts of IDOT and the Tollway to provide race-neutral measures pale in comparison with the efforts of other jurisdictions. *See*, *e.g.*, *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. California Dep't of Transp.*, 713 F.3d 1187, 1199 (9th Cir. 2013) (the California Department of Transportation DBE Program increased its number of race-neutral measures from 45 race-neutral measures in 2008 to 150 in 2010); and Washington Sound Transit Disadvantaged Business Enterprise (DBE) Program Proposed Amended Three-Year Overall Goal & Methodology for Federal Fiscal Years 2014 Through 2016, at 8 (2013) (providing 22 race-neutral measures). New Jersey's Emerging Small Business Enterprise program has enabled that state to meet almost *all* of its DBE goals through a race-neutral program. Joseph M. Amico, *Affirmative Action in Construction Contracting and New Jersey's 'Emerging Small Business Enterprise' Program*, 16 Rutgers Race & L. Rev. 79, 104 (2015). Under that program, New Jersey establishes attainment goals for all state-certified small and economically

[5] *Available at* http://www.idot.illinois.gov/Assets/uploads/files/Doing-Business/Reports/OBWD/FHWA%2013-15%20Goal%20Doc.pdf (last visited May 28, 2015).

disadvantaged firms, not just those owned by individuals of a certain race or sex. *See id.* at 105 (describing New Jersey's race-neutral contracting measures).

Federal regulations provide more examples of race-neutral measures including, but not limited to: "Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses." 49 C.F.R. § 26.51(b)(1). The United States Commission on Civil Rights has proposed additional race-neutral contracting objectives, from enforcing current nondiscrimination laws to expanding contracting opportunities in underutilized geographic regions. U.S. Comm'n on Civil Rights, *Federal Procurement After Adarand*, at 31 (Sept. 2005).[6]

Indeed, in public contracting, race-neutral measures should always be sufficient to remedy discrimination (which is the only compelling interest advanced for preferences in contracting). Nondiscrimination can be assured through greater transparency—that is, by widely publicizing bidding opportunities and the terms of awarded contracts. *See* Roger Clegg, *Unfinished Business: The Bush Administration and Racial Preferences*, 32 Harv. J.L. & Pub. Pol'y 971, 975-77 (2009) (discussing how transparency in contracting would allow for the detection and elimination of discrimination). Most states award general contracts through a process of public competitive bidding, which requires interested contractors to submit sealed bids by a specified date and time. It also requires government

[6] *Available at* http://www.usccr.gov/pubs/080505_fedprocadarand.pdf (last visited May 28, 2015).

agencies open all bids publicly and award the contract to the lowest responsive and responsible bidder. This process protects taxpayers, and prevents excessive costs and corrupt practices. *Danis Clarkco Landfill Co. v. Clark Cnty. Solid Waste Mgmt. Dist.*, 653 N.E.2d 646, 656 (Ohio 1995). Of particular importance here, open bidding protects the government and bidders from charges of discrimination, fraud, or collusion. *Id.* Availing the subcontracting process to public competitive bidding as a race-neutral alternative to state-imposed DBE subcontracting goals would likewise remedy and eliminate discrimination by prime contractors. *See* Christine Chambers Goodman, *Disregarding Intent: Using Statistical Evidence to Provide Greater Protection of the Laws*, 66 Alb. L. Rev. 633, 691 (2003) (discussing measures to remedy discrimination without violating competitive bidding laws). Neither IDOT, nor the Tollway, require prime contractors to award subcontracts through an open and race-neutral bidding process.

To satisfy narrow tailoring, the Supreme Court imposes on government "the ultimate burden" of proving, before turning to race-conscious remedies, "that available, workable race-neutral alternatives do not suffice." *Fisher*, 133 S. Ct. at 2420. IDOT and the Tollway cannot meet this burden, because they each failed to adopt the reasonable race-neutral measures that were recommended in their own disparity studies. Other states have proven that many more workable race-neutral measures are available and have proven to be effective in overcoming the effects of past discrimination.

It is well settled that under strict scrutiny, government "must show that its purpose or interest [in a racial classification] is both constitutionally permissible

and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (plurality opinion) (citations omitted). Here, IDOT and the Tollway have failed to show that the discriminatory contracting policies adopted by their state-funded programs are necessary to remedy past discrimination, or have been narrowly tailored to any such interest through consideration and use of non-racial measures.

CONCLUSION

For the foregoing reasons, Amici Curiae Pacific Legal Foundation, Rothe Development Corporation, Cato Institute, and Center for Equal Opportunity respectfully request that this Court reverse the decision of the district court, and hold that the race-conscious measures in the IDOT and Tollway DBE Programs violate the Equal Protection Clause of the Fourteenth Amendment.

DATED: June 2, 2015.

Respectfully submitted,

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