SECTION 1

CIVIL RIGHTS AND TRANSPORTATION AGENCIES

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A. INTRODUCTION

The first subsection of this report addresses recent cases decided by the Supreme Court and lower courts on the questions of the constitutionality and requirements of affirmative action programs for disadvantaged business enterprises in public contracting. More recent case law and regulations have superseded much of a prior report on the same subject.[1]

The second subsection addresses whether there are actionable rights arising under disparate impact regulations prohibiting discrimination, for example, in the "siting" of highway projects. The section in effect updates an earlier article regarding civil rights issues arising out of the location of transportation projects.[2]

The third and fourth subsections address whether transportation departments may be sued for alleged civil rights violations under 42 U.S.C. § 1983 or under federal civil rights laws prohibiting discrimination based on age, disability, race, or gender. The two sections update an earlier article on the impact of § 1983 on highway departments, personnel, and officials.[3]

The fifth subsection deals with First Amendment issues affecting transportation departments such as the claims of certain groups to participate in Adopt-a-Highway programs or to have their logos on state license plates.

B. AFFIRMATIVE ACTION, PUBLIC CONTRACTING, AND TRANSPORTATION DEPARTMENTS

1. Cases and Developments Pre- and Post-*Adarand v. Pena* (*Adarand III*) (1995)

This section discusses the constitutional, statutory, and regulatory framework of affirmative action with respect to public contracting and transportation departments. Subsection A.1 provides a brief overview of significant cases prior to the Supreme Court's decision in *Adarand v. Pena* (*Adarand III*).[4] The constitutional and statutory elements are discussed in subsection A.2 in light of *Adarand III*. Subsection A.3 discusses the regulations promulgated by the United States Department of Transportation (U.S. DOT) in 1999.

a. Cases and Developments Pre-Adarand III

This subsection of the report addresses recent case law and federal regulations concerning the constitutionality of the use of race-based classifications for minority business enterprises, as well as business enterprises owned by women.[5] Although earlier regulations and cases referred to the affected groups by several acronyms, in this report they are referred to as Disadvantaged Business Enterprises (DBEs). DBE is the acronym for the federal program; however, many state and local governments continue to use the Minority Business Enterprises (MBE), Women's Business Enterprises (WBE), and Female Business Enterprises (FBE) acronyms to describe their programs.

As discussed in the earlier report by Orrin Finch on this subject, federal law mandating contract provisions for nondiscrimination have a common origin in President Roosevelt's 1941 Executive Order 11246. An Executive Order, issued September 24, 1965, by President Johnson expanded the 1941 edict to apply to all federally assisted construction contracts. In 1971, in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*[6] the United States Court of Appeals for the Third Circuit held that the President had the authority to impose fair employment conditions incident to the power to contract. The court held that the "Philadelphia Plan" was validly "designed to remedy the perceived evil that minority tradesmen [had] not been included in the labor pool available for the performance of construction projects in which the federal government [had] a cost and performance interest."[7] The decision set the pattern in many ways for the development of various plans and programs under executive authority to correct for racial imbalances in employment and in business enterprises.

Section 8(a) of the Small Business Act of 1953[8] (SBA), as amended in 1978, authorized the Small Business Administration to contract directly with small businesses and developed a set-aside program for socially or economically disadvantaged small businesses. In 1980, the United States Supreme Court in *Fullilove v. Klutznick*[9] (overruled in 1995 by *Adarand III*[10] where inconsistent with *Adarand III*) suggested that such programs would pass constitutional muster. The Court upheld a federally mandated 10 percent set-aside program for minority-owned businesses under the Public Works Employment Act of 1977. Six justices voted to

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[1] ORRIN FINCH, MINORITY AND DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS IN PUBLIC CONTRACTING (National Cooperative Highway Research Program (NCHRP), Research Results Digest No. 146, 1985, and supplement, Legal Research Digest No. 25, 1992), hereinafter the "Finch Report."

[2] ANDREW BAIDA, CIVIL RIGHTS IN TRANSPORTATION PROJECTS (NCHRP, Legal Research Digest No. 48, 2003).

[3] DWIGHT H. MERRIAM & LUTHER PROPST, IMPACT OF 42 U.S.C. § 1983 (CIVIL RIGHTS ACT) ON HIGHWAY DEPARTMENTS, PERSONNEL & OFFICIALS (NCHRP, Legal Research Digest No. 11, 1990).

[4] Adarand Constructors, Inc. v. Pena (*Adarand III*), 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

[5] The Finch Report, *supra* note 1, discusses at some length the historical origins of affirmative action in regard to public contracting.

[6] 442 F.2d 159 (3d Cir. 1971), *cert. denied,* 404 U.S. 854, 92 S. Ct. 98, 30 L. Ed. 2d 95 (1971).

[7] *Id.* at 177.

[8] 15 U.S.C. § 637(a) (Supp. III 1979).

[9] 448 U.S. 448, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980).

[10] *Adarand III*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

affirm the MBE provision of the Public Works Employment Act of 1977, Section 103(f)(2).[11]

There was disagreement among the justices regarding the standard of review to be applied. Chief Justice Burger, joined by Justices White and Powell, stated that,

> any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees…. This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *University of California Regents v. Bakke*, 438 U.S. 265 (1978). However, our analysis demonstrates that the MBE provision would survive judicial review under either "test" articulated in the several *Bakke* opinions.[12]

However, Justice Powell also authored an opinion, one considered to be the controlling opinion, in which he argued that there needed to be a greater emphasis than that placed by the Chief Justice on the standard of review to be applied and that, "[U]nder this Court's established doctrine, a racial classification is suspect and subject to strict judicial scrutiny."[13]

In 1989, in *Richmond v. J.A. Croson Co.*[14] the Supreme Court struck down a municipal plan requiring prime contractors to whom the city awarded construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more minority business enterprises.[15] In *Croson*, a clear majority of the Court agreed that the plan had two defects, one being the failure to make specific findings on the market to be addressed by the remedy and the other being the failure to limit the scope of the remedy because of having only generalized findings of discrimination.[16] The Richmond Plan also did not consider "race-neutral means" to increase minority business participation in city contracting, and the 30 percent quota was not narrowly tailored.[17]

The *Croson* Court dealt with the proper standard of review to be applied to state and local minority set-aside provisions under the Equal Protection Clause of the Fourteenth Amendment.[18] In *Croson*, the city had adopted a 5-year plan in 1983[19] requiring that non-MBE contractors awarded a contract by the city were to subcontract at least 30 percent of the dollar amount of the contract to one or more MBEs. An MBE was defined as a business enterprise that was owned and controlled at least 51 percent by a minority. Minorities were defined as all "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."[20] The city stated that the plan was remedial in nature and was for the purpose of increasing participation by MBEs in public contracts.[21] The plan, which permitted a waiver of the 30 percent set-aside requirement in exceptional circumstances, set forth procedures for contracts let by the city under the terms of the plan.[22] Statistics presented at a public hearing prior to the plan's adoption indicated that, although 50 percent of the city was African American, only 0.67 percent of the city's prime contracts had been awarded to MBEs between 1978 and 1983.[23] Prime contractors attending the hearing had virtually no MBEs within their "membership."[24] However, there was no direct evidence of racial discrimination in public contracting by the city or its prime contractors.[25]

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[11] In *Fullilove* the MBE provision required that

> [e]xcept to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

Fullilove, 448 U.S. at 454.

[12] *Id.* at 491.

[13] *Id.* at 507.

[14] 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989).

[15] *Id. See* also discussion of *Croson* in Adarand Constructors v. Slater (*Adarand VI*); 228 F.3d 1147, 1163 (10th Cir. 2000).

[16] *Id.*

[17] *Id.*

[18] *Croson,* 488 U.S. at 477. After the Supreme Court's 1980 ruling in *Fullilove,* holding that a federal race-based Affirmative Action Plan (AAP) did not violate the Constitution, some lower courts began to apply a similar standard of review to state and local AAPs. *Croson,* 488 U.S. at 477. In 1986, two terms before the Court's opinion in *Croson*, the Court addressed the constitutionality of a local race-based AAP in Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986). Similarly, some lower courts had applied the constitutional standard of review articulated in *Wygant* in deciding the constitutionality of state and local programs that had similar quota requirements. Thereafter, in *Croson* the Court addressed the applicability of *Wygant* to the minority set-aside program implemented by the City of Richmond. *Croson,* 488 U.S. at 477.

[19] The Court noted that the case was not moot even though the ordinance had expired because if the refusal to award the contract to the appellee violated the Constitution, then the appellee would be entitled to damages. *Id.* at 478, n.1 (citing Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 8–9, 98 S. Ct. 1554, 1559–60, 56 L. Ed. 2d 30, 38–39 (1978).

[20] *Id.* at 477–78.

[21] *Id.* at 478.

[22] *Id.* at 479.

[23] *Id*. at 479–80.

[24] *Id*. at 480.

[25] *Id*.

To meet the 30 percent set-aside requirement when bidding on the project, Croson determined that a minority contractor would have to supply the product for the contract that amounted to 75 percent of the total contract price. After contacting several MBEs, one MBE expressed interest but failed to submit a bid. Croson then petitioned the city for a waiver of the 30 percent set-aside requirement. On learning of Croson's petition, the one MBE that had expressed an interest submitted a bid that was 7 percent more than the price of the product in Croson's bid. Croson requested either a waiver of the 30 percent set-aside requirement or an increase in the contract price to accommodate the MBE's price. The city ultimately denied the request for a waiver or for an increase in the contract price.[26]

Both the District Court and the Fourth Circuit applied the *Fullilove*[27] and *Bakke*[28] standard of review. Both courts deferred to the city's decision, which was based on the Supreme Court's decision in *Fullilove* giving deference to Congress's findings of past discrimination.[29] The Court reversed and remanded the case in light of the Court's decision in *Wygant v. Jackson Board of Education*.[30]

The Fourth Circuit's decision on remand was that the affirmative action plan was unconstitutional.[31] The appellate court held that the plan violated both prongs of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment mainly because of a lack of particularized evidence of prior discrimination by the city.[32] In affirming the Fourth Circuit's decision on remand, the Supreme Court ruled that the evidence offered in support of the city's plan amounted only to a "generalized assertion" of past discrimination.[33]

> While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.[34]

Although the city had relied on *Fullilove* and the federal plan that was ruled to be constitutional in that case, the Court observed that in *Fullilove* the Congress had exercised its power under Section 5 of the Fourteenth Amendment in finding discrimination at the national level. The Court emphasized that a state or locality may implement remedial measures too but only if the state or locality presents particular evidence of discrimination.[35] The Court held that the city could not support a compelling interest for its race-based plan because of the deficiency in the city's evidence.[36] An analysis of whether the city's plan was narrowly tailored was nearly impossible as the plan had not been linked to discrimination.[37] Moreover, the Court observed that the city had not considered race-neutral means to effectuate the ends sought and ruled that the 30 percent quota lacked sound reasoning.[38]

> The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone…. None of [the district court's] "findings," singly or together, provide the city of Richmond with a "strong basis in evidence for its conclusion that remedial action was necessary."[39]

> [T]he 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing.[40]

Thus, the Court rejected the claim that the program was narrowly tailored to remedy the effects of prior discrimination.[41]

After *Croson* the question of whether a federal affirmative action plan was subject to the same standard of strict scrutiny was not answered until the Supreme Court's decision in *Adarand III*.[42] However, prior to *Adarand III*, in 1990 in *Metro Broadcasting, Inc. v. Federal Communications Commission,*[43] which was overruled by *Adarand III* as discussed below, the Supreme Court held that:

> Benign race[-]conscious measures mandated by Congress—even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives…. Our decision last Term in *Richmond* v. *J. A. Croson Co.*, 488 U.S. 469 (1989), concerning a minority set-aside program adopted by a municipality, does not prescribe the level of scrutiny to be applied to a be-

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[26] *Id.* at 481–83.

[27] 448 U.S. 448, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980).

[28] 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978).

[29] *Croson*, 488 U.S. at 484.

[30] 476 U.S. 267, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986); *cert. granted, judgment vacated, and case remanded* in J. A. Croson Co. v. Richmond, 478 U.S. 1016, 106 S. Ct. 3326, 92 L. Ed. 2d 733 (1986).

[31] *Croson,* 488 U.S. at 485.

[32] *Id*.

[33] *Id.* at 498 (*citing Wygant*, 476 U.S. 267, 275 (1986)).

[34] *Id.* at 499.

[35] *Id.* at 504.

[36] *Id.* at 505–06 (additionally noting that absolutely no evidence was presented of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons). *Id.* at 506.

[37] *Id*. at 507.

[38] *Id*. at 500, 507.

[39] *Id*. at 499, 500 (citation omitted).

[40] *Id*. at 507.

[41] *Id.* at 507–08.

[42] *Adarand III,* 515 U.S. at 222.

[43] 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990).

nign racial classification employed by Congress [citations omitted].[44]

Although in *Metro Broadcasting* the Court found that the Federal Communications Commission's program based on awarding licenses and benefits to minority owners did not serve as a remedy for past discrimination, it did find that the race-based program served an important governmental interest in promoting broadcast diversity. Applying the constitutional test of intermediate scrutiny, the Court held that this was an important governmental objective and that the policies were substantially related to an important governmental interest, thus passing a constitutional challenge.[45]

In sum, as one appellate court would declare later, "[t]he Supreme Court's declarations in the affirmative action area are characterized by plurality and split decisions and by the overruling of precedent. This fractured prism complicates the task of lower courts in both identifying and applying an appropriate form of equal protection review."[46]

b. Adarand III and Strict Scrutiny

The Supreme Court's decision in *Adarand III* and its progeny illustrate how the legal landscape has changed since the last report on this subject, beginning with the standard of review that must now be applied to affirmative action programs. In brief, however, the Supreme Court has created three standards of review (rational basis, intermediate scrutiny, and strict scrutiny) for use in equal protection analysis concerning whether a particular law permissibly or impermissibly infringes upon a person's constitutional rights. The standard of review to apply depends on whether a party belongs to a discrete and insular group. The Court in *Adarand III* reversed the use of the test of intermediate scrutiny and held that in matters involving race-based classifications, the standard of review is one of strict scrutiny. Under the strict scrutiny test a race-based affirmative action program must use narrowly tailored means that are substantially related to a compelling governmental interest. In the area of gender classification relevant to WBEs, the case law currently continues to apply an intermediate standard of scrutiny.

At issue in the *Adarand* cases were Sections 8(a) and 8(d) and 502 of the SBA as amended.[47] The regulations promulgated pursuant to the above statutes are "complex, cumbersome, and changing…."[48] Indeed, the regulations were changed in the course of the *Adarand* cases. There are seven *Adarand* decisions; the issues and dispositions in the seven cases are summarized in Table 1 following the discussion of *Adarand*.

What gave rise to the *Adarand* cases was that in 1989 the Central Federal Lands Highway Division (CFLHD), a part of the U.S. DOT, awarded a prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company (CMGC). After being awarded the contract, CMGC solicited bids from subcontractors for a guardrail-portion of the contract and awarded the bid to the Gonzales Construction Company (Gonzales). Gonzales was certified as a small business that was controlled by socially and economically disadvantaged individuals.[49] CMGC awarded the subcontract to Gonzales over the low bidder, Adarand, which challenged the outcome in the courts.[50]

The terms of the prime contract provided that CMGC would receive additional compensation if it hired a subcontractor certified as a disadvantaged small business. Federal law at the time required a Subcontractor Compensation Clause (SCC) in most federal agency contracts similar to the one used in the *Adarand* case. The law required the clause to state that "the contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individuals found to be disadvantaged by the Small Business Administration pursuant to Section 8(a) of the Small Business Act."[51]

In *Adarand III* the Supreme Court readdressed the issue of the constitutionality of a *federal* affirmative action plan for only the third time.[52] Overruling *Metro Broadcasting,*[53] the Court vacated and remanded in *Adarand III*, holding that for all racial classifications, the courts must apply strict scrutiny. The Court also overruled *Fullilove* to the extent that the *Fullilove* decision suggests that a standard of review less than strict scrutiny may be applied to programs based on racial classifications. The Supreme Court left the question to the lower courts of whether there was a compelling governmental interest for the program and whether the

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[44] *Id.* at 564–65.

[45] *Id.* at 566–69.

[46] *Adarand VII*, 228 F.3d at 1161.

[47] 15 U.S.C. §§ 637(a)(d), 644(g); § 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 132, 145 (1987); § 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, 105 Stat. 1914, 1919–21 (1991); and § 1101(b) of the Transportation Equity Act for the 21st Century of 1998 (TEA-21), Pub. L. No. 105-178, 112 Stat. 107, 113–15 (1998).

[48] *Adarand VII*, 228 F.3d at 1160.

[49] Certification may occur under the Small Business Act's § 8(a) or (d) program or by a state under the DOT regulations.

[50] *Adarand III,* 515 U.S. at 205.

[51] *Id.*; *see also* 15 U.S.C. § 687(d)(2), (3).

[52] *Adarand III*, 515 U.S. at 256; *see* Metro Broadcasting, Inc. v. Fed. Communications Comm'n, 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990) (upholding federally mandated program awarding new radio and television licenses to minority controlled firms) and Fullilove v. Klutznick, 448 U.S. 448, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980) (upholding constitutionality of federal affirmative action plan requiring at least 10 percent of federal funds for local public works be used to procure services or supplies from minority business enterprises).

[53] *Metro Broadcasting,* 497 U.S. 547.

means employed were narrowly tailored to achieve that interest.[54]

Following the Supreme Court's remand in *Adarand III*, the district court in *Adarand IV*[55] stated that, contrary to the Court's pronouncement that the application of strict scrutiny is not "fatal in fact" to an affirmative action program, the district court could not envisage a race-based classification that was narrowly tailored.[56] Thus, the district court granted the plaintiff highway construction company's motion for summary judgment, which had sought declaratory and permanent injunctive relief because the SCC was not sufficiently narrowly tailored to pass strict scrutiny. Although recognizing that its further finding on whether there was a compelling governmental interest was *obiter dicta,*[57] the district court did find that the

> Requisite particularized findings of discrimination to support a compelling governmental interest for Congress' action in implementing the SCCs under a strict scrutiny standard of review would include findings of discriminatory barriers facing DBEs in federal construction contracting nationwide, rather than in a single state, whether such barriers were as a result of intentional acts of the federal government or "passive complicity in the acts of discrimination by the private sector…." Such a standard, while acknowledging the Court's requirement that there be findings of discrimination in the specific industry where alleged discrimination is sought to be remedied, …takes into account Congress' responsibility to address nation-wide problems with nation-wide legislation.[58]

The Tenth Circuit in *Adarand V*, because Colorado had modified its DBE regulations (see table on page 1-9), vacated the District Court's judgment and remanded it with instructions to dismiss.[59] In *Adarand VI*, the Supreme Court held that the case against the federal government was still viable and reversed and remanded.[60]

In *Adarand VII* the Tenth Circuit reversed the judgment of the District Court and held that the SCC program and the DBE certification program as *currently* structured did pass constitutional muster, but as the programs were structured in 1997 they did not.[61] Although the SCC program was no longer in use in federal highway construction procurement contracts, the Tenth Circuit decided not to ignore intervening changes in the statutory and regulatory framework since the *Adarand IV* decision.[62]

The Tenth Circuit in *Adarand VII* noted that the only significant change in regard to the transportation appropriations statutes was the addition of both Section 1003(b) of the Intermodal Surface Transportation Efficiency Act (ISTEA), 105 Stat. 1920-22, and Section 1101(b)(6) of the Transportation Equity Act for the 21st Century (TEA-21), 112 Stat. 114-15, requiring the Comptroller General to conduct a study and report to Congress regarding several aspects of the DBE program.[63] Moreover, the court noted that the regulations implementing affirmative action programs of the Surface Transportation and Uniform Relocation Assistance Act (STURAA), ISTEA, and TEA-21 had undergone the most substantial change of any of the regulations, particularly to meet the narrow tailoring requirement established by *Adarand III*.[64]

Six main changes occurred between the old and new regulations in regard to implementation, which may be briefly described as follows: (1) presumption of economic disadvantage is automatically rebutted for an individual with a net worth above $750,000, without a requirement of further proceedings;[65] (2) quotas are explicitly prohibited in allocating subcontracts to DBEs and set-asides are limited to extreme circumstances;[66] (3) DBE participation goals cannot be made in a specific area until extensive requirements have been met;[67] (4) race-neutral means must be employed wherever possible in order to meet the highest feasible portion of the overall DBE participation goals;[68] (5) individuals not presumed socially disadvantaged may prove their status by a preponderance of the evidence, and recipients must make certain that DBEs are not saturated in one particular type of work so as to preclude non-DBE firms from participating;[69] and (6) recipients may seek waivers and exemptions to ensure that the programs are not applied more broadly than permissible.[70]

In *Adarand VII* the Tenth Circuit held that the government had demonstrated a "strong basis in evidence" supporting "its articulated, constitutionally valid, compelling interest"[71] that Adarand had not rebutted.

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[54] *Adarand III,* 515 U.S. 237–38.

[55] Adarand Constructors v. Pena (*Adarand IV*), 965 F. Supp. 1556 (D. Colo. 1997).

[56] *Id.* at 1580.

[57] *Id.* at 1570.

[58] *Id.* at 1573.

[59] Adarand Constructors v. Slater (*Adarand V*), 169 F.3d 1292 (10th Cir. 1999).

[60] Adarand Constructors v. Slater (*Adarand VI*), 528 U.S. 216, 120 S. Ct. 722, 145 L. Ed. 2d 650 (2000).

[61] *Adarand VII,* 228 F.3d 1147.

[62] *Id.* at 1159, 1188.

[63] *Id.* at 1192.

[64] *Id.* at 1193, *citing Participation by Disadvantaged Business Enterprises in Department of Transportation Programs*, 64 Fed. Reg. 5096 (1999). "The current regulations, which apply to any federal highway funds authorized under ISTEA or TEA-21, *see* 49 C.F.R. § 26.3(a) (2000), are at 49 C.F.R. pt. 26;" s*ee also* 64 Fed. Reg. at 5101-03 (discussing the narrowly tailored requirement in relation to the new regulations).

[65] *Adarand VII*, 228 F.3d at 1193, *citing* 49 C.F.R. § 26.67(b)(1) (2000). *See* 13 C.F.R. § 124.104 (2000) (conforming Small Business Act recertification of economic disadvantage with 49 C.F.R. § 26.67(b)(1) (2000)).

[66] *Id., citing* 49 C.F.R. § 26.43(a)–(b).

[67] *Id., citing* 49 C.F.R. § 26.45.

[68] *Id., citing* 49 C.F.R. § 26.51(a)–(b), (f).

[69] *Id., citing* 49 C.F.R. §§ 26.61(d), 26.67(d), 26.33(a).

[70] *Id., citing* 49 C.F.R. § 26.15.

[71] *Id.* at 1174–75.

Moreover, the court agreed that "Congress ha[d] a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies."[72] The court held that the evidence of the existence of discriminatory barriers was supported by "ample 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."[73] Adarand failed to meet its burden of demonstrating that the affirmative action program was unconstitutional.[74] The court held that the revised law was sufficiently narrowly tailored and, thus, constitutional. Although the 1996 SCC was insufficiently narrowly tailored, the SCC was no longer used in direct federal procurements; its defects had been "remedied" by TEA-21 and the revised regulations that relate to the Federal-aid program.[75]

Thereafter, the Supreme Court granted *certiorari* to decide whether the court misapplied the strict scrutiny standard. However, the Court dismissed the writ as improvidently granted on the basis that the contractor had shifted its challenge from the regulations to the statutes and regulations that pertained to direct procurement for highway construction on federal lands. Moreover, the Court dismissed the writ because the appeals court had not considered whether the various race-based programs applicable to direct federal contracting could satisfy strict scrutiny, and because the petition for *certiorari* nowhere disputed the circuit court's explicit holding that the contractor lacked standing to challenge the very provisions it asked the court to review.[76]

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[72] *Id.* at 1176.
[73] *Id.* at 1174.
[74] *Id.* at 1176.
[75] *Id.* at 1179, 1186–87; *see also* 49 C.F.R. § 26.51, *et seq*.
[76] *Adarand VI*, 534 U.S. 103.

TABLE 1

Adarand v. Pena in the District Court in Colorado, the 10th Circuit, and the U.S. Supreme Court: *Summary of Issues, Holdings, and Dispositions*

Citation	Issue(s) Presented	Holding(s)	Disposition
Adarand I *Adarand Constructors, Inc. v. Skinner,* 790 F. Supp. 240 (D. Colo. 1992).	(1) Whether the federal Disadvantaged Business Enterprise (DBE) program promulgated under federal highway funding provisions of the Surface Transportation Assistance Act of 1982 (STAA) and Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), administered by the Central Federal Lands Highway Division (CFLHD), violated the U.S. Constitution or the privileges and immunities guaranteed by 42 U.S.C. §§ 1983 and (2000(d)). (2) Whether the DBE, STAA, and STURAA, served legitimate governmental interests and, if so, whether they are narrowly tailored to achieve those interests.	(1) Distinguishing the Supreme Court's decisions in *Croson* from *Fullilove* and *Metro Broadcasting*, the district court did not require specific findings of past discrimination to justify the race-conscious measures promulgated by Congress, as required for states and local government entities under *Croson*. Instead, the court noted that Justice O'Connor stated in *Croson* that Congress may identify and redress the effects of society-wide discrimination without specific findings of discrimination. As a result, the district court concluded that the appropriate standard of review was intermediate scrutiny, not strict scrutiny. (2) The district court found the program served appropriate governmental objectives and that the program was narrowly tailored to achieve those interests because it operated in a flexible manner, and it had minimum impact on non-DBEs.	Acknowledging that Congress had authorized the DBE, STAA, and STURAA programs, the district court held that each program required a review only under intermediate scrutiny analysis and that each program passed that level of constitutional review. As a result, the district court granted the defendants' motion for summary judgment and dismissed the plaintiff's claims and actions with prejudice. Adarand appealed the district court's decision to the Tenth Circuit Court of Appeals.
Adarand II *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. Colo. 1994).	(1) Whether the appropriate standard of review was that found in *Fullilove* rather than in *Croson*. (2) Whether CFLHD must make specific findings of past discrimination, as required in *Croson*, to justify its reliance on the DBE	(1) The Tenth Circuit agreed that the Supreme Court's decision in *Fullilove* provided the proper standard of review for the instant case because CFLHD simply applied a federal command pursuant to the SBA. (2) The Tenth Circuit did not find any support of any kind that would require a	The court of appeals affirmed the district court's judgment, but on different grounds. Adarand filed a *writ of certiorari* and the Supreme Court granted *certiorari.*

	program, which furnished the necessary criteria for the federal agency's implementation of a race-conscious subcontracting clause (the SCC program). (3) Whether § 502 of the Small Business Act (SBA)*, 15 U.S.C. § 644(g), which provides the statutory authorization for the challenged SCC program, is constitutional, considering that the Act delegated the authority to federal agencies to develop minority-participation goals and the means for achieving those goals. (4) Whether SBA § 502 served legitimate governmental interests and, if so, whether they are narrowly tailored to achieve those interests. * Adarand erroneously asserted and the district court mistakenly determined that the challenged program was authorized by the STAA and its successor, STURAA.	separate independent finding by a federal agency to justify the use of a race-conscious program implemented pursuant to federal requirements. Accordingly, the Tenth Circuit held that CFLHD was not required to make specific findings of past discrimination. (3) The Tenth Circuit held that CFLHD did not need to make specific findings of past discrimination in order to pass constitutional review because Congress permissibly had delegated the precise goals to CFLHD after Congress made its nationwide finding. (4) The Tenth Circuit found the program served appropriate governmental objectives and that the program was narrowly tailored to achieve those interests because it operated in a flexible manner and had minimum impact on non-DBEs.	
Adarand III *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).	(1) Whether the appropriate standard of review to be applied for the race-conscious SBA program was intermediate scrutiny.	(1) The Supreme Court held that all racial classifications imposed by the federal or state governments are to be analyzed under strict scrutiny, overruling the Court's decision in *Metro Broadcasting*. Therefore, only narrowly tailored measures that further compelling governmental interests are constitutional.	The Supreme Court vacated the lower court's judgment and remanded the case for further consideration based on the principles enunciated in the majority opinion.
Adarand IV	(1) Whether the race-conscious SCC program	(1)(a) In considering whether the SCC program	The district court granted Adarand's mo-

Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556 (D. Colo. 1997).	violated the Constitution, as well as the Civil Rights Act of 1964, 42 U.S.C. § 2000d, under the standard of strict scrutiny.	survived the first prong of strict scrutiny, the district court noted that although the congruency principle discussed in *Adarand III* placed the same standard of review on federal and states' use of racial classifications, the breadth of Congress's power under § 5 of the Fourteenth Amendment may require less exacting justifications for such use. * Here, the district court held that Congress's nationwide finding of discriminatory barriers facing DBEs in federal contracts was sufficient and that regional and state specific findings were unnecessary. The district court held that the governmental objectives were compelling. (1)(b) However, the district court did not find the program to be narrowly tailored. Thus, the court concluded that the SCC program violated the Constitution and the Civil Rights Act of 1964. The district court relied on the five factors discussed in *Paradise* and concluded that the statutes and regulations implicated in the SCC program did not provide reasonable assurances that the application of racial criteria would be limited to accomplishing the remedial objectives of Congress. *The Supreme Court in *Adarand III* did not address the question of how much congressional deference is due to a congressionally mandated race-conscious program.	tion for summary judgment and enjoined the defendants from administering, enforcing, soliciting bids for, or allocating any funds under the SCC program. Adarand appealed.
Adarand V *Adarand*	(1) Whether the SCC program was sufficiently narrowly tailored to	(1) After *Adarand IV*, Colorado modified its DBE regulations and eliminated	The Tenth Circuit vacated the district court's judgment and remanded

Constructors, Inc. v. Slater, 169 F.3d 1292 (10th Cir. Colo. 1999).	serve a compelling governmental interest as to survive strict scrutiny.	the presumption of social and economic disadvantage for racial and ethnic minorities, and conditioned the social disadvantage-status solely on the applicant's certification that the applicant is socially disadvantaged. More notably, Adarand became certified as a socially disadvantaged DBE. Because of the change in circumstances that invoked a procedural issue, the court held the matter to be moot.	it with instruction to dismiss. Adarand petitioned for a writ of certiorari.
Adarand VI *Adarand Constructors, Inc. v. Slater,* 528 U.S. 216 (2000).	(1) Whether Colorado's modification of its DBE regulations and Adarand's subsequent certification under those provisions mooted the case.	(1) The court held the Colorado Department of Highways/Transportation (CDOT) did not result in acceptance of the certification by the federal government under its separate regulations. Therefore, Adarand's claim against the federal government was still viable.	The Supreme Court reversed and remanded.
Adarand VII *Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147 (10th Cir. Colo. 2000).	(1) Whether the SCC program served a compelling governmental interest. (2) Whether the SCC program was sufficiently narrowly tailored to serve a compelling governmental interest so as to survive strict scrutiny.	(1) The Tenth Circuit affirmed the district court's finding of a compelling governmental interest. (2) The Tenth Circuit again looked at the factors pronounced by the Court in *Paradise* and at additional, narrow-tailoring factors. Significant changes had taken place with regard to the SCC program and DBE program since the 1997 trial court decision. After determining which provisions of the statutes were at issue and their scope, the court held that the current programs were narrowly tailored to serve a compelling governmental interest.	The Tenth Circuit reversed the judgment of the district court. Adarand petitioned for a writ of certiorari that the Court initially granted. *See Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941 (2001). However, the Court subsequently dismissed the writ as improvidently granted because it would require review of issues decided by the Tenth Circuit but not included in the *writ of certiorari*. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001).

As the Supreme Court in *Fullilove* had stated, "Congress may employ racial or ethnic classifications in exercising its Spending or other legislative powers only if those classifications do not violate

the equal protection component" as now construed by the Court to be a part also of the Due Process Clause of the Fifth Amendment.[77] However, "the burden rests with the Government to demonstrate that Congress had a strong basis in evidence to create this remedial program."[78] Since the Court's decision in *Adarand III,* the strict scrutiny test must be applied to "'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool" and to "ensure[] that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."[79]

c. TEA-21, SAFETEA-LU, and the U.S. DOT DBE Regulations (1999)

More recently and post-*Adarand III*, and similar to Section 105(f) of the Surface Transportation Act of 1982 (STAA), Section 1101(b) of TEA-21[80] required that at least 10 percent of funds be made available for any program under titles I, III, and V of the Act to benefit DBEs.[81] After September 30, 2003, there were numerous extensions of TEA-21.[82] Meanwhile, in 1999 the U.S. DOT promulgated regulations regarding requirements that were applicable to DBEs.[83] In addition to the regulations, discussed below, there is official guidance at a Web site maintained by the Office of Small Disadvantaged Business Utilization and the Minority Resource Center.[84] The site provides information on services and programs available to small businesses in the transportation sector, including DBEs and WBEs.[85]

In 2005 Congress enacted the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU).[86] SAFETEA-LU reauthorized the DBE program through fiscal year (FY) 2009 with relatively minor changes,[87] such as the increase in the limit on gross receipts for eligible small businesses to $19.57 million.[88] The DBE program requirements also now apply to expenditures under the Highway Safety Research and Development Program.

However, SAFETEA-LU has three additional sections pertaining to race and DBE programs. First, the Act created a grant program to encourage states to enact measures that would prohibit and discourage racial profiling by providing funding for such measures. Under this section, the Act awards grants to any state that implements one of two measures. The first measure requires a state to enact and enforce laws that prohibit racial profiling in the enforcement of state laws that regulate the use of federal funds for highways. The second measure requires a state to maintain and allow public inspection of statistical information on the race and ethnicity of any driver and any passenger(s) for each motor vehicle-stop made by law enforcement on any Federal-aid highway or to provide adequate assurances that the state is complying with the first measure.[89]

Second, in Section 1920 Congress made certain findings on transportation and investment in the

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[77] Rothe Dev. Co. v. United States Dep't of Defense (*Rothe IV*), 324 F. Supp. 2d 840, 843 (W.D. Tex. 2004), *citing Fullilove*, 448 U.S. at 480, 100 S. Ct. at 2758, 65 L. Ed. 2d at 902 (1980).

[78] *Id.* at 842.

[79] *Id.* at 848, *quoting Croson,* 488 U.S. at 493, 109 S. Ct. at 721, 102 L. Ed. 2d at 881–82.

[80] Pub. L. No. 105–178, 112 Stat. 107 (1998).

[81] *See* 49 C.F.R. § 26.3 (stating that the provision applies to titles I, II, V), *but see* 49 C.F.R. § 26.41 (stating that not less than 10 percent of funds be expended on DBEs but 10 percent "requirement" is an aspirational goal and not a requirement).

[82] On July 30, 2005, President Bush signed a 12th extension (H.R. 3512, Pub. L. No. 109-42) that was to expire on August 14, 2005; *see* FHWA Reauthorization of TEA-21, *available at* http://www.fhwa.dot.gov/reauthorization/extension.htm, showing all renewals prior to July 30, 2005.

[83] *See* U.S. DOT, Disadvantaged Business Enterprise, http://www.dotcr.ost.dot.gov/asp/dbe.asp (site discusses enactment of TEA-21 and authorized DBE programs and that the DOT's DBE regulations are found in 49 C.F.R. pts. 23, 26, published in 1999).

[84] Office of Small and Disadvantaged Business Utilization, www.osdbu.dot.gov.

[85] *See also* U.S. Department of Transportation, Federal Highway Administration, Program Administration, Administration of Engineering and Design Related Services Contracts, *available at* www.fhwa.dot.gov/programadmin/172qa.htm; http://knowledge.fhwa.dot.gov/cops/dbex.nsf/home; and http://osdbu.dot.gov/documents/pdf/dbe/dbe/pdf. 64 Fed. Reg. 5096 (Feb. 2, 1999) (to be codified at 49 C.F.R. pts. 23, 26).

[86] Pub. L. No. 109-59, 112 Stat. 1144 (2005).

[87] *See* SAFETEA-LU, Pub. L. No. 109-59, § 1101(b), 112 Stat. 113 (2005) (codified at 23 U.S.C. § 101 (2006)); *compare to* TEA-21, Pub. L. No. 105-178, § 1101(b), 112 Stat. 1156 (1998) (codified at 23 U.S.C. § 101 (1998)). TEA-21 included a provision requiring the Comptroller General to conduct a review of the DBE program and provide a report to Congress. SAFETEA-LU does not impose such a requirement.

[88] SAFETEA-LU, Pub. L. No. 109-59, § 1101(b)(1)(a), 119 Stat. 1156 (2005) (codified at 23 U.S.C. § 101 (2006)).

[89] *Id.* § 1906.

local workforce, including a finding that transportation projects can offer young people, including economically disadvantaged young people, an opportunity to gain productive employment.[90] Congress stated that it was the

> sense of Congress that Federal transportation projects should facilitate and encourage the collaboration between interested persons, including Federal, State, and local governments, community colleges, apprentice programs, local high schools, and other community-based organizations that have an interest in improving the job skills of low-income individuals, to help leverage scarce training and community resources and to help ensure local participation in the building of transportation projects.[91]

Third, SAFETEA-LU requires the Secretary, acting through the Minority Resource Center, to provide assistance in obtaining bid, payment, and performance bonds by DBEs pursuant to 49 U.S.C. § 332(b)(4). Congress appropriated such sums as necessary to carry out the activities under this subsection.[92]

U.S. DOT also has revised and updated the airport concession rules applicable to DBEs as authorized by 49 U.S.C. § 47101(e), which are found in the Code of Federal Regulations (C.F.R.) at 49 C.F.R., Part 23, effective as of April 21, 2005.[93] Although similar to the U.S. DOT–assisted contracts and concession rules found in 49 C.F.R., Part 26, that are applicable to DBEs, the Airport Concession DBEs (ACDBEs) rules are based on a different statute altogether. Although the former TEA-21 and 49 U.S.C. § 47101(e) apply to different kinds of businesses and business relationships and differ in method, the laws maintain the same DBE-objective. Unlike U.S. DOT–assisted contracts, for example, ACDBEs may specialize in car rentals or restaurants located in or around airport facilities and may be subject to standards for business size as determined by the Secretary. Because the two DBE programs were regulated by separate statutes, the Supreme Court's decision in *Adarand III*, requiring that strict scrutiny be applied to DBEs under 49 C.F.R., Part 26, indirectly raised constitutional concerns for ACDBEs under 49 C.F.R., Part 23.[94] The 2005 revision of the ACDBE regulations addressed this concern.

Unlike Part 26-businesses seeking DBE certification, which requires strict adherence to SBA size standards and a cap on average gross receipts, Part 23 permits flexibility for setting size standards in the discretion of the Secretary.[95] Although Part 23 permits an average $30 million cap, compared to the $17.42 million cap (now $19.57 million under SAFETEA-LU) in Part 26 on average gross annual receipts, subject to periodic adjustments for inflation, guidelines for size-standards for ACDBEs under Part 23 are still being considered.[96]

The former TEA-21 and regulations pursuant thereto did "not establish a nationwide DBE program centrally administered by the U.S. DOT. Rather, the regulations delegate to each State that accepts federal transportation funds the responsibility for implementing a DBE program that comports with TEA-21."[97] As discussed in subsection A.4, *infra*, the courts have upheld the DBE regulations issued by U.S. DOT in 1999.[98] (As stated, SAFETEA-LU maintained the DBE program found in TEA-21 nearly in whole and contains three additional sections pertaining to DBE programs.)

However, the courts also have had to address how to handle cases in which new regulations were promulgated in the midst of pending challenges to affirmative action requirements. For example, as

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[90] *Id.* § 1920 (2005). As references to the U.S.C. or United States Statutes were not available as of this time, please see the United States Code Classification Tables, *available at* http://uscode.house.gov/classification/tables.shtml.

[91] SAFETEA-LU, Pub. L. No. 109-59, § 1920 (2005).

[92] *Id.* § 1951, 112 Stat. 1514 (2005) (codified at 40 U.S.C. § 332 (2006)).

[93] *Participation by Disadvantaged Business Enterprises in Airport Concessions*, 70 Fed. Reg. 14496 (Mar. 22, 2005), *available at* http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-5530.pdf; *Participation by Disadvantaged Business Enterprises in Airport Concession*s, 70 Fed. Reg. 14520 (Mar. 22, 2005), *available at* http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-5529.pdf. DOT issued pt. 23 in 1992 and amended it in 1999. *See* 57 Fed. Reg. 18410 (April 30, 1992); 64 Fed. Reg. 5126 (Feb. 2, 1999). The recent revisions were in response to three proposed rules in 1993, 1997, and 2000. *See* 58 Fed. Reg 52050 (Oct. 8, 1993); 62 Fed. Reg. 24548 (May 30, 1997); 65 Fed. Reg. 54454 (Sept. 8, 2000).

[94] *Participation by Disadvantaged Business Enterprises in Airport Concessions*, 70 Fed. Reg. at 14496 (Mar. 22, 2005).

[95] *Id.*

[96] *Id.* at 14520 (Mar. 22, 2005).

[97] Western States Paving Co. v. Washington State, 407 F.3d 983, 989 (9th Cir. 2005).

[98] *Participation by Disadvantaged Business Enterprises in Dep't of Transp. Financial Assistance Programs*, 49 C.F.R. pt. 26, § 26.1, *et seq.*; 64 Fed. Reg. 5126 (Feb. 2, 1999), *as amended* at 64 Fed. Reg. 34570 (June 28, 1999); 65 Fed. Reg. 68951 (Nov. 15, 2000); 68 Fed. Reg. 35553 (June 16, 2003). (The statutory authorities for the above regulations are 23 U.S.C. § 324; 41 U.S.C. § 2000d, *et seq.*; 49 U.S.C. §§ 1615, 47107, 47113, and 47123; *see* Pub. L. No. 105-178, § 1101(b), 112 Stat. 107, 113.)

seen, the *Adarand* case had such a long history that, by the time *Adarand VII* was before the Tenth Circuit, there had been "intervening changes" in the applicable statutes and regulations. Nevertheless, the Tenth Circuit held that it was permissible for the court to consider the new law so as not "to shirk our responsibility to strictly scrutinize the real-world legal regime against which Adarand seeks prospective relief,"[99] as well as to consider "the statutory and regulatory framework in its prior stages as well."[100] As the court noted, "STURAA, ISTEA, and TEA-21, the transportation appropriation statutes at issue in this case, incorporate the presumption of disadvantage from SBA § 8(d)."[101]

As set forth in the 1999 U.S. DOT regulations, the DBE program has several objectives, including the assurance that there is "nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs."[102] The requirements of the DBE program apply to "[a]ll FHWA recipients receiving funds authorized by a statute to which this part applies…."[103] Discriminatory actions that are forbidden include actions that exclude "any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin."[104] The regulations are intended "[t]o create a level playing field on which DBEs can compete fairly for DOT-assisted contracts"[105] and "[t]o ensure that the Department's DBE program is narrowly tailored in accordance with applicable law…."[106]

In brief, although the regulations should be consulted for the particulars, socially and economically disadvantaged individuals who qualify for the DBE program include "any individual who is a citizen (or lawfully admitted permanent resident) of the United States" and is an "individual who a [r]ecipient finds to be a socially and economically disadvantaged individual on a case-by-case basis."[107] A "[r]ecipient is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance."[108] Individuals rebuttably presumed to be socially and economically disadvantaged include Black Americans, Hispanic Americans, those of Portuguese culture or origin, Native Americans, Asian-Pacific Americans, subcontinent Asian Americans, women, and "[a]ny additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective."[109] A firm not presumed to be a DBE may apply for DBE certification.[110] There are various requirements that must be met, but to be eligible "a firm must be at least 51 percent owned by socially and economically disadvantaged individuals,"[111] and ownership "must be real, substantial, and continuing, [and] going beyond *pro forma* ownership of the firm…."[112]

Under present law, the Congress presumes that firms that are more likely to be economically disadvantaged are firms owned by minorities or women;[113] however, unlike earlier affirmative action programs, the current "program…takes race into consideration as only one factor."[114] Although certain groups are presumed to be DBEs, "the current regulations are designed to increase the participation of non-minority DBEs" in that nonminorities that are not presumed to be socially disadvantaged are allowed to prove by a preponderance of the evidence their right to participate in the DBE program.[115]

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[99] *Adarand VII*, 228 F.3d at 1158.

[100] *Id.* at 1159 (stating that "'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" (internal citations omitted)). The court considered the prior law even though "the manager of the Federal Lands Program indicate[d] that the SCC is no longer in use in federal highway construction contracts." *Id.* at 1159 n.4.

[101] *Id.* at 1160.

[102] 49 C.F.R. § 26.21(a)(1). *See also* § 26.3(a)(1) through (3). A recipient under the DBE program includes any recipients of Federal-aid highway funds pursuant to certain federal laws, federal transit funds, and airport funds.

[103] 49 C.F.R. § 26.21(a)(1). *See* § 26.21(a)(2) and (3), respectively, regarding FTA recipients (certain assistance exceeding $250,000; excluding transit vehicle purchases) and FAA recipients (certain grants exceeding $250,000).

[104] *Id.* § 26.7(a). Subsec. (b) states that a recipient "must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin."

[105] *Id.* § 26.1(b).

[106] *Id.* § 26.1(c). *See also* § 26.1(d) through (g) for other stated objectives.

[107] *Id.* § 26.5(1).

[108] *Id.* § 26.5.

[109] *Id.* § 26.5(2).

[110] *Id.* §§ 26.61, 26.65, and 26.67.

[111] *Id.* § 26.69(b).

[112] *Id.* § 26.69(c). *See also* § 26.71.

[113] *Rothe IV,* 324 F. Supp. 2d at 857.

[114] *Id.*

[115] *Adarand VII,* 228 F.3d at 1183.

Section 26.5 of the 1999 regulations also defines "race-conscious" and "race-neutral" measures under the program: A "[r]ace-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs."[116] A "[r]ace-neutral measure or program is one that is, or can be, used to assist all small businesses.... [R]ace-neutral includes gender-neutrality."[117] A recipient of federal funds must use race-neutral means before resorting to race-conscious means to remedy discrimination.

> [A recipient] must meet the maximum feasible portion of [its] overall goal by using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts).[118]

Race-neutral means include: "[a]rranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses;"[119] "[p]roviding assistance in overcoming limitations such as inability to obtain bonding or financing;"[120] "technical assistance and other services;"[121] and otherwise as specified in the regulations. The recipient "must establish contract goals to meet any portion of [its] overall goal [it does] not project being able to meet using race-neutral means."[122]

Thus, current law "employs a race-based rebuttable presumption to define the use of race-conscious remedial measures...."[123] Assuming that a compelling interest has been demonstrated for a "race-conscious" approach, the law must be narrowly tailored. Although rigid numerical quotas are not narrowly tailored and are not permissible, it is not impermissible for Congress to require "innocent persons" to share some of the burden in eradicating racial discrimination by "cur[ing] the effects of prior discrimination."[124]

Under current federal law, a state must set a DBE utilization goal that reflects its "determination of the level of DBE participation [that] would be expected absent the effects of discrimination."[125] The goal is "undifferentiated" in that it must encompass all minority groups.[126] Part C of the regulations addresses the role of the "statutory 10 percent goal" in the DBE program. As the regulations provide,

> (a) The statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.
>
> (b) This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs' opportunities to participate in DOT-assisted contracts.
>
> (c) The national 10 percent goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.[127]

Although there are several steps in the process of setting the recipient's DBE program goal, Section 26.5 provides, *inter alia*, that the recipient's

> overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on [the recipient's] DOT-assisted contracts (hereafter, the "relative availability of DBEs"). The goal must reflect [the recipient's] determination of the level of DBE participation [it] would expect absent the effects of discrimination. [The recipient] cannot simply rely on either the 10 percent national goal, [the recipient's] previous overall goal or past DBE participation rates in [its] program without reference to the relative availability of DBEs in [the recipient's] market.

As Section 26.43 states, a recipient "is not permitted to use quotas for DBEs on DOT-assisted contracts subject to this part."[128] Furthermore, a recipient "may not set-aside contracts for DBEs on DOT-assisted contracts subject to this part, except that, in limited and extreme circumstances, [a recipient] may use set-asides when no other method could be reasonably expected to redress egregious instances of discrimination."[129]

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[116] 49 C.F.R. § 26.5.

[117] *Id.*

[118] *Id.* § 26.51(a).

[119] *Id.* § 26.51(b)(1).

[120] *Id.* § 26.51(b)(2).

[121] *Id.* § 26.51(b)(3).

[122] *Id.* § 26.51(d).

[123] Northern Contracting v. Ill. Dep't of Transp., No. 00C45115, 2004, U.S. Dist. LEXIS 3226, *86 (N.D. Ill. 2004).

[124] *Adarand VII*, 228 F.3d at 1177, *quoting Wygant*, 476 U.S. at 280–81, 106 S. Ct. at 1850, 90 L. Ed. 2d at 273 (Powell, J.) (*quoting Fullilove*, 448 U.S. at 484, 100 S. Ct. at 2779, 65 L. Ed. 2d at 929 (plurality)).

[125] *Western States*, 407 F.3d at 989.

[126] *Id.* at 990, *citing* 49 C.F.R. § 26.45(h).

[127] 49 C.F.R. § 26.41(a), (b), and (c).

[128] *Id.* § 26.43(a).

[129] *Id.* § 46.43(b). For the required steps in the goal-setting process, *see id.* § 26.45(c), (d), (e), (f), and (g).

Prior law had given rise to ill-defined goals upon which remedial measures were based.[130] However, as one court has observed, under current law

> *[T]he process by which recipients of federal transportation funding set aspirational goals is now much more rigorous.* The current regulation instructs each recipient that its "overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on [the recipient's] DOT-assisted contracts" and must make "reference to the relative availability of DBEs in [the recipient's] market." 49 C.F.R. § 26.45(b) (2000). In addition, goal setting must involve "examining all evidence available in [the recipient's] jurisdiction." *Id*. § 26.45(c). Such evidence may include census data and valid disparity studies. *See id*. § 26.45(c)(1)-(3). After examining this evidence, the recipient must adjust its DBE participation goal by examining the capacity of DBEs to perform needed work, disparity studies, and other evidence. *See id*. § 26.45(d). When submitting a goal, the recipient must include a description of the methodology and evidence used. *See id*. § 26.45(f)(3).[131]

Important provisions regarding contract goals appear in § 26.51(e) and (f). For example,

> (1) [A recipient] may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.
>
> (2) [A recipient is] not required to set a contract goal on every DOT-assisted contract. [A recipient is] not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal….

Furthermore,

> [t]o ensure that [the recipient's] DBE program continues to be narrowly tailored to overcome the effects of discrimination, [the recipient] must adjust [its] use of contract goals as follows:
>
> (1) If [the recipient's] approved projection under paragraph (c) of this section estimates that [it] can meet [its] entire overall goal for a given year through race-neutral means, [the recipient] must implement [its] program without setting contract goals during that year….
>
> (2) If, during the course of any year in which [the recipient is] using contract goals, [it] determine[s] that [it] will exceed [its] overall goal, [the recipient] must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If [the recipient] determine[s] that [it] will fall short of [its] overall goal, then [the recipient] must make appropriate modifications in [its] use of race-neutral and/or race-conscious measures to allow [it] to meet the overall goal.[132]

When a recipient has established a DBE contract-goal, it must

> award the contract only to a bidder/offeror who makes good faith efforts to meet it. [The recipient] must determine that a bidder/offeror has made good faith efforts if the bidder/ offeror does either of the following things:
>
> (1) Documents that it has obtained enough DBE participation to meet the goal; or
>
> (2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so….[133]

Importantly, as provided in the 1999 regulations,

> (a) [A recipient] cannot be penalized, or treated by the Department as being in noncompliance with this rule, because [the recipient's] DBE participation falls short of [its] overall goal, unless [the recipient has] failed to administer [its] program in good faith.
>
> (b) If [the recipient does] not have an approved DBE program or overall goal, or if [it] fail[s] to implement [its] program in good faith, [the recipient is] in noncompliance with this part.[134]

Various requirements exist for recipients; for example, under § 26.27, recipients "must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in [a recipient's] community and make reasonable efforts to use these institutions. [A recipient] must also encourage prime contractors to use such institutions." Under § 26.33, recipients must take steps "to address overconcentration of DBEs in certain types of work," such as

> the use of incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which you have determined that non-DBEs are unduly burdened. [A recipient] may also consider varying [its] use of contract goals, to the extent consistent with § 26.51, to unsure that non-DBEs are not unfairly prevented from competing for subcontracts.

Notwithstanding the DBE program's requirements, recipients are allowed to apply for an exemption from any provision of Part A.[135] As for

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[130] *Adarand VII*, 228 F.3d at 1182 ("[T]he government failed to carry its evidentiary burden in the district court insofar as the use of the 1996 SCC was based on an ill-defined 12-15% goal apparently adopted by the Federal Highway Administration" under the law prior to the new regulations promulgated in 1999.) *Id.*

[131] *Id.* at 1182 (emphasis supplied).

[132] 49 C.F.R. § 26.51(f)(1) and (2).

[133] *Id.* § 26.53(a).

[134] *Id.* § 26.47(a) and (b).

[135] *Id.* § 26.15(a).

Parts B or C, a recipient may "apply for a waiver of any provisions…including but not limited to, any provisions regarding administrative requirements."[136]

d. Decisions Upholding U.S. DOT's 1999 DBE Regulations

As discussed below, decisions upholding TEA-21 and the U.S. DOT's 1999 regulations include *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation,*[137] *Northern Contracting, Inc. v. State of Illinois*,[138] and *Western States Paving Co. v. Washington State Department of Transportation*.[139] (In *Western States Paving Co*., the court did hold that the federal DBE program was not facially unconstitutional but that the State of Washington's implementation of its program was unconstitutional "as applied.") The foregoing cases are discussed also in subsections C.1 to C.4, *infra*, and elsewhere in the report.

In *Sherbrooke*, the court rejected the claimant's argument that in enacting TEA-21, "Congress had no 'hard evidence' of widespread intentional race discrimination in the contracting industry…."[140] Moreover, Sherbrooke Turf, Inc., and Gross Seed Company "failed to present affirmative evidence that no remedial action was necessary [on the theory that] minority owned small businesses enjoy nondiscriminatory access to and participate in highway contracts."[141] The court held that there was a strong basis in the evidence to support Congress's conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand VII*.[142] As discussed later in the report, the court rejected an argument that the state transportation agencies, in this instance Minnesota and Nebraska, had to "independently satisfy the compelling interest aspect of strict scrutiny review."[143]

In *Northern Contracting*,[144] Northern Contracting, which was owned 100 percent by a white male, regularly bid on subcontracts for Federal-aid highway prime contracts awarded to the Illinois Department of Transportation (IDOT). Northern Contracting, specializing in fencing, guardrail, and handrail construction, alleged that "several contracts for which it submitted the lowest bid were awarded to subcontractors owned by racial minorities and/or women."[145] The plaintiff challenged "the constitutionality of provisions of federal and state laws designed to guarantee the award of a portion of highway subcontracts to disadvantaged business enterprises…."[146] The court granted the federal defendants' motion for summary judgment but denied the state defendants' and plaintiffs' motions for summary judgment.

The court held that federal officials had identified a compelling governmental interest for enacting TEA-21, that the statute and regulations were narrowly tailored, and that the state officials did not need to establish a distinct compelling interest for implementing the federal program. Issues of fact remained, however, *inter alia*, regarding whether the state employed race- and gender-conscious goals in awarding prime contracts and regarding the state's zero-goal experimental program, the relative number and dollar amounts of subcontracts awarded to DBEs, and the number, type, investigation, and resolution of oral and written complaints of discrimination. On September 8, 2005, the court upheld the State of Illinois's implementation of its program.[147]

In *Western States Paving Co. v. Washington State Department of Transportation*,[148] Western States, a company owned by a white male, was an asphalt and paving contractor based in Vancouver, Washington. To comply with TEA-21, the State of Washington had "mandated that the city obtain 14% minority participation on the project" on which the plaintiff submitted a bid. Prime Contractors rejected Western States' bids, in one case choosing a bid that was $100,000 less than that of the minority-owned firm that was selected.[149] The Ninth Circuit addressed whether TEA-21 was facially unconstitutional and whether it was unconstitutional as applied in the State of Washington.

Western States argued that TEA-21's "minority preference program" was a violation of equal protection under the Fifth and Fourteenth Amend-

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[136] *Id.* § 26.15(b).

[137] 345 F.3d 964 (8th Cir. 2003). *See also* the companion case to Sherbrooke Turf, Inc., Gross Seed v. Nebraska, 345 F.3d 964 (8th Cir. 2003) (complaint dismissed challenging TEA-21 and U.S. DOT regulations).

[138] 2004 U.S. Dist. LEXIS 3226, at *2.

[139] 407 F.3d 983, 2005 U.S. App. LEXIS 8061 (9th Cir. 2005).

[140] *Sherbrooke Turf,* 345 F.3d at 969–70.

[141] *Id.* at 970.

[142] *Adarand VII*, 228 F.3d at 1167–76.

[143] *Sherbrooke Turf*, 345 F.3d at 970.

[144] 2004 U.S. Dist. LEXIS 3226, at *2.

[145] *Id.* at *3.

[146] *Id*. at *2. Specifically, Northern sought a "declaration that the federal statutory provisions, federal implementing regulations, and state statute authorizing the Illinois DBE program, as well as the Illinois program itself, are unlawful and unconstitutional." *Id.* at **2–3.

[147] Northern Contracting v. State of Illinois, No. 00C4515, 2005 U.S. Dist. LEXIS 19868 (N.D. Ill. Sept. 8, 2005).

[148] 407 F.3d 983 (9th Cir. 2005).

[149] *Western States*, 407 F.3d at 987.

ments to the U.S. Constitution."[150] The district court held that TEA-21's minority preference program was both constitutional on its face and as applied. The district court concluded that the State of Washington did not have "to demonstrate that its minority preference program independently satisfied strict scrutiny."[151] As to the "as applied" constitutional ruling, the Ninth Circuit reversed. In short, without any evidence of discrimination, the court remanded the case "to the district court with instructions to enter summary judgment in favor of Western States on its as-applied challenge."[152]

Besides the *Adarand* case (*see* discussion, *supra*, of *Adarand VII*), the effect of changes in the law is illustrated also by the district court's decision (on remand) in *Rothe Development Corp. v. United States Department of Defense*[153] or *"Rothe IV."* (Although the case does not involve the U.S. DOT's DBE program, the case addresses a number of relevant issues discussed in this subsection and elsewhere in the report.) Although in June 2005 in *Rothe V*, the Federal Circuit affirmed in part and reversed in part certain rulings by the district court,[154] the district court's analysis, nevertheless, is instructive.

Rothe was a Texas corporation, owned by a white female. The contract in question was for computer operations and maintenance services for the Base Telecommunications System and Network Control Center at Columbus Air Force Base, Mississippi. Because the government increased Rothe's bid by 10 percent, International Computers & Telecommunications (ICT) was the company awarded the contract.[155] At issue in *Rothe* was the constitutionality of Section 1207 of the National Defense Authorization Act of 1987. In the Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals.[156] To achieve that goal, Congress authorized the Department of Defense to adjust bids submitted by non-socially and -economically disadvantaged firms upwards by 10 percent (the "price evaluation adjustment program" or "PEA" program).[157] ICT met the requirements for being a socially and economically disadvantaged business and also qualified for a bid after the Department adjusted Rothe's lowest bid.[158] At issue was whether the 5-percent goal and the 10-percent preferential increase violated the Equal Protection Clause because both features relied in part "on race-conscious classifications."[159]

In *Rothe I*, in April 1999, the district court granted summary judgment for the government.[160] After the Fifth Circuit in *Rothe II* transferred the case to the Federal Circuit,[161] the Federal Circuit reversed the district court.[162] The Federal Circuit held that "'the district court failed to analyze the constitutionality of the 1207 program under the strict scrutiny analysis required by the Supreme Court in *Croson* and *Adarand*…and [that the district court] relied on post-reauthorization evidence to determine the constitutionality of the 1207 program as re-authorized.'"[163]

In its 2005 decision, because Rothe sought prospective and declaratory relief, the district court in *Rothe IV* "address[ed] both the 1992 reauthorization as well as the 2003 reauthorization."[164] As for the program that was reauthorized in 1992 and applied in 1998, it was held to be unconstitutional "because of the lack of statistical evidence of discrimination against Asian Americans in this particular industry."[165] In *Rothe*, similar to *Adarand IV*, because the government provided ample evidence demonstrating that in this case the Defense Department was acting as a passive participant in present-day discrimination, the court found that Congress had a strong basis to believe that a race-based remedy was necessary in 2003. In *Rothe IV*, the district court held that the 5 percent and 10 percent features of the program as reauthorized in 1992 and applied in 1998 were *unconstitutional*. However, the court held that both features as *reauthorized* in 2003 were *constitutional*.

The court held that "this type of statistical evidence is more than ample to support Congress's finding that a discreet remedy encouraging 5% of Defense dollars [for] SDBs [small disadvantaged businesses] [is] constitutional."[166] Moreover, "this

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[150] *Id.* at 987.

[151] *Id.* at 988.

[152] *Id.* at 1003.

[153] 324 F. Supp. 2d 840 (W.D. Tex. 2004).

[154] Rothe Dev. Corp. v. United States Dep't of Defense (*Rothe V*), 413 F.3d 1327 (Fed. Cir. 2005).

[155] *Rothe IV*, 324 F. Supp. 2d at 842–43.

[156] 10 U.S.C. § 2323.

[157] *Rothe IV*, 324 F. Supp. 2d at 841, *citing* 10 U.S.C. § 2323(e)(3).

[158] *Id.* at 842.

[159] *Id.*

[160] Rothe Dev. Corp. v. United States Dep't of Defense (*Rothe I*), 49 F. Supp. 2d 937 (W. D. Tex. 1999).

[161] Rothe Dev. Corp. v. United States Dep't of Defense (*Rothe II*), 194 F.3d 622 (5th Cir. 1999).

[162] Rothe Dev. Corp. v. United States Dep't of Defense (*Rothe III*), 262 F.3d 1306 (Fed. Cir. 2001) (vacating and remanding *Rothe I*).

[163] *Rothe IV*, 324 F. Supp. 2d at 844 (citation omitted).

[164] *Id.* at 845.

[165] *Id.* at 853–54.

[166] *Id.* at 857.

type of generalized statistical evidence documenting the wide disparity in public contracting dollars and SDBs shows pervasive discrimination affecting all minority groups."[167] Furthermore, "[t]his five percent goal cannot be considered a quota because there are no penalties involved if the Department of Defense does not meet the goal."[168]

In *Rothe V* the Federal Circuit affirmed in part and reversed in part and remanded the district court's decision in *Rothe IV*.[169] In this appeal only the issues of the present reauthorization and of the alleged facial constitutionality of Section 1207 were before the court. The court ruled that the government had failed to show that the PEA program would remain suspended in the future.[170] Moreover, the suspension of the PEA program neither mooted Rothe's claim nor deprived Rothe of standing to bring the action initially.[171] Also, Rothe's claim was ripe because "the issue whether section 1207, as reauthorized in 2002, is facially unconstitutional is a purely legal issue that is neither abstract nor hypothetical."[172]

In *Rothe V* the Federal Circuit reversed and remanded the case, however, because on the prior remand the district court had been instructed "to include an analysis of section 1207 'at present'…."[173] However, in a series of discovery rulings, the district court "narrowed the issues on remand to exclude the evaluation of the present reauthorization of section 1207."[174] The Federal Circuit remanded, rather than direct a summary judgment in Rothe's favor, because in the district court "the government was not on notice that it was required to come forward with all of its evidence" on the issues of the reauthorization and facial constitutionality of Section 1207.[175]

Finally, it may be noted that as of this writing the case of *Enterprise Flasher, Co. v. Mineta,*[176] now pending in the Delaware district court, challenges Delaware's administration of the DBE program.

Although it has been held that the DBE provisions of TEA-21 and the 1999 U.S. DOT regulations are constitutional,[177] there are still issues that may generate challenges to a DBE program. For example, "a future plaintiff could offer additional evidence sufficient to raise a genuine issue of material fact as to whether the government has met its evidentiary burden."[178] Moreover, in "*Adarand VII*, the court did not evaluate the state's DBE program."[179]

2. State and Local Affirmative Action Programs

In *Concrete Works of Colorado, Inc. v. City and County of Denver*,[180] the Tenth Circuit held that the defendant could use its spending powers to remedy private discrimination if it identified that discrimination with particularity as required by the Fourteenth Amendment.[181] In *Concrete Works*, Concrete Works of Colorado, Inc., challenged the constitutionality of an affirmative action ordinance enacted by the City and County of Denver. Although Denver had enacted the first version of the law in 1990 and had enacted versions twice since then, the essential elements remained unchanged. In a case with a long history, the appellate court reversed the district court's order enjoining Denver from enforcing the law.

In reviewing Denver's evidence, including disparity studies, the appellate court rejected various attacks on the studies. The appellate court held that "evidence of market place data can be used to

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[167] *Id.* (citation omitted).

[168] *Id.* at 858 (citation omitted).

[169] *Rothe V,* 413 F.3d 1327 (Fed. Cir. 2005).

[170] *Id.* at 1333.

[171] *Id.* at 1335. "At the time Rothe filed suit, the price-evaluation adjustment was in full force. The mere passage of the mechanism by which the suspension could be implemented does not demonstrate that Rothe's claimed injury was so 'conjectural or hypothetical' that it lacked standing." *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* at 1335–36.

[175] *Id.* at 1336.

[176] Civil Action No. 03-CV-198-GMS.

[177] *Northern Contracting*, 2004 U.S. Dist. LEXIS 3226 at *87 (citation omitted).

[178] *Id.* at *87.

[179] *Id.* at **87–88 (citation omitted).

[180] 321 F.3d 950 (10th Cir. 2003). The 10th Circuit decision was criticized in Hershell Gill Consulting Eng'rs v. Miami-Dade County, Fla., 333 F. Supp. 2d 1305, 1325 (S.D. Fla. 2004):

> I have considered the Tenth Circuit's decision in Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F.3d 950 (10th Cir. 2003), which the County says supports the constitutionality of the MWBE programs in the A&E sector. I do not, however, find *Concrete Works* persuasive. First, in the Tenth Circuit one who challenges an affirmative action program retains the ultimate burden of proving the program's unconstitutionality, and this allocation of the burden of proof conflicts with Eleventh Circuit precedent. *Compare Concrete Works*, 321 F.3d at 959, with *Johnson,* 263 F.3d at 1244. Second, I believe the Tenth Circuit's decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari. *See* Concrete Works of Colorado, Inc. v. City and County of Colorado, 540 U.S. 1027, 157 L. Ed. 2d 449, 124 S. Ct. 556, 557–60 (2003) (Scalia, J., dissenting from the denial of certiorari).

[181] *Concrete Works,* 321 F.3d at 958.

support a compelling interest.…"[182] It was proper for Denver to "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 powers to the private discrimination."[183] For instance, "evidence of discriminatory barriers to the formation of businesses by minorities and women" in the industry "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.'"[184]

However, the appellate court ruled that the district court did properly consider Denver's "business formation studies[] and the studies measuring marketplace discrimination."[185] The appellate court rejected attacks on the evidence that the "disparities shown in the studies may be attributable to firm size and experience rather than discrimination";[186] that the studies did not control for "firm specialization";[187] or that the studies were unreliable because they were "not a measure of only those firms *actually* bidding on City construction projects,"[188] as well as rejected other attacks on the sufficiency of the studies. After acknowledging that the record contained "extensive evidence" of Denver's compelling interest in the remediation of discrimination against both MBEs and WBEs,[189] the court, finding the plan to be narrowly tailored, upheld the constitutionality of the Denver plan and reversed and remanded the case with instructions to enter judgment for Denver.[190]

However, the courts have ruled that other affirmative action programs are unconstitutional. For example, in *Builders Association of Greater Chicago v. County of Cook*[191] the court, finding that there was no evidence that the prime contractors on the county's projects were discriminating against minorities and that such pre-enactment evidence of discrimination was unknown to the county, the county was not entitled to take remedial action. The county failed to establish the premise for a racial remedy, which in any event went further than was necessary to eliminate the evil against which it was directed. Upholding these findings of fact, the Seventh Circuit affirmed the district court's judgment, ruling that the county's program was unconstitutional.[192]

In *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*[193] six trade associations whose members regularly performed work for the county challenged "three substantially identical affirmative action programs administered by Dade County" that were enacted between 1982 and 1994 for Black Business Enterprises, Hispanic Business Enterprises, and WBEs[194] with participation goals of 15 percent, 19 percent, and 11 percent, respectively, for each group.[195] Any contract over $25,000 funded in part by the county required that every reasonable effort be made to achieve the goal, including set-asides, subcontractor goals, project goals, bid preferences, and selection factors.[196] The goals of each contract were reviewed by the county and could be appealed to the county manager; each year the county commission had to decide whether to renew the affirmative action program.[197]

In applying strict scrutiny, the district court found that the affirmative action plan did not meet the "strong basis in evidence" requirement in reference to the Black and Hispanic businesses, nor could the court find that the affirmative action program was narrowly tailored to serve the government's compelling interest.[198] Likewise, the court found that in reference to the women's businesses there was a lack of probative evidence to support the county's rationale for implementing a gender preference and that the gender-based affirmative action plan was not substantially related to an important government interest.[199]

The appellate court affirmed the district court's ruling that the programs violated the Equal Protection Clause.[200] The appellate court, moreover, held that, even if it were assumed that the county had demonstrated a strong basis in evidence supporting a compelling reason for an affirmative action program, the county's affirmative action programs for Blacks and Hispanics were not narrowly tailored because the county had implemented race- or ethnicity-conscious measures without even considering

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[182] *Id.* at 976.

[183] *Id.* (internal quotation marks omitted; citation omitted).

[184] *Id.* at 977, *quoting Adarand VII*, 228 F.3d at 1167–68.

[185] *Id.* at 979.

[186] *Id.* at 980.

[187] *Id.* at 982.

[188] *Id.* at 983.

[189] *Id.* at 990.

[190] *Id.* at 983.

[191] 256 F.3d 642 (7th Cir. 2001).

[192] *Id.* at 647–48.

[193] Eng'g Contractors Ass'n of South Fla. v. Metro. Dade County, 122 F.3d 895, 900–01 (11th Cir. 1997).

[194] *Eng'g Contractors*, 122 F.3d at 900.

[195] *Id.* at 900–01.

[196] *Id.* at 901.

[197] *Id.*

[198] *Id.* at 902.

[199] *Id.*

[200] *Id.* at 929.

or trying alternatives or neutral measures.[201] On the other hand, the county's gender-conscious program was sufficiently flexible, but the county failed "to present sufficient probative evidence of discrimination against women in the relevant parts of the local construction industry."[202] Failing to find clear error by the district court, the appellate court affirmed the judgment.[203]

In *Association for Fairness in Business, Inc. v. State of New Jersey*,[204] a preliminary injunction was granted and denied in part in an action challenging the minority set-aside provisions of the New Jersey Casino Control Act that provided that each casino licensee shall have a goal of expending 15 percent of the dollar value of its contracts for goods and services with MBEs and WBEs. The court ruled, *inter alia,* that

> [i]n this case, the State of New Jersey and the New Jersey Casino Control Commission have not made a showing of discrimination that would support a finding that New Jersey has a compelling interest in applying a set-aside program to contracts for goods and services in the casino industry. First, there is little evidence that the creation of the set-aside program in this case was predicated on findings of race-based or gender-based discrimination in the casino industry. There is no evidence, for example, that the New Jersey Legislature adopted the set-aside program on the basis of any such findings.[205]

Enjoining the statute's provisions that concerned implementation of the program, the court granted the Plaintiff's motion for preliminary injunction.[206]

3. Issues Arising in Connection With Challenges to DBE Requirements

a. Preliminary or Procedural Issues

Recent cases have addressed preliminary or procedural issues having to do with whether the claimant challenging a DBE program has standing and whether events have occurred in the interim that have rendered all or part of the case moot.

Standing.—As for whether the plaintiff has standing to challenge an affirmative action program,

> [t]he Supreme Court has set forth three requirements that constitute the "irreducible constitutional minimum" of standing…. First, a plaintiff must demonstrate an "injury in fact" that is "concrete," "distinct and palpable," and "actual or imminent." Second, a plaintiff must establish causation—a "fairly traceable" connection between the alleged injury in fact and the alleged conduct of the defendant. Third, a plaintiff must show redressability, that is, a "substantial likelihood that the requested relief will remedy the alleged injury in fact."[207]

In *Northern Contracting,* the court observed that "no uniform picture emerges from the case law regarding standing doctrine in cases involving governmental race or gender-based set-aside programs."[208] Nevertheless, the court held that the plaintiff had standing where the

> [p]laintiff bid on federal-aid IDOT highway contracts in the past, will continue to bid on such projects in the future, and suffered competitive harm (however minimal) when three subcontracts in the past three years for which Plaintiff submitted the lowest bid were nevertheless awarded to DBEs pursuant to the federal and state DBE programs.[209]

In *Engineering Contractors*, one of the principal issues in the case was also the one of standing. While affirming the district court's finding that the county's evidence of past discrimination was insufficient and ruling that the challenged enactments were unconstitutional, the Eleventh Circuit, however, agreed that the association had standing, as their members regularly performed work for the county.

> By stipulation, the plaintiffs' members are competing with MWBEs for County construction contracts, and because of the MWBE programs they do not compete on an equal basis. When the government loads the dice that way, the Supreme Court says that anyone in the game has standing to raise a constitutional challenge. "The injury in cases of this kind is that a discriminatory classification prevents the plaintiff from competing on an equal footing…." "To establish standing, therefore, a party challenging a set-aside program…need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." We are satisfied that the plaintiffs have standing….[210]

Although recognizing that at least two courts had held that the plaintiff had not demonstrated causation or redressability resulting from TEA-21 and implementation of the regulations and thus lacked

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[201] *Id.* at 926–27.

[202] *Id.* at 929.

[203] *Id.*

[204] 82 F. Supp. 2d 353 (2000).

[205] *Association for Fairness in Bus.,* 82 F. Supp. 2d at 359.

[206] *Id.* at 364.

[207] *Northern Contracting*, 2004 U.S. Dist. LEXIS 3226 at **71–72, *quoting* McConnell v. Fed. Election Comm'n, United States, 540 U.S. 93, 124 S. Ct. 619, 707, 157 L. Ed. 2d 491 (2003).

[208] *Id.* at *83.

[209] *Id.* at **84–85.

[210] *Eng'g Contractors*, 122 F.3d at 906 (internal citations omitted).

standing,[211] the *Northern Contracting* court concluded that in most of the cases in this area the claimants were held to have standing.[212]

In *Rothe V* the Federal Circuit held that the government's suspension of the PEA program did not deprive Rothe of standing to bring the case initially; "'while it is true that a plaintiff must have a personal interest at stake throughout the litigation of a case, such interest is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter….'"[213]

Mootness.—Where a provision of an affirmative action program is challenged, the government may announce that the program feature is no longer in use. The question has arisen whether the government's change in policy after the initiation of a constitutional challenge has the effect of mooting the claimant's case.

In *Rothe IV*, as noted, at issue was a preferential price increase or PEA. Although the government had not used the provision since 1998, the district court ruled that that "the possibility that the program could be reimplemented in the future confirms that the issue presented remains a live controversy."[214] The court stated that "a case does not become moot simply because the challenged conduct has temporarily ceased."[215] In *Rothe V*, the Federal Circuit affirmed the district court's ruling that the suspension of the price-evaluation adjustment component of Section 1207 did not moot Rothe's claim, in part "[b]ecause the continued viability of the suspension depends on the continued fulfillment of the five percent goal[;] this fact tends to undermine the government's proof that the price-evaluation adjustment will remain suspended."[216]

On the other hand, the Federal Circuit affirmed the district court's ruling that part of Rothe's case was moot because the Defense Department (after Rothe's unsuccessful bid for an award of the 1998 contract at issue) had "resolicited bids and awarded [a] new contract without the PEA program to an entirely different entity."[217] The Federal Circuit stated that a claim may be moot where the contract at issue was directed to the provision of services "over a specific time period that has now passed."[218]

b. Evidence Required to Satisfy the Compelling Interest Requirement

Burden of Proof of Discrimination.—As held in *Adarand III,* when a governmental program relies on racial classifications, the program must satisfy the test of strict scrutiny. The program in fact must satisfy a two-prong test: it "must serve a compelling governmental interest, and [it] must be narrowly tailored to further that interest.'"[219] Both prongs and the sub-issues arising under each are discussed in this and the next section of the report.

First, when racial classifications are present in public contracting, the court "must determine whether the government's articulated goal in enacting the race-based measures…is appropriately considered a 'compelling interest'…."[220] Second, the court must elucidate the standards required for evaluating the government's evidence of a compelling interest.[221] Third, the court must decide whether the government's interest is sufficiently strong to meet the government's initial burden of demonstrating that there is a compelling interest.[222] Finally, the court must decide whether the party challenging the program has met its "ultimate burden of rebutting the government's evidence…."[223]

When enacting a DBE program Congress may consider evidence of discrimination in society at large with respect to public contracting, because the reach of Congress is "nationwide."[224] The validity of the evidence considered by Congress is entitled to some deference, but the congressional decision to implement a program is subject to judicial scrutiny.[225] As seen, since the passage of TEA-21 and the promulgation of the U.S. DOT DBE regulations in 1999, several courts have considered the issue of the sufficiency of the evidence considered by Congress. The courts have "conclude[d] that the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its dis-

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[211] Klaver Constr. Co. v. Kan. Dep't of Transp., 211 F. Supp. 2d 1296 (D. Kan. 2002); Interstate Traffic Control v. Beverage, 101 F. Supp. 2d 445 (S.D. W. Va. 2000).

[212] *See* Northeastern Fla. Chapter of Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993); *Adarand III,* 515 U.S. 200, *Sherbrooke Turf,* 345 F.3d 964; Contractors Ass'n of Eastern Pa. v. City of Philadelphia, 6 F.3d 990 (3d Cir. 1993); and Monterey Mech. Co. v. Wilson, 125 F.3d 702 (9th Cir. 1997).

[213] *Rothe V*, 413 F.3d at 1334 (citation omitted).

[214] *Rothe IV,* 324 F. Supp. 2d. at 848.

[215] *Id.* (citations omitted).

[216] *Rothe V*, 413 F.3d at 1333 (Fed. Cir. 2005).

[217] *Rothe IV*, 324 F. Supp. 2d at 845.

[218] *Rothe V,* 413 F.3d at 1332.

[219] *Adarand VII*, 228 F.3d at 1164 (citation omitted).

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.* at 1165.

[225] *Rothe IV*, 324 F. Supp. 2d at 853, *see also* the cite to *Rothe III*, 262 F.3d at 1322 n.[14].

bursements."[226] Congress, thus, unlike the states, may "redress the effects of society-wide discrimination…."[227]

Nevertheless, generalized congressional statements regarding racial discrimination are not enough "to demonstrate a strong basis in the evidence" but "must be considered when determining Congress's intent."[228] When Congress reauthorized the DBE program in 2003[229] there were "more than fifty documents and thirty congressional hearings on minority-owned businesses prepared in response to the Supreme Court's *Adarand* decision" that were entitled to some deference and constituted valid evidence.[230] Moreover, Congress may rely on earlier, pre-enactment evidence, such as "[n]umbers and statistics from 1990, 1996, and 1998 [which were] still relevant to Congress' decision-making in 2003."[231] Congress also may "extrapolate findings of private discrimination to support a finding of unconstitutional discrimination in the public sector;" the reason is that such evidence "support[s] a congressional finding that the government acts as a passive participant in discrimination."[232]

Even so, the question is "how much evidence is necessary in order for Congress to use this power [to] create a nationwide program."[233] It is not necessary that Congress make specific findings in regard to discrimination against specific minority groups. Congress need not, for example, review the evidence or lack thereof of discrimination specifically against "Korean-Americans, because the DBE in question was owned by a member of that particular ethnic group," nor must Congress have evidence specifically of discrimination in the "computer maintenance and repair services in the defense industry," as was argued unsuccessfully in the *Rothe* case.[234] That is, "Congress need only look to broad categories to provide information on the prevalence of discrimination."[235] For instance, in *Rothe IV* the court stated that Rothe's argument that "a particular sub-class should not be presumed socially and economically disadvantaged narrows the inquiry too much for Congress."[236]

Requirement of a "Strong Basis in Evidence."— The question of whether the government demonstrated a strong basis in evidence is a question of law that is reviewed *de novo* on appeal; the "[u]nderlying factual findings [are] reviewed for clear error."[237] For the government to fulfill the requirement that there must be a compelling interest for a program, there must be "identified discrimination;" there must be specific "evidence of past or present discrimination."[238] There must be "a strong basis in evidence to conclude that remedial action was necessary…."[239] As the court explained in *Concrete Works,* the government "must identify the past or present discrimination 'with some specificity.' Second, it must also demonstrate that a 'strong basis in evidence' supports its conclusion that remedial action is necessary."[240]

With respect to TEA-21 and the 1999 regulations, the courts in *Adarand VII*, *Sherbrooke Turf*, *Northern Contracting,* and *Western States Paving* concluded "that Congress 'had 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.'"[241] Thus, "Congress had a 'strong basis in evidence' to conclude that the DBE program was necessary to redress private discrimination in federally-assisted highway subcontracting."[242] Strong evidence is that "'approaching a *prima facie* case of a constitutional or statutory violation,' *not* irrefutable or definitive proof of discrimination."[243] The government's burden can be met "without conclusively proving the existence of past or present racial discrimination."[244] In *Western States*, the Ninth Circuit held that with respect to public contracting, the federal government had demonstrated "a compelling basis for classifying individuals according to race...."[245] Moreover, the State of Washington did not have to "demonstrate an independent compelling interest for its DBE program."[246] With respect to Denver's affirmative action program, although Denver submitted evi-

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[226] *Adarand VII*, 228 F.3d at 1165, *citing Croson,* 488 U.S. at 492 (O'Connor, J.).

[227] *Id., quoting Croson,* 488 U.S. at 490.

[228] *Rothe IV*, 324 F. Supp. 2d at 851.

[229] The program was reauthorized in 1998 with TEA-21; the 1999 regulations were amended in 2003.

[230] *Rothe IV*, 324 F. Supp. 2d at 856.

[231] *Id.*

[232] *Id.* at 850.

[233] *Id.* at 846.

[234] *Id.* at 847, *citing Fullilove*, 448 U.S. at 515–16 n.14.

[235] *Id.* at 847.

[236] *Id.* at 860.

[237] *Concrete Works*, 321 F.3d at 958 (citation omitted).

[238] *Northern Contracting,* 2004 U.S. Dist. LEXIS 3226, at *89, *quoting* Shaw v. Hunt, 517 U.S. 899, 909–10, 116 S. Ct. 1894, 1902–03, 135 L. Ed. 2d 207, 221–22 (1996).

[239] *Id.* at *90, *quoting* Shaw v. Hunt, 517 U.S. at 909–10.

[240] *Concrete Works*, 321 F.3d at 958, *citing Shaw,* 517 U.S. at 909.

[241] *Northern Contracting,* 2004 U.S. Dist. LEXIS 3226, at *100, *quoting Sherbrooke Turf*, 345 F.3d at 969–70.

[242] *Id.* at *121.

[243] *Concrete Works*, 321 F.3d at 971, *quoting Croson*, 488 U.S. at 500.

[244] *Id.* at 958, *citing Concrete Works II*, 36 F.3d at 1522.

[245] *Western States*, 407 F.3d at 993.

[246] *Id.* at 997.

dence of discrimination against each group included in the ordinances, Denver did not have "to show that each group suffered equally from discrimination."[247] Instead, "Denver's only burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination."[248]

Not all government defendants are able to meet the compelling interest requirement. For example, in *Builders Association of Greater Chicago v. County of Cook*[249] the Seventh Circuit held that there was no evidence that the prime contractors on the county's projects were discriminating against minorities. The county failed to establish the premise for a racial remedy and the remedy went further than was necessary to eliminate the evil against which it was directed.

Similarly, in *Association for Fairness in Business, Inc. v. State of New Jersey*[250] a federal district court in New Jersey granted a preliminary injunction in an action challenging the minority set-aside provisions of the New Jersey Casino Control Act. The Act provided that each casino licensee would have a goal of expending 15 percent of the dollar value of its contracts for goods and services with MBEs and WBEs. The State of New Jersey and the New Jersey Casino Control Commission were unable to make "a showing of discrimination that would support a finding that New Jersey has a compelling interest in applying a set-aside program to contracts for goods and services in the casino industry." [251]

Evidence Required for a Race-Conscious Versus a Gender-Conscious DBE Program.—Under the 1999 DBE regulations applicable to recipients of federal aid for highway, transit, and airport projects, the regulations are applicable both to minorities and women. However, the *evidence* needed to support a compelling interest for the establishment of a race- or ethnicity-based program in contrast to a gender-based program is different. For a race- or ethnicity-based program, "'there must be a strong basis in evidence' to support the conclusion that remedial action is necessary."[252] However, the evidence required is something less for a gender-conscious program. It appears that the most that can be said now of the evidence required is that it must be "probative evidence" that is also "sufficient."[253] Although such language may be imprecise and "beg the question," apparently the standard to be applied will have to "draw meaning from an evolving body of case law."[254]

Requirement of Statistical Evidence of Discrimination.—As seen, Congress had to have "a strong basis in evidence" before enacting a "race-based remedial program."[255] Since the Supreme Court's decisions in *Adarand III* and in *Shaw v. Hunt*,[256] Congress has had "a burden to statistically document the need for a race-based program."[257]

Decisional law, as well as the U.S. DOT's 1999 DBE regulations, specifically authorizes the use of disparity studies. In *Adarand VII,* the court considered local disparity studies undertaken by state and local governments "to assess the disparity, if any, between availability and utilization of minority-owned businesses in government contracting."[258] Although such studies were not conclusive that "the number of minority DBEs would be significantly higher but for such barriers," the court reasoned that "[t]he disparity between minority DBE availability and market utilization in the subcontracting industry raises an inference that the various discriminatory factors the government cites have created that disparity."[259]

Although disparity and availability studies are beyond the scope of the report, one source states that "[d]isparity is the difference between capacity and utilization. In an ideal environment, capacity and utilization would be identical and the disparity measure would be zero. For the purposes of disparity study, a disparity measure of less than zero (a negative number) suggests underutilization of MBE or WBE firms, and a disparity measure of greater than zero suggests over utilization."[260] As for an availability study, it is "an analysis of the market of qualified MBE/WBE businesses that are available in a given geographical location to do the work involved. The analysis should be based on

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[247] *Concrete Works*, 321 F.3d at 971.

[248] *Id.*

[249] 256 F.3d 642 (7th Cir. 2001).

[250] 82 F. Supp. 2d 353 (D. N.J. 2000).

[251] *Id.* at 359.

[252] *Eng'g Contractors*, 122 F.3d at 906, *quoting Ensley Branch*, *NAACP*, 31 F.3d 1548, 1566 (11th Cir. 1994).

[253] *Id.* at 909.

[254] *Id.* at 910.

[255] *Rothe IV*, 324 F. Supp. 2d at 842. Where a program is reauthorized, "the Court can examine evidence available to Congress prior to the 2003 reauthorization because an enactment and a reauthorization are equivalent." *Id.* at 849 (citation omitted).

[256] 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996).

[257] *Rothe IV*, 324 F. Supp. 2d at 850.

[258] *Adarand VII*, 228 F.3d at 1172.

[259] *Id.* at 1173–74.

[260] MINORITY AND WOMEN BUSINESS ENTERPRISES DIVISION OF INDIANA DEPARTMENT OF ADMINISTRATION, STATISTICAL ANALYSIS OF UTILIZATION STUDY FOR STATE OF INDIANA CONTRACTS BETWEEN JANUARY 1, 2004, AND APRIL 15, 2005 (2005), available at http:www.in.gov/idoa/minority/pdf/study.pdf.

those qualified MBE/WBE firms that are available to do the work in the given arena or field that you need for your project."[261]

Several cases since 1995 have dealt with whether an affirmative action program was supported by a strong basis in the evidence of past or current discrimination. In *Concrete Works, supra,* the court found that "59 statistical studies from across the nation succinctly demonstrate[d] that Congress was reacting with a strong basis in the evidence."[262] The evidence "conclusively demonstrate[d] that Asian-Americans, as well as other minorities, were not competing at a national level because of discrimination."[263] In another case involving promotions, a statistical model demonstrated that "past promotions of African-Americans and Hispanics to detective were…substantially below" what they should have been in the absence of discrimination.[264]

In *Concrete Works* the court reviewed statistical evidence from as early as 1989. In 1997 the City had retained a company "to conduct a study to estimate the availability of MBEs and WBEs and to examine, *inter alia*, whether race and gender discrimination limited the participation of MBEs and WBEs in construction projects of the type typically undertaken by the City…."[265] The court noted that the resulting "study used a more sophisticated method to calculate availability than the earlier studies...."[266] Thereafter, Denver "reduced the annual goals to 10% for both MBEs and WBEs and eliminated a provision which previously allowed M/WBEs to count their own work toward their project goals."[267]

The appellate court held that:

> Denver may rely on "empirical evidence that demonstrates 'a significant statistical disparity between the number of qualified minority contractors…and the number of such contractors actually engaged by the locality or the locality's prime contractors….'" Denver may supplement the statistical evidence with anecdotal evidence of public and private discrimination…. Denver, however, clearly may take measures to remedy its own discrimination or even to prevent itself from acting as a "passive participant in a system of racial exclusion practiced by elements of the local construction industry…." Thus, Denver may establish its compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination….[268]

The appellate court held that "[t]he record contains extensive evidence" that Denver's ordinances "were necessary to remediate discrimination against both MBEs and WEBs."[269] Thus, the City had a *compelling* interest in remedying race discrimination in the construction industry, and it had an *important* government interest in remedying gender discrimination in the construction industry.[270]

In the district court's 2005 opinion in *Northern Contracting*, in which the court upheld IDOT's DBE program, the court reviewed IDOT's evidence in detail. The court noted that

> [i]n setting its overall goal for the FY 2005 Plan, IDOT followed the two-step process set forth in 49 C.F.R. pt. 26: (1) calculation of a base figure for the relative availability of DBEs and (2) consideration of a possible adjustment to the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination.[271]

As discussed in the court's opinion, under the 1999 regulations a recipient "may calculate its base estimate of DBE availability using one of five methods." Previously, IDOT had used a bidders' list to make its calculations, but for the 2005 plan

> IDOT commissioned [National Economic Research Associates, Inc., a Chicago-based consulting firm, ("NERA")] to conduct a custom census to determine whether a more accurate means of determining the relative availability of DBEs might be available….
>
> In developing its own methodology, NERA relied on 49 C.F.R. § 26.45(c)(5), which authorizes a Recipient to utilize alternative methods (beyond those specifically identified in the Regulations) to determine[] the relative availability of DBEs, so long as the alternative methodology is "based on demonstrable evidence of local market conditions and… designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in [the Recipient's] market.[272]

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[261] MICHAEL B. COOK, ET AL., U.S. ENVIRONMENTAL PROTECTION AGENCY, APPLICATION OF MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE REQUIREMENTS IN THE CLEAN WATER AND DRINKING WATER STATE REVOLVING FUND PROGRAMS (1998), available at http://www.epa.gov/owm/cwfinance/cwsrf/enhance/DocFiles/srf99-03.pdf.

[262] *Rothe IV*, 324 F. Supp. 2d at 859.

[263] *Id.*

[264] *Majeske,* 218 F.3d 816, 820 (7th Cir. 2000).

[265] *Concrete Works*, 321 F.3d at 966.

[266] *Id.*

[267] *Id.* at 969 (citation omitted).

[268] *Id.* at 958 (internal citations omitted).

[269] *Id.* at 990.

[270] *Id.* at 994 (emphasis supplied).

[271] *Northern Contracting*, 2005 U.S. Dist. LEXIS 19868, at *20.

[272] *Id.* at **21–22. IDOT also considered other evidence, including a separate DBE study that NERA had done for the Northeast Illinois Regional Commuter Railroad Corporation, the "Metra Study." *See id*. at *29.

In approving the approach taken by IDOT and its consultant, the court reviewed NERA's six-step analysis used "to determine the baseline level of DBE availability."[273]

Statistical studies of discrimination have been attacked on various grounds. However, in *Engineering Contractors Association of South Florida, Inc.*, *supra*, the plaintiffs' principal objection to the county's evidence was that the disparities had a neutral explanation—the size of the firms. The appellate court agreed with the district court that the anecdotal evidence and the statistical evidence together were still an insufficient evidentiary foundation.[274] Without statistical evidence "anecdotal evidence is not enough to sustain a race-based remedial program."[275] Because of the lack of evidence to support the program, the court affirmed the district court's decision, finding the program to be unconstitutional.[276] Likewise, in *Association for Fairness in Business, Inc.*,[277] there was "little evidence that the creation of the set-aside program in this case was predicated on findings of race-based or gender-based discrimination in the casino industry."[278]

c. Factors Applicable to the Narrow Tailoring Requirement

Summary of Factors Applied by the Courts.—Assuming that a compelling interest has been demonstrated for a "race-conscious" approach, the government may use race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry by allowing tax dollars 'to finance the evil of private prejudice.'"[279] However, the law must be narrowly tailored. Rigid numerical quotas are not permitted precisely because they are not narrowly tailored.

There appear to be four to six factors the courts commonly consider in deciding whether the law is narrowly tailored:

> (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship of the stated numerical goals to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the over[-]inclusiveness or under[-]inclusiveness of the racial classification.[280]

In *Dallas Fire Fighters Association* the Fifth Circuit only addressed the question of whether the race-conscious promotions were constitutional, not the affirmative action policies as a whole.[281] The court acknowledged that

> [i]n analyzing race conscious remedial measures we essentially are guided by four factors: (1) necessity for the relief and efficacy of alternative remedies; (2) flexibility and duration of the relief; (3) relationship of the numerical goals to the relevant labor market; and (4) impact of the relief on the rights of third parties.[282]

Race-Neutral Means.—Narrow tailoring means that a program "discriminates against whites as little as possible consistent with effective remediation."[283] Reliance first on race-neutral means is important in demonstrating that an affirmative action program for public contracting is narrowly tailored. Since *Adarand* the government must show that it adequately considered "race neutral alternative remedies" prior to the implementation of a plan with its race-based presumptions of disadvantage.[284] Thus, the Tenth Circuit has emphasized that the U.S. DOT's "current, revised regulations instruct recipients that 'you must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participa-

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[273] *Id.* at *65 *et seq*.

[274] *Eng'g Contractors*, 122 F.3d at 926.

[275] *Rothe IV*, 324 F. Supp. 2d at 851. In *Eng'g Contractors*, most of the county's statistical evidence was post-enactment evidence or evidence collected after the program was enacted. Such evidence is admissible; however, the risk is that the "program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market." *Eng'g Contractors*, 122 F.3d at 912.

[276] *Eng'g Contractors*, 122 F.3d at 929.

[277] 82 F. Supp. 2d 353 (2000).

[278] *Id.* at 359.

[279] *Adarand VII*, 228 F.3d at 1164, *citing Concrete Works,* 36 F.3d at 1519 (10th Cir. 1994), (*quoting Croson,* 488 U.S. at 492, 102 S. Ct. at 721, 102 L. Ed. 2d at 881) (some internal quotation marks omitted).

[280] *Rothe IV*, 324 F. Supp. 2d at 847, *citing Rothe III,* 262 F.3d at 1331 (*citing* United States v. Paradise, 480 U.S. 149, 171, 107 S. Ct. 1053, 94 L. Ed. 2d 203 (1987)); *Croson,* 488 U.S. at 506, 109 S. Ct. at 728, 102 L. Ed. 2d at 890; and *Adarand III,* 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

[281] *Dallas Fire Fighters Ass'n,* 150 F.3d 438, 440 (5th Cir. 1998).

[282] *Id.* at 441.

[283] *Northern Contracting*, 2004 U.S. Dist. LEXIS 3226 (2004), at *123, *quoting* Majeske v. City of Chicago, 218 F.3d 816, 820 (7th Cir. 2000).

[284] *Adarand VII*, 228 F.3d at 1178 (involving 15 U.S.C. § 644(g) and the SCC). The court stated that the government "fail[ed] to address whether the FLHP considered either measures short of a race conscious subsidy to prime contractors or a more refined means of assessing subcontractors' eligibility for race conscious programs prior to promulgating the regulations implementing the SCC."

tion.'"[285] As has been noted, "[t]he current regulations also outline several race-neutral means available to program recipients including helping [DBEs to] overcome bonding and financing obstacles, providing technical assistance, and establishing programs to assist start-up firms, as well as other methods."[286]

In *Northern Contracting*, *supra*, the court rejected claims that the federal DBE program was not narrowly tailored, noting, *inter alia*, that "the [r]egulations place strong emphasis on 'the use of race-neutral means to increase minority business participation'"[287] and "prohibit the use of quotas and severely limit the use of set asides."[288] As for the race-conscious aspects of the program, the court held "that the federal DBE scheme is appropriately limited to last no longer than necessary;"[289] "recipients may obtain waivers or exemptions from any requirement;"[290] and "[r]ecipients are not required to set a contract goal on every U.S. DOT–assisted contract."[291] The court noted that

> [i]f a [r]ecipient projects it will not be able to meet its overall goal using only race-neutral means, it must establish contract goals to the extent that such goals will achieve the overall goal. A [r]ecipient may use contract goals only on those U.S. DOT–assisted contracts that have subcontracting possibilities.[292]

In its 2004 opinion, the district court in *Northern Contracting* dismissed the case against the federal defendants but found that there was an issue of fact as to whether the IDOT program was narrowly tailored. In an opinion in 2005, the district court upheld the IDOT DBE program. In regard to race-neutral means, the court stated that "IDOT's fiscal year 2005 plan contains a number of race- and gender-neutral measures designed to achieve the maximum feasible portion of its overall DBE utilization goal without resort to race- or gender-conscious measures."[293] IDOT's measures, *inter alia*, included "encourag[ing] participation in IDOT-contracted work on the part of small businesses, whether or not they qualify as DBEs."[294]

Program Flexibility.—Another factor the courts consider is the program's flexibility. The 1999 DBE regulations have been held to satisfy that test. It is important that the program's goals are not rigid and that a recipient is not actually required to meet them but "merely that the [recipient] make a good faith effort to do so…."[295] Even so, in *Adarand VII*, the court found that the 1996 SCC program, as well as the present version of the regulations, met the *flexibility* test.[296]

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[285] *Id.* at 1178–79, *citing* 49 C.F.R. § 26.51(a),(f) (2000) (Noting that "if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures…, and enumerate a list of race-neutral measures….", *citing id*. § 26.51(b) (2000)).

[286] *Id.* at 1194, *citing* 49 C.F.R. § 26.51(b). *See Northern Contracting,* 2004 U.S. Dist. LEXIS 3226, at **18–19.

> Race neutral DBE participation includes a DBE's being awarded (1) a prime contract through customary competitive procurement procedures, (2) a subcontract on a prime contract that does not carry a DBE goal, and (3) a subcontract on a prime contract that does carry a DBE goal but where the prime contractor did not consider its DBE status in making the award (e.g., where a prime contractor uses a strict low bid system to award subcontracts). *Id.* Race-neutral means include providing assistance in overcoming limitations such as inability to obtain bonding or financing by simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs and other small businesses obtain bonding and financing. 49 C.F.R. § 26.51(b). Contract goals are considered race-conscious measures. 64 Fed. Reg. at 5112.

[287] *Northern Contracting*, 2004 U.S. Dist. LEXIS 3226, at *127, *quoting Sherbooke Turf*, 345 F.3d at 972 (*quoting Adarand III*, 515 U.S. at 237–38).

[288] *Id.* at *128, *citing Adarand III,* 515 U.S. at 237–38 (*citing Croson*, 488 U.S. at 496 (plurality opinion)).

[289] *Id.* at **129–30.

[290] *Id.* at *130, *citing* 49 C.F.R. § 26.15(b).

[291] *Id.*, *citing* 49 C.F.R. § 26.51(e)(2).

[292] *Northern Contracting,* 2004 U.S. Dist. LEXIS 3226, at **19–20 (citations omitted). Because of the Federal Circuit's ruling in *Rothe III,* 262 F.3d 1306 (Fed. Cir. 2001), the district court had only to consider the "(1) efficacy of race neutral alternatives; (2) the evidence detailing the relationship between the stated numerical goal of five percent and the relevant market; and (3) the over- and under-inclusiveness of the program." *See Rothe IV*, 324 F. Supp. 2d at 847.

[293] *Northern Contracting*, 2005 U.S. Dist. LEXIS 19868, at *44–45.

[294] *Id.* at *45.

[295] *Adarand VII*, 228 F.3d at 1193.

[296] *Id.* at 1180–81.

> The 1996 SCC program, providing a subsidy for the use of DBEs, is certainly more flexible than the set-asides considered in either *Fullilove* or *Croson* because the program is not mandatory. It does not require the use of DBEs in subcontracting against the will of the prime contractor…. Moreover, the 1996 SCC program incorporates an additional element of flexibility—"the availability of waiver,"—because any prime contractor is free not to take advantage of the clause and will never be required to make a "gratuitous" choice of subcontractors…. With regard to flexibility, the 1996 program passes muster under a narrow-tailoring analysis.
>
> Nothing has changed in this regard from 1996 until the present that would militate [against] the contrary conclusion. On the contrary, the present version of the regulations [has] increased the flexibility of the government's

In the 2005 *Northern Contracting* decision regarding whether the IDOT DBE program was narrowly tailored, the district court stated that "IDOT's DBE program also retains significant flexibility through the use of contract-by-contract goal setting…. IDOT sets individual contract goals only after considering the nature of the work involved, the geographic area, and the availability of DBEs in that area."[297]

Under- or Over-Inclusiveness.—The program must be assessed for "under or over-inclusiveness of the DBE classification."[298] That is, "we must be especially careful to inquire into whether there has been an effort to identify worthy participants in DBE programs or whether the programs in question paint with too broad—or too narrow—a brush."[299] However, in analyzing whether the DBE program is narrowly tailored, it is not necessary to "inquire into [the extent of] discrimination against each particular minority racial or ethnic group."[300] A program must be evaluated regarding its "'consideration of the use of race-neutral means' and whether the program [is] appropriately limited [so as] not to last longer than the discriminatory effects it is designed to eliminate."[301]

For a classification to be narrowly tailored, it does not have to include minority individuals who have themselves suffered discrimination, as well as "all non-minority individuals who have suffered disadvantage as well."[302] If that "degree of precise fit" were required the test would "render strict scrutiny 'fatal in fact,'" an unacceptable outcome given the Supreme Court's declaration that the application of the strict scrutiny test is *not* fatal in fact.[303] As the *Rothe IV* court stated, Congress directed the affirmative action program at issue in that case "specifically at individuals affected by discrimination" with regulations designed "to identify and eliminate individuals who were not disadvantaged and should no longer qualify."[304] Finally, the DBE program is not over-inclusive based on a now-discredited argument that the "[r]egulations 'require[] states to presume literally everyone in America is socially and economically disadvantaged except white males.'"[305]

Duration of the DBE Program.—The revised regulations, together with the congressional debate over whether to continue the DBE program by enacting TEA-21, demonstrate that the program's duration is limited so that it does not last any "'longer than the discriminatory effects [they are] designed to eliminate.'"[306]

Burden on Third Parties.—TEA-21 and now, presumably, SAFETEA-LU, and the 1999 regulations satisfy the next factor—the burden on third parties—in part because limitations have been incorporated so that "the subsidy is capped in such a way to circumscribe the financial incentive to hire DBEs; after a fairly low threshold the incentive for the prime contractor to hire further DBEs disappears."[307]

Numerical Proportionality.—Next, courts have considered the factor of numerical proportionality—"whether the aspirational goals of 5% in the SBA and 10% participation contained in STURAA, ISTEA, and TEA-21 are proportionate only if they correspond to an actual finding as to the number of

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DBE programs: An express waiver provision has been added to the current regulations.

Id. (internal citations omitted).

[297] *Northern Contracting*, 2005 U.S. Dist. LEXIS 19868, at *90.

[298] *Adarand VII*, 228 F.3d at 1177.

[299] *Id.*

[300] *Id.* at 1186.

[301] *Id.* at 1177, *quoting Adarand III*, 515 U.S. at 237–38. The appellate court directed its analysis to

> *Adarand III*'s specific questions on remand, and the foregoing narrow-tailoring factors…: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the SCC and DBE certification programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness.

Id. at 1177–78.

[302] *Id.* at 1186 (internal citations omitted).

[303] *Id.* (internal citations omitted).

[304] *Rothe IV*, 324 F. Supp. 2d at 858–59, *citing Fullilove,* 448 U.S. at 487. The *Rothe IV* court noted various features of the program that demonstrated that it was not overreaching and specifically targeted individuals affected by discrimination.

> For example, an SDB can only participate in the program for a period of nine years. 13 C.F.R. § 124.2. In addition, the Small Business Administration has placed net worth caps on individuals participating in the program. 13 C.F.R. § 124.104(c)(2). By placing a cap on individuals that can participate, the program targets individuals "whose ability to compete" is no longer impaired. 13 C.F.R. § 124.104. In addition, the presumption of social disability can be overcome with credible evidence. 13 C.F.R. § 124.103(c). Likewise, an interested party may protest the disadvantaged status of an apparently successful SDB. 13 C.F.R. § 124.1017. Thus, these waiver provisions further support the Court's conclusion that Congress specifically and narrowly tailored this remedy to its perceived compelling interest.

Id. at 859.

[305] *Northern Contracting,* 2004 U.S. Dist. LEXIS 3226, at *136.

[306] *Adarand VII*, 228 F.3d at 1177, *quoting Adarand III*, 515 U.S. at 237–38.

[307] *Id.* at 1183.

existing minority-owned businesses."[308] The Supreme Court in *Croson* had found that it was "'completely unrealistic'" that "'minorities will choose a particular trade in lockstep proportion to their representation in the local population.'"[309] The Tenth Circuit in *Adarand* found that the record of past discrimination supported "the government's contention that the 5% and 10% goals incorporated in the statutes at issue here, unlike the set asides in both *Fullilove* and *Croson*, are merely aspirational and not mandatory."[310] In *Northern Contracting* the court rejected the contention "that the federal DBE program lacks numerical proportionality, *i.e.*, that the goal-setting mechanism is not 'reasonably tied to' the number of DBEs that are 'qualified, willing, and able' to work."[311]

d. Evidence Required to Satisfy the Narrow Tailoring Requirement

This subsection discusses the type and quality of evidence needed to satisfy strict scrutiny as illustrated by two recent cases in which both courts accepted the federal DBE program as a compelling governmental interest. The courts recognized also that the federal program delegated to the states the actual administration of the program. Thus, the courts' scrutiny also focused on whether the two states' DBE programs were narrowly tailored to further the federal government's compelling interest. Although Congress's findings were sufficient evidence to meet the compelling interest prong of strict scrutiny, the courts required the states to support their application of a DBE program through evidence sufficient to justify the need for the federal DBE program in each state.

In 2005 in *Western States* the Ninth Circuit addressed whether TEA-21 violated the Equal Protection Clause on its face or as applied by the State of Washington.[312] This statute contained race preferences in the distribution of federally funded transportation contracts. Under TEA-21 federal funds were provided to the Washington State Department of Transportation (WSDOT). Use of these funds required compliance with a minority utilization provision as discussed below. WSDOT determined that its projects had to obtain 14 percent minority participation to comply with this provision. The WSDOT rejected a bid submitted by Western States for one project and accepted a higher bid by a minority-owned firm.[313]

The TEA-21 provision in question stated that "except to the extent that the Secretary [of U.S. DOT] determines otherwise, not less than 10 percent of the amounts made available for any program under titles I, III, and V of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals."[314] The U.S. DOT's regulations, *supra*, state that the purpose of the preference program is to create a level playing field. As seen, the regulations define a DBE and permit a rebuttable presumption of social and economic disadvantage based on race.[315] Although the level of DBE-participation is determined by the state, the statute seeks an aspirational goal of 10 percent.[316] In determining the level of DBE-utilization under the regulations, the states are required to apply a two-step process. First, the state must determine the availability of DBEs within the state and may compare it to the availability of non-DBEs. Second, this figure may be adjusted upwards or downwards when compared to non-DBE firms available in the state based on the capacity of DBEs to perform work and based on statistical or anecdotal evidence of discrimination against DBEs obtained from statistical disparity studies, discrimination in the bonding and financing industries, and the present effect of past discrimination. The process results in the state's DBE-utilization goal for the fiscal year.[317]

In *Western States* the Ninth Circuit emphasized that Congress did not have to put forth evidence that minorities suffer discrimination in every single contract.[318] The Court held that

> [i]n light of the substantial body of statistical and anecdotal material considered at the time of TEA-21's enactment, Congress had a strong basis in evidence for concluding that—in at least some parts of the country—discrimination within the transporta-

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[308] *Id.* at 1181.

[309] *Id.*, *quoting* Croson, 488 U.S. at 507 (*citing Sheet Metal Workers*, 478 U.S. 421, 494 (1986) (O'Conner, J., concurring in part and dissenting in part)).

[310] *Id.*

[311] *Northern Contracting*, 2004 U.S. Dist. LEXIS 3226, at **131–32. *See also Northern Contracting*, 2005 U.S. Dist. LEXIS 19868 (upholding IDOT DBE program as being narrowly tailored).

[312] *Western States*, 407 F.3d at 987.

[313] *Id.*

[314] TEA-21, Pub. L. No. 105-178 § 1101(b)(1), 112 Stat. at 113; *see also* 49 C.F.R. pt. 26 (1999) (setting forth the specifics of the minority preference program as promulgated by the U.S. DOT).

[315] *See Western States*, 407 F.3d at 988–89; *see also* 49 C.F.R. §§ 26.1(b), 26.5, 26.67(b), (d).

[316] *See Western States*, 407 F.3d at 989; *see also* 49 C.F.R. § 26.41(b)–(c).

[317] *See Western States*, 407 F.3d at 989; *see also* 49 C.F.R. § 26.45(b)–(f).

[318] *Western States*, 407 F.3d at 992.

> tion contracting industry hinders minorities' ability to compete for federally funded contracts.[319]

Western States argued that WSDOT offered no evidence of discrimination in Washington at all. WSDOT responded by stating that it did not need to establish independently that its application of TEA-21 passed this prong of strict scrutiny. Although the court agreed with WSDOT, the court next inquired into the constitutionality of WSDOT's application of the provision.[320]

In determining whether WSDOT's application was narrowly tailored, the court required additional evidence to justify WSDOT's application of the plan. In ascertaining the state's DBE utilization goal under the regulations, WSDOT did not adjust its DBE utilization figure either for discrimination in the bonding and financing industry or past or present effects of discrimination because of a lack of supporting statistical or anecdotal evidence of such discrimination. Accordingly, the court held that WSDOT's application of the DBE program violated equal protection because WSDOT's application of the program was not narrowly tailored to further Congress's remedial objective.[321]

In *Northern Contracting, supra,* in 2004 the district court had earlier upheld the federal DBE provisions and dismissed the federal defendants but had noted that an inquiry into the state's application of the state's DBE program was needed to determine whether it was narrowly tailored for purposes of strict scrutiny.[322] Because Northern Contracting sought prospective relief only the court analyzed the constitutionality of only the most recent IDOT DBE program (2005) to determine whether the program was narrowly tailored.[323] The court explained that

> IDOT is, however, required to demonstrate that its implementation of the federal DBE program is narrowly tailored to serve the federal program's compelling interest. Specifically, to be narrowly tailored, "a national program must be limited to those parts of the country where its race-based measures are demonstrably needed." The federal DBE program delegates this tailoring function to the state; thus, IDOT must demonstrate, as part of the narrowly tailored prong, that there is a demonstrable need for the implementation of the federal DBE program within its jurisdiction.[324]

In ascertaining the state's DBE utilization goal as required under the federal provision, IDOT considered whether DBE availability was artificially low due to or but for past discrimination. IDOT commissioned a study to address this possibility and also considered an independent study, testimony from three esteemed expert witnesses, comparison analyses from DBE and non-DBE program regions, a report on the consequences of having no goals at all, and the effect of prior IDOT DBE utilization, as well as testimony from public hearings. All of these sources supported the conclusion that past discrimination did artificially lower the availability of DBEs.[325] Accordingly, the evidence supported the use of the DBE program within IDOT's jurisdiction. The plan was flexible in its application and had race neutral requirements. After considering the evidence proffered by IDOT and its application of the program, the district court held that the program was narrowly tailored as applied.[326]

e. Whether States Are Required to Make a Separate Showing to Satisfy Strict Scrutiny

The discussion in the previous subsections has touched on the issue of whether a state is required to make a separate showing to satisfy strict scrutiny, an issue addressed by the Eighth Circuit in *Sherbrooke Turf.*[327] It has been held that a state does not have to establish the compelling-interest prong independently of Congress's finding of a compelling interest, but the state must prove that its DBE program is narrowly tailored.

In *Sherbrooke Turf*, the court held, first, that Congress had a strong basis in the evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand VII.* [328] The court rejected the argument that in enacting TEA-21 the "Congress had no 'hard evidence' of widespread intentional race discrimination in the contracting industry…."[329] Moreover, Sherbrooke Turf and Gross Seed "failed to present affirmative evidence that no remedial action was necessary because minority[-]owned small businesses enjoy non-discriminatory access to and participation in highway contracts."[330]

Second, the Minnesota Department of Transportation (MnDOT) and Nebraska Department of Roads (NDOR) did not have to satisfy independently "the compelling interest aspect of strict scru-

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[319] *Id.* at 993.

[320] *Id.* at 995–98.

[321] *Id.* at 999–1002.

[322] *See Northern Contracting,* 2005 U.S. Dist. LEXIS 19868, at **3–4.

[323] *Id.* at **18–19.

[324] *Id*. at **61 (citations omitted).

[325] *Id.* at **27–42.

[326] *Id.* at **86–92.

[327] *Sherbrooke Turf*, 345 F.3d 964 (8th Cir. 2003).

[328] *Adarand VII*, 228 F.3d at 1165.

[329] *Sherbrooke Turf*, 345 F.3d at 969.

[330] *Id.* at 970.

tiny review."[331] The court noted that under prior law (when the 10 percent federal set-aside was more mandatory and *Fullilove*, not strict scrutiny, applied) the Seventh Circuit had held that a contractor could not challenge a grantee state for "'merely complying with federal law.'"[332] Thus, the *Sherbooke* court rejected the plaintiffs' argument that the states had to prove independently that there was a compelling interest for the program because of discrimination:

> *[i]f Congress or the federal agency acted for a proper purpose and with a strong basis in the evidence, the program has the requisite compelling government interest nationwide, even if the evidence did not come from or apply to every State or locale in the Nation.* Thus, we reject appellants' contention that their facial challenges to the DBE program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting *in Minnesota and Nebraska*. On the other hand, a valid race-based program must be narrowly tailored, and to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny. Thus, we leave this question of state implementation to our narrow tailoring analysis.[333]

Although Congress did not need to have "strong evidence of race discrimination in construction contracting in *Minnesota and Nebraska*," the court agreed that, with respect to the issue of whether a program was *narrowly tailored,* "a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed."[334] Thus, although a state DOT may not need to make a separate showing to satisfy the compelling-interest prong of the strict scrutiny test, the state would have to show that the program was narrowly tailored.[335]

Sherbrooke and Gross Seed argued that the Minnesota and Nebraska DBE programs were not narrowly tailored.[336] However, both states had commissioned studies of their highway contracting markets before adopting overall goals for DBE participation for federally assisted highway projects in FY 2001. With Sherbrooke Turf and Gross Seed unable to offer better data the court ruled that both programs were narrowly tailored.[337] Similarly, the Ninth Circuit has ruled that "'to the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny.'"[338] The court discussed how in the *Sherbrooke Turf* case it was shown that "[b]oth Minnesota and Nebraska had hired outside consulting firms to conduct statistical analyses of the availability and capacity of DBEs in their local markets…."[339]

In contrast, in the *Western States* case, there was no evidence, statistical or otherwise, of discrimination in the state's transportation contracting industry.[340] Under the law, however, "each of the principal minority groups [that were] benefited by Washington's DBE program…must have suffered discrimination in the state."[341] In *Western States*, the court reviewed how WSDOT had arrived at its final DBE utilization goal of 14 percent, but the department "did not make any adjustment to its base figure to reflect the effects of past or present discrimination because it lacked any statistical studies evidencing such discrimination."[342] The court pointed out various problems with the government's evidence. For example, the "disparity between the proportion of DBE performance on contracts that include[d] affirmative action components and those without such provisions does not provide any evidence of discrimination against DBEs."[343] Other evidence was "oversimplified," because it did "not account for factors that may affect the relative capacity of DBEs to undertake contracting work."[344] Finally, there was no anecdotal evidence of discrimination in the industry.[345]

In its 2005 decision in *Northern Contracting*, *supra*, the district court held that IDOT's DBE pro-

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[331] *Id.*

[332] *Id.* (citations omitted).

[333] *Id.* at 970–71 (emphasis supplied).

[334] *Id.* at 971.

[335] *Id.*

[336] *Id.* at 973.

[337] *See id.* For example, in Minnesota:

> [F]ollowing promulgation of the current DOT regulations, MnDOT commissioned National Economic Research Associates (NERA) to study the highway contracting market in Minnesota. NERA first determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in the highway construction market. See 49 C.F.R. § 26.45(c) (Step 1). Of this number, 0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, NERA next estimated that the number of participating minority[-]owned businesses would be 34 percent higher in a race-neutral market. Therefore, NERA adjusted its DBE availability figure from 11.4 to 11.6 percent. See 49 C.F.R. § 26.45(c) (Step 1). Based on Nora's study, MnDOT adopted an overall goal of 11.6 percent DBE participation for federally assisted highway projects in fiscal year 2001. Id.

[338] *Western States*, 407 F.3d at 997, *quoting Sherbrooke Turf*, 345 F.3d at 971.

[339] *Id.* at 997.

[340] *Id.* at 998–99.

[341] *Id.* at 999.

[342] *Id.* at 999.

[343] *Id.* at 1000.

[344] *Id.*

[345] *Id.* at 999.

gram was narrowly tailored to achieve the federal government's compelling interest, which the court had upheld earlier when dismissing the claim of Northern Contracting against the federal defendants.[346]

In sum, a recipient state "need not establish a distinct compelling interest before implementing the federal DBE program."[347] However, "a [r]ecipient's implementation of the federal DBE program must be analyzed under the narrow tailoring analysis…."[348]

4. Relationship of Federal DBE Requirements to State Constitutional Provisions

At least one case has addressed the issue of the relationship of the federal DBE requirements under 10 C.F.R. § 1040, *et seq*. (1998 Equal Business Opportunity Program) and a state constitutional provision prohibiting governmental affirmative action except in a narrow instance.

In *C&C Construction, Inc. v. Sacramento Municipal Utility District*,[349] the Sacramento Municipal Utility District (SMUD) appealed a summary judgment in favor of the plaintiff contractor for declaratory and injunctive relief. The contractor alleged that the district's affirmative action program violated Article 1, Section 31(a) of the California Constitution, an amendment resulting from a voter initiative. SMUD conceded that its affirmative action program discriminated in favor of minorities but argued that the program fell within the exception of California Constitution Article I, Section 31(e) for measures required to maintain eligibility for the receipt of federal funds. The trial court found that SMUD had failed to produce evidence of express federal contractual conditions, laws, or regulations that made approval of federal funds contingent upon race-based discrimination.

C&C challenged SMUD's 1998 affirmative action program on the basis that it violated Section 31 of the California Constitution, an amendment adopted as Proposition 209 in 1996 as the California Civil Rights Initiative. Article 31(a) provides: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." The court noted that it had been held that "a municipal contracting scheme that requires preferential treatment on the basis of race or gender violates this provision."[350] However, an exception stated that "[n]othing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State."[351]

The Superior Court of Sacramento County had ruled in favor of C&C's complaint for declaratory and injunctive relief, because the program violated the California Constitution Article 1, Section § 3(a). The appellate court affirmed. At issue was whether SMUD had offered substantial evidence that its race-based program was necessary to maintain federal funding. Although SMUD had conducted disparity studies, it had actually done so "to assess [] whether the requisite factual conditions existed within SMUD's geographic market area to justify remedial discrimination in the form of race-based affirmative action program."[352] The studies did not assess race-neutral methods. The appellate court noted that "[s]ection 31 is similar to, but not synonymous with, the equal protection clause of the federal Constitution. Under equal protection principles, state actions that rely upon suspect classifications must be tested under strict scrutiny to determine whether there is a compelling governmental interest."[353] However, "[s]ection 31 allows no compelling interest exception."[354] As seen, the only exception is for the use of race-based governmental action to maintain eligibility for federal funds.

C&C's complaint alleged "that SMUD's affirmative action program violate[d] section 31 because it [gave] preferential treatment to contractors on the basis of race."[355] SMUD was unable to show that its affirmative action program was required as a condition to maintaining eligibility for federal funds. The court reviewed various federal laws, including those pertaining to the U.S. DOT. In every case, the court found no federal law that required SMUD to use race-based measures. For example, under the applicable regulations, the U.S. DOT does not require race-based affirmative action, even though it allows such action.[356]

The court held that "the governmental agency must have substantial evidence that it will lose federal funding if it does not use race-based meas-

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[346] *Northern Contracting*, 2005 U.S. Dist. LEXIS 19868.

[347] *Northern Contracting*, 2004 U.S. Dist. LEXIS 3226, at *138.

[348] *Id.* at *139.

[349] 18 Cal. Rptr. 3d 715, 122 Cal. App. 4th 284 (Cal. App., 3d Dist. 2004).

[350] *C&C Construction*, 18 Cal. Rptr. 3d at 718, *citing* Hi-Voltage Wire Works v. City of San Jose, 24 Cal. 4th 537, 565, 101 Cal. Rptr. 2d 653, 12 P.3d 1068 (2000).

[351] CAL. CONST. art. I, § 31(e).

[352] *C&C Construction*, 18 Cal. Rptr. 3d at 718.

[353] *Id.* at 719.

[354] *Id.* (citation omitted).

[355] *Id.* at 722.

[356] *Id.* at 730–31, *citing* 49 C.F.R. § 21.5(b)(7) (2003).

ures and must narrowly tailor those measures to minimize race-based discrimination."[357] SMUD, however, did not "study whether race-neutral programs would suffice," nor did SMUD prove that there were any federal laws concerning the distribution of federal money to the states that required race-based measures.[358] The court stated that "the disparity studies were designed to determine whether the Supreme Court decision in *Croson* permitted race-based affirmative action…."[359] However, "SMUD cannot impose race-based affirmative action unless it can establish that it cannot remediate past discrimination with race-neutral measures. The California Constitution requires the state agency to comply with *both* the federal laws and regulations *and* section 31, subdivision (a), if possible."[360]

In sum, to discriminate based on race a state entity had to have substantial evidence that it would lose federal funding if it did not use race-based measures. Moreover, such measures had to be narrowly tailored to minimize race-based discrimination. In *C&C Construction, Inc*. the court held that the definition of "discrimination" in Section 8315 of the California Government Code was ineffective. The court reviewed the federal regulations that required affirmative action to remediate past discrimination and noted that affirmative action could be either race-based or race-neutral; SMUD could not impose race-based affirmative action without a showing that race-neutral measures were inadequate.

The court affirmed the lower court's judgment and issuance of a permanent injunction in favor of the contractor on its complaint alleging that the district's affirmative action program violated Article 31(a) of the California Constitution.[361]

5. Affirmative Action in Hiring and Promotions

Although not involving affirmative action in public contracting, there are recent cases in which the issue was affirmative action in hiring and promotions. For example, in *Majeske v. City of Chicago*[362] the Chicago Police Department had "developed a plan to increase the number of minorities promoted to detective" by dividing the candidates into three groups of white, African American, and Hispanic members.[363] The candidates that scored in the top 17 percent of each group took the written test for promotion.[364] The court accepted the city's "persuasive statistical evidence" of past discrimination.[365] There was persuasive statistical data and anecdotal evidence that adequately established past discrimination by the defendant; remedying such discrimination was a compelling governmental interest that justified the defendant's affirmative action plan; and the city's plan on promotions was narrowly tailored. The court affirmed the district court's ruling and upheld the city's affirmative action plan as being constitutional.[366]

Similarly, in *Dallas Fire Fighters Association v. City of Dallas, Texas* the Fifth Circuit considered a case dealing with affirmative action policies that permitted race- and gender-based out-of-rank promotions and a fire chief's appointment of an African American under the policy.[367] The fire department's promotional system dealt with several factors: examination scores at each level of rank, conduct issues, and race and gender considerations.[368] Race and gender factored into the promotional process in an attempt to increase minority and female representation in the fire department over nonminority, male firefighters, even though this group scored higher than females or minority candidates.[369] The claimants protested the race- and gender-based promotions, while a fourth group protested the promotion of an African American to deputy chief in 1990.[370] The district court granted summary judgment in favor of the Dallas firefighters, finding both constitutional and statutory violations.[371]

The Fifth Circuit held that the race-based, out-of-rank plan violated the Equal Protection Clause of the Fourteenth Amendment because it lacked sufficient findings of "egregious and pervasive discrimination or resistance to affirmative action."[372] The level of discrimination did not rise to one that showed a compelling governmental interest of

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[357] *Id.* at 723.

[358] *Id.* at 724, 732.

[359] *Id.* at 732.

[360] *Id.* at 733.

[361] *Id*. at 727. The court stated that

> [I]n California, the People are sovereign, whose power may be exercised by initiative…. By adopting section 31, the People have determined, by implication, that special measures are not only unnecessary to ensure human rights and fundamental freedoms in California, but inimical to those principles. Therefore, "special measures," in the form of exceptions to the plain meaning of "discrimination," are not permitted in California, even under the Convention. Certainly, SMUD does not have the authority to determine otherwise, contrary to the sovereign's will.

Id. (internal citations omitted).

[362] 218 F.3d 816 (7th Cir. 2000).

[363] *Majeske,* 218 F.3d at 818.

[364] *Id*.

[365] *Id.* at 820.

[366] *Id.* at 826.

[367] Dallas Fire Fighters Ass'n v. City of Dallas, Tex., 150 F.3d 438, 438 (5th Cir. 1998).

[368] *Dallas Fire Fighters Ass'n,* 150 F.3d at 440.

[369] *Id.*

[370] *Id.*

[371] *Id.*

[372] *Id.* at 441.

remedying the present effects of past discrimination.[373] The court noted that Dallas pointed to several features of the promotional plan that weighed in favor of its constitutionality, *e.g.,* (1) only qualified individuals are promoted; (2) the Dallas Fire Department uses banding of test scores to ensure that the beneficiaries of the out-of-rank promotions are equally qualified to those whom they pass over; (3) the affirmative action plan under which the promotions are made lasts only 5 years; (4) the affirmative action promotions to a rank will cease when the manifest imbalance in the rank is eliminated; and (5) only 50 percent of annual promotions to a rank may be made under the affirmative action plan.[374]

The court responded by stating that "they are not enough to overcome the minimal record evidence of discrimination that is sufficient to support only the use of less intrusive alternative remedies."[375] Additionally, the court held that the gender-based, out-of-rank promotions violated the Equal Protection Clause because the evidentiary burden for evidence of gender discrimination at the fire department or in the industry itself was not met. Even though the appellate court applied the less exacting standard of intermediate scrutiny to gender-based discrimination, the court could not find that the promotions were substantially related to an important governmental interest as required under the standard.[376]

On the other hand, the appointment of an African American to deputy chief was not based on the affirmative action policies but was merely one factor in the consideration and was permissible under Title VII.[377] The validity of the appointment depended on whether it was "justified by a manifest imbalance in a traditionally segregated job category and whether the appointment unnecessarily trammeled the rights of nonminorities or created an absolute bar to their advancement."[378] The court found there was a lack of evidence to establish that claim, finding that the African American was appointed for more reasons than just his race and that no rights of nonminorities were barred absolutely or were unnecessarily trammeled.[379]

6. The University of Michigan Cases

Although not involving DBE programs, two cases involving the University of Michigan's affirmative action plans must be noted as they are the Supreme Court's most recent rulings on the subject. The Supreme Court held to the view of the plurality opinion in *Bakke* that diversity is a compelling governmental interest for the purposes of the strict scrutiny analysis. Although the Court avoided limiting diversity solely to education, there is no indication as yet that diversity is a permissible compelling governmental interest in the realm of public contracting.

In *Grutter v. Bollinger*[380] the Michigan Law School denied admission to Grutter, a well-qualified, white female. Grutter alleged that the law school discriminated against her through its admission policy, which considered race as one of many factors in the application process.[381] As it stands, quotas are impermissible, yet a holistic assessment of applicants for the purpose of diversity is permissible. In *Grutter* the Court considered voluminous evidence on the benefits derived from having diversity. Michigan Law School based its affirmative action policy on Justice Powell's opinion in *Bakke*, which permitted race consideration if race were only one of many elements used for ascertaining the compelling state interest of attaining a diverse student body. According to the Court, diversity attaches itself in a unique way to the educational process.

In *Grutter* the law school's alleged objective was to obtain the educational benefits that are derived from a diverse student body. The objective was not to ameliorate past discrimination or societal discrimination. In brief, the plan sought to obtain a critical mass of minority students; the law school's application process considered "soft variables," and these variables included the applicant's undergraduate institution's quality and the race of the applicant or other types of diversity, such as life experience and socioeconomic background. The plan placed substantial weight on these latter considerations in the admissions process in attempting to attain a critical mass of minority students.[382]

The Court has found diversity to be a compelling governmental interest, fulfilling one of the prongs for the strict scrutiny analysis; nevertheless, the means for attaining that interest must be narrowly tailored. Michigan Law School did not set a number of minority students sought by the law school.[383] The school's goal was to achieve a critical mass by recruiting minority applicants who, based on the "fixed" requirements, would not have been considered for admission.

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[373] *Id.*

[374] *Id.* at 441 n.13.

[375] *Id.*

[376] *Id.* at 442.

[377] *Id.* at 442–43.

[378] *Id.* at 442, *citing* Johnson v. Transp. Agency, 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987).

[379] *Id.* at 442–43.

[380] 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003).

[381] *Id*. at 316–17.

[382] *Id.* at 319.

[383] *Id.* at 318–19.

The Court also considered the context and relevant differences of the affirmative action plan, principles derived from *Gomillion v. Lightfoot*[384] and *Adarand III*,[385] respectively. As for relevant differences, the Court in *Adarand III* had stated:

> Justice Stevens concurs in our view that courts should take a skeptical view of all governmental racial classifications. He also allows that "nothing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account." What he fails to recognize is that strict scrutiny *does* take "relevant differences" into account—indeed, that is its fundamental purpose…. [T]o the contrary, it evaluates carefully all governmental race-based decisions *in order to decide* which are constitutionally objectionable and which are not…. And Justice Stevens himself has already explained in his dissent in *Fullilove* why "good intentions" alone are not enough to sustain a supposedly "benign" racial classification….[386]

In *Grutter*, by taking into account the context and relevant differences of the school's policies, the majority opinion effectively limited the application of its decision more or less to education. However, the Court's reasoning may provide insight into the constitutionality of affirmative action when diversity is believed to be a compelling government interest and indicate acceptable means by which a plan may be narrowly tailored to achieve this interest. The law school claimed race-neutral alternatives would have a detrimental effect on the ability of the school to have a diverse student body.[387] The Court did not require exhaustion of race-neutral alternatives to be in accordance with narrow tailoring. Cautioning about the use of race-based preferences, the Court again required that affirmative action plans must not unduly burden individuals who are not a part of the favored racial group.[388] The Court recognized that the Fourteenth Amendment's objective was to bring an end to any type of discrimination based on race and created a sunset provision of 25 years.[389] In light of individualistic review of applicants, supported by significant research attesting to the educational benefits of a diverse student body, the Court found that the policy did not violate the Equal Protection Clause.[390] The Court relied on evidence from numerous businesses such as 3M and GM, as well as from high-ranking retired military officers and from civilian leaders. In dissent, Chief Justice Rehnquist argued that the law school's program was merely a guise for racial balancing.[391]

In *Gratz v. Bollinger*[392] Gratz and Hamacher were denied admission to the University of Michigan's undergraduate program even though both were qualified for acceptance. The Court held, in a six to three decision with five separate opinions, that the university's undergraduate admission policies violated the Equal Protection Clause, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981 in that the university's use of race was not narrowly tailored in its pursuit of diversity.[393]

In *Gratz*, the university used a point system, awarding an applicant up to a maximum of 150 points based on several predictable categories. However, there was one category called "miscellaneous" that automatically awarded 20 points based upon the applicant's membership in an under-represented minority-status group or socioeconomically disadvantaged group; attendance at a high school with a predominantly under-represented minority population; or under-representation in the unit to which the student was applying.[394] The Admissions Review Committee could flag an application if it did not pass the initial screening but showed promise.[395]

The Court did not question the legitimacy of the university's interest. Rather, the Court questioned whether the means were narrowly tailored to achieve the interest in attaining educational diversity.[396] The Court stated that "the result of the automatic distribution of 20 points is that the University would never consider student A's individual background, experiences, and characteristics to assess his individual 'potential contribution to diversity….' Instead, every applicant like student A would simply be admitted."[397] The applicants must be placed on the same footing for consideration, but this does not mean according them the same weight.[398]

With the uncertainty of *Bakke* and Justice Powell's concurring opinion on the legitimacy of diversity as a compelling governmental interest, in *Grutter* and *Gratz* the Court again faced the issue of affirmative action plans in higher education.[399] In

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[384] 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960).

[385] 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

[386] *Id.* at 228–29.

[387] *Grutter*, 539 U.S. at 339.

[388] *Id.* at 341.

[389] *Id.* at 323.

[390] *Id.* at 343–44.

[391] *Id.* at 378.

[392] 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003).

[393] *Id.* at 275–76.

[394] *Id.* at 255.

[395] *Id.* at 256–57.

[396] *Id.* at 271.

[397] *See id.* at 273.

[398] *Id.* at 294.

[399] *See* Grutter v. Bollinger, 539 U.S. 306; *see also* Gratz v. Bollinger, 539 U.S. 244.

all three cases, *Bakke, Grutter*, and *Gratz*, the appellants provided evidence of the benefits of diversity to support the use of race in admissions. In *Grutter* the Court addressed the issue of whether diversity is a compelling governmental interest, which had previously divided the circuits.[400] Because of the large amount of evidence submitted by the appellant and third parties, the Court deferred to the appellant and accepted its conclusion that diversity was a compelling governmental interest while still applying the legal standard of strict scrutiny.[401]

Bakke arguably provided clear insight concerning the answer to the above question, but the Court's jurisprudence did not provide much insight concerning how to *demonstrate* the need for diversity and the *benefits* that are derived from diversity. In *Grutter* the appellant primarily met its evidentiary burden through expert testimony and reports. The university explained the need and importance of diversity but, arguably more importantly, explained the limited use for which race was employed in achieving diversity.[402] Additionally, numerous higher education institutions, major American businesses, high-ranking retired officers, and civilian leaders of the United States military submitted *amici curiae* briefs in support of the benefits that flow from diversity, stating that the "skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[403]

Although not involving a federal or state DBE program as discussed in this report, the *Grutter* and *Gratz* cases as of this writing are nevertheless the latest decisions of the Supreme Court on the matter of affirmative action.

C. LAWS PROHIBITING DISCRIMINATION IN TRANSPORTATION PROJECTS

1. Statutory and Regulatory Framework

a. Title VI, Section 601 of the Civil Rights Act of 1964

Civil rights issues arise when public transportation officials plan highways and related projects that are alleged to affect minority or ethnic groups on a discriminatory basis. The primary law is Title VI of the Civil Rights Act of 1964. Section 601 of the Act provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[404]

The Supreme Court has interpreted Section 601 as proscribing only "intentional" discrimination.[405] In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*[406] the district court stated that "[i]n order to state a claim upon which relief can be granted under either 601 of Title VI or the Equal Protection Clause of the Fourteenth Amendment and § 1983, a party must allege that he or she was the target of purposeful, invidious discrimination."[407] In *Alexander v. Sandoval*[408] the Supreme Court held that, first, "private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages"[409] and "[s]econd, it is similarly beyond dispute—and no party disagrees—that § 601 prohibits only intentional discrimination."[410]

As one article explains,

> [t]he Court has stated that "the reach of Title VI's protection extends no further than the Fourteenth Amendment." To succeed, the plaintiffs must demonstrate that they were the target of purposeful or in-

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[400] *Grutter,* 539 U.S. at 322 (stating the question as one "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities"); *compare* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (holding that diversity is not a compelling state interest); Smith v. University of Wash. Law Sch., 233 F.3d 1188 (9th Cir. 2000) (holding that diversity is a compelling state interest).

[401] *Grutter,* 539 U.S. at 328 (holding that diversity is a compelling governmental interest and deferring to the educational judgment of the Law School as fact, with its conclusion substantiated by third parties *amici*).

[402] For example, the Court noted that the program did not restrict the types of diversity, define diversity solely in terms of racial and ethnic status, treat the competition among all students for admissions insensitively, act as a quota, operate as a percentage, or act as a remedial scheme. *See generally id.* at 328.

[403] *Id.* at 330–31 (stating that the Court recently acknowledged the "overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society.")

[404] 42 U.S.C. § 2000d.

[405] Alexander v. Choate, 469 U.S. 287, 293, 105 S. Ct. 712, 716, L. Ed. 2d 661, 667 (1985).

[406] 254 F. Supp. 2d 486, 495 (D. N.J. 2003).

[407] *South Camden Citizens in Action,* 254 F. Supp. 2d at 495.

[408] 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

[409] *Id.* at 279–80 (citation omitted).

[410] *Id.* at 280 (citations omitted).

> vidious discrimination. *It is not enough that the law has a disproportionately adverse effect upon a racial minority; rather, to be unconstitutional under the Equal Protection Clause, the disproportionate adverse impact must be traced to a discriminatory purpose….*
>
> "[D]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." In fact, when the disproportionate impact is essentially an unavoidable consequence of a legitimate legislative policy, the "inference simply fails to ripen into proof." *Thus, allegations of disparate impact alone provide an insufficient basis for relief under either section 601 of Title VI or 1983.*[411]

In an earlier case, *Alexander v. Choate*,[412] involving Section 504 of the Rehabilitation Act of 1973, the Supreme Court ruled that the section only prohibited intentional discrimination, not discrimination of the disparate impact variety. In *Choate*, the state had reduced the number of annual days of inpatient hospital care covered by the state Medicaid program. The petitioners alleged that both the 14-day limitation and in fact any limitation on inpatient coverage would disparately affect the handicapped. The petitioners alleged a violation of Section 504 of the Rehabilitation Act of 1973.[413] Section 504 provides that "[n]o otherwise qualified handicapped individual…shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[414] Although the reduction had more impact on the handicapped, the Court agreed with the State of Tennessee that Section 504 reaches only purposeful discrimination.

In *Choate*, the Court noted that in *Guardians Association v. Civil Service Commission of New York City*,[415] the Court

> confronted the question whether Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq*., which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, reaches both intentional and disparate-impact discrimination. No opinion commanded a majority in *Guardians*, and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, …the Court held that *Title VI itself directly reached only instances of intentional discrimination.*[416]

The Court in *Choate* also said that in the case of discrimination against the handicapped, the discrimination is usually the result "not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect."[417]

On the other hand, the *Choate* Court, noting that courts of appeals had held under some circumstances that Section 504 reaches disparate impact legislation, stated that the Court "assume[d] without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped."[418] The Court, however, rejected the respondents' disparate impact claims, observing that in *Southeastern Community College v. Davis*,[419] the Court had stated "that § 504 does not impose an 'affirmative-action obligation on all recipients of federal funds.'"[420]

In sum, Section 601 of Title VI may be invoked only in instances of intentional discrimination.

b. Disparate Impact Regulations Under Title VI, Section 602

Title VI, Section 602 provides in pertinent part that

> [e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity…is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.[421]

Under Title VI of the Civil Rights Act of 1964,[422] as well as Title VII of the Civil Rights Act of 1968[423] and other statutes and regulations, the U.S. DOT promulgated rules to effectuate Title VI[424] and provided guidelines for the Federal Highway Administration's (FHWA) Title VI compliance program and review of that program relative to the Federal-aid highway program.[425] However, as discussed in

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[411] Amy Luria, *Constitutionally-Based Environmental Justice Suits and Their Likely Negative Environmental and Economic Impact,* 7 U. PA. J. CONST. L. 591, 601–02 (2004) (citations omitted; emphasis supplied).

[412] 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985).

[413] 29 U.S.C. § 794.

[414] *See Choate*, 469 U.S. at 290*, citing* 29 U.S.C § 794.

[415] 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983).

[416] *Choate*, 469 U.S. at 292–93 (emphasis supplied).

[417] *Id.* at 295.

[418] *Id.* at 299.

[419] *Id.* at 300; *see also id*. at 297.

[420] *Id.* at 300 n.20 (citation omitted).

[421] 42 U.S.C. § 2000d-1.

[422] *Id.* § 2000d – 2000d-4.

[423] *Id.* §§ 3601–3619, 4601–4655; 23 U.S.C. §§ 109(h), 324.

[424] 49 C.F.R. pt. 21.

[425] 23 C.F.R. § 200.1, *et seq*. Title VI requirements for 23 U.S.C. § 402 are covered under a joint FHWA/NHTSA

the next section, the Supreme Court has held that no private right of action exists to enforce the disparate impact regulations and policies.[426] Nonetheless, transportation officials need to be aware of other civil rights–related laws and regulations that are implicated by their decisions regarding projects and planning. The regulations issued pursuant to Section 602 of Title VI are implicated when "a recipient, in violation of agency regulations, uses a neutral procedure or practice that has a disparate impact on protected individuals, and such practice lacks a substantial legitimate justification."[427]

The U.S. DOT is obligated "to assure that possible adverse economic, social, and environmental effects relating to any proposed project on any Federal-aid system have been fully considered in developing such project, and that the final decisions on the project are made in the best overall public interest…."[428] Federal regulations achieve these goals by requiring state transportation agencies to give "state assurances" of being in compliance with Title VI when federal assistance is sought with respect to proposed highway projects.[429] Compliance is accomplished by requiring state highway agencies to engage in a number of other "state actions," including the establishment and staffing of a responsible civil rights unit.[430]

Part 21 of Title 49 of the C.F.R. gives effect to Title VI in that "no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Transportation."[431] Part 200 of Title 23 of the C.F.R. establishes a Title VI compliance program and a review procedure for it, thereby seeking to effectuate the purpose of 49 C.F.R. Part 21.

U.S. DOT regulations are representative of how departments and agencies of the federal executive branch have given effect to federal law on disparate impact. U.S. DOT regulations provide that participants in such programs

> may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.[432]

The regulations also state that,

> [i]n determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part.[433]

Although 49 C.F.R. § 21.19 provides for judicial review pursuant to the limitations of Title VI, as discussed in the next section, the Supreme Court has held that disparate impact regulations promulgated pursuant to Title VI do not give rise to a private right of action. Thus, the sole remedy available to individuals alleging that there has been a disparate impact exists under the regulations and procedures described in part C hereafter.

c. Requirements Under Executive Order 12898 (1994)

As seen, § 2000d-1 may operate as a sword against intentional discrimination but not against disproportionate or adverse impact.[434]

On February 11, 1994, President Clinton issued Executive Order 12898 entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.[435] The Order seeks to identify and address "disproportionately high and adverse human health or environmental effects of [federal agency] programs, policies, and activities on minority populations and low-income populations."[436] The Order created an interagency working group, which includes the head of the U.S. DOT.[437] The Order, moreover, required each federal

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agreement. *See* 23 C.F.R. § 200.3. 23 C.F.R. pt. 200 seeks additionally to ensure compliance with 49 C.F.R. pt. 21 and related statutes and regulations. *See* 23 C.F.R. § 200.7. In addition, the Uniform Relocation Assistance and Real Property Acquisition Policies Act "establishes a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance…." 42 U.S.C. § 4621(b).

[426] Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

[427] *See* U.S. DEP'T OF TRANSP., COMPLAINTS INVESTIGATIONS REFERENCE NOTEBOOK FOR CIVIL RIGHTS PERSONNEL, http://www.fhwa.dot.gov/download/module3.pdf.

[428] 23 U.S.C. § 109(h).

[429] *Id*. § 200.9(a).

[430] *Id*. § 200.9(b)(1).

[431] 49 C.F.R. § 21.1, *quoting* 42 U.S.C. § 2000d (Title VI).

[432] *Id.* § 21.5(b)(2).

[433] *Id.* § 21.5(b)(3) (emphasis added).

[434] *See* Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

[435] Exec. Order No. 12898, Fed. Reg., vol. 59, no. 32 (Feb. 11, 1994).

[436] *Id*. § 1-101.

[437] *Id.* § 1-102.

agency to implement an agency strategy that would at a minimum

(1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations;

(2) ensure greater public participation;

(3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and

(4) identify differential patterns of consumption of natural resources among minority populations and low-income populations.[438]

The effect of the Order is to require federal agencies to approach and combat directly disproportionate and adverse effects to human health by their programs, policies, and activities on minority and low-income populations. The Order results in internal agency reflection that is reviewed by other agencies and the U.S. Environmental Protection Agency.[439] The Order does not create a private right of action and is intended solely to improve the internal management of the executive branch.[440]

Section 2-2 of the Order uses language similar to that found in 42 U.S.C. § 2000d, stating that

> [e]ach Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under[] such[] programs, policies, and activities[] because of their race, [c]olor, or national origin.[441]

2. No Private Right of Action Under Disparate Impact Regulations

Although the Supreme Court on several occasions has addressed the scope of Title VI during the last 20 years,[442] the Court did not decide until 2001 whether under Title VI there was a private right of action to enforce the disparate impact regulations promulgated under Title VI.[443] There is no private right of action.

In *Alexander v. Sandoval*,[444] the issue was "whether private individuals may sue to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964."[444a] The plaintiff had claimed that Alabama's English-only driver's license examination violated disparate impact regulations. The Court declared that it was not addressing whether the regulations were "authorized by § 602 [of Title VI], or whether the courts below were correct to hold that the English-only policy had the effect of discriminating on the basis of national origin…."[445] Rather, the Court agreed to review "only the question posed in the first paragraph of this opinion: whether there is a private cause of action to enforce the regulation."[446]

First, the Court held "that § 601 prohibits only intentional discrimination."[447] Second, the Court explained that "[i]t is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations."[448] Declaring that such a right must come, if at all, from the independent force of Section 602, the Court held that "we assume for purposes of this decision that § 602 confers the authority to promulgate disparate-impact regulations" but held that this section does not confer a private right to enforce the regulations.[449]

The Court stated that Congress, as opposed to executive branch agencies, must create private

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[438] *Id.* § 1-103.

[439] *See id.* § 1-102.

[440] *Id.* § 6-609.

[441] *Compare* Exec. Order No. 12898, § 2-2 *with* 42 U.S.C. § 2000d (stating "[no] person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance").

[442] S*ee Choate*, 469 U.S. at 293; Guardians Ass'n v. Civil Service Comm'r of N.Y. City, 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983); Cannon v. Univ. of Chicago, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979); *Bakke,* 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978).

[443] *See, e.g.,* Julia B. Latham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?,* 27 B.C. ENVTL. AFF. L. REV. 631 (2000); Thomas A. Lambert, *The Case Against Private Disparate Impact Suits*, 34 GA. L. REV. 1155 (2000); Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions,* 73 TUL. L. REV. 787 (1999); and Gilbert Paul Carrasco, *"Public Wrongs, Private Rights: Private Attorneys General for Civil Rights*, 9 VILL. ENVTL. L.J. 321 (1998).

[444] 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

[444a] *Id*. at 278.

[445] *Id.* at 278.

[446] *Id.*

[447] *Id.* at 280, *citing Bakke,* 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978), *Guardians Ass'n,* 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983), and *Choate,* 469 U.S. 287, 293, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985).

[448] *Sandoval,* 532 U.S. at 285–86 (citation omitted).

[449] *Id.* at 286.

rights of action to enforce federal law.[450] A statute that focuses on the person regulated instead of on the individuals to be protected does not imply an intent to confer rights on any particular classes of persons. In this case, "the focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI's protection," because the section "focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating."[451] The Court pointed out that Section 602 authorizes agencies to enforce the regulations by terminating funding or "any other means authorized by law,"[452] but that a private right of action does not exist to enforce disparate impact regulations promulgated under Title VI. The authority given to issue regulations indicated not the intent of Congress to sanction a right of action under the regulations but rather the opposite;[453] "[n]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602."[454]

In 2002, in *Gonzaga University v. Doe*,[455] in a case involving the improper or unauthorized release of personal information under the Family Educational Rights and Privacy Act of 1974 (FERPA),[456] the Court held that "the relevant provisions of FERPA create no personal rights to enforce under 42 U.S.C. § 1983."[457] Under FERPA, federal funds to a university "may be terminated only if the Secretary determines that a recipient institution 'is failing to comply substantially with any requirement of [FERPA]….'"[458] According to the Court, however, the statutory regime does not "confer [] upon any student enrolled at a covered school or institution a federal right, enforceable in suits for damages under § 1983, not to have 'education records' disclosed to unauthorized persons without the student's express written consent."[459] The Court stated it had "never" held "that spending legislation drafted in terms resembling those of FERPA can confer enforceable rights."[460]

The Court continued and stated emphatically that it "now reject[ed] the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983."[461] The statute, not the regulations, must have "rights-creating language" before a claim may be pursued under § 1983 that "'by itself does not protect anyone against anything.'"[462] The Court emphasized that under FERPA the Congress authorized the Secretary of Education to handle violations of the Act.[463]

Recent cases decided by courts of appeals have followed the *Sandoval* and *Gonzaga* decisions. In *South Camden Citizens in Action*, the Third Circuit held that "a federal regulation alone may not create a right enforceable through section 1983 not already found in the enforcing statute."[464] The court rejected the contrary view of the Sixth Circuit in *Loschiavo v. City of Dearborn* and held that "the EPA's disparate impact regulations cannot create a federal right enforceable through section 1983."[465] It may be noted that Justice O'Connor, on behalf of four Justices in *Wright v. City of Roanoke Redevelopment and Housing Authority*, had stated that the question of "whether administrative regulations alone could create such a right" is "a troubling issue."[466]

In 2003, in *Save Our Valley v. Sound Transit (Central Puget Sound Regional Transit Authority)*,[467] the plaintiff, a community advocacy group, challenged the defendant Regional Transit Authority's plan to build a light-rail line through the community. The plaintiff argued that the project would "cause disproportionate adverse impacts to minority residents."[468] The plaintiff alleged that the proposed line "violated a Department of Transportation 'disparate impact' regulation—promulgated pursuant to Title VI of the Civil Rights Act of 1964…."[469] The court noted that the department's disparate impact regulations go further than the statute they implement, "proscribing activities that

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[450] *Id.* at 289.

[451] *Id.* (citation omitted).

[452] *Id., quoting* 42 U.S.C. § 2000d-1.

[453] *Id.*

[454] *Id.* at 293 (Stevens, Souter, Ginsburg, & Breyer, JJ., dissenting).

[455] 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002).

[456] 20 U.S.C. § 1232(g).

[457] *Gonzaga Univ.,* 536 U.S. at 276.

[458] *Id.* at 279, *citing* 20 U.S.C. §§ 1234c(a), 1232g(f).

[459] *Id.*

[460] *Id.*

[461] *Id.* at 283.

[462] *Id.* at 285, *quoting* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617, 99 S. Ct. 1905, 60 L. Ed. 2d 508 (1979).

[463] *Id.* at 289.

[464] 274 F.3d 771, 790 (2001).

[465] *Id.* at 788.

[466] *Id.* at 781, *quoting* Wright v. City of Roanoke Redevelopment and Housing Auth., 479 U.S. 418, 437, 107 S. Ct. 766, 777–78, 93 L. Ed. 2d 781, 797 (1987) (O'Connor, J., dissenting) (emphasis in original) (*Wright superseded by statute* as stated in McDowell v. Philadelphia Housing Auth., 2005 U.S. App. LEXIS 19711 (3d Cir. 2005)).

[467] 335 F.3d 932 (9th Cir. 2003).

[468] *Id.* at 934.

[469] *Id.* at 935.

have disparate effects on racial groups, even though such activities are permissible under § 601."[470]

The Ninth Circuit ruled that violations of rights, not violations of laws, gave rise to § 1983 actions; that plaintiffs suing under § 1983 must demonstrate that a statute, not a regulation, conferred an individual right; and that the paramount consideration was to determine whether Congress intended to create the particular federal right sought to be enforced. The Ninth Circuit stated:

> Section 1983 creates a cause of action against any person who, acting under color of state law, abridges "rights, privileges, or immunities secured by the Constitution and laws" of the United States…. The Supreme Court has held that only violations of rights, not laws, give rise to § 1983 actions…. This makes sense because § 1983 merely provides a mechanism for enforcing individual rights "secured" elsewhere, i.e., rights independently "secured by the Constitution and laws" of the United States. "One cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything…."
>
> The Third, Fourth, and Eleventh Circuits have held that an agency regulation cannot create an individual federal right enforceable through § 1983….
>
> Since only Congress can create implied rights of action (as the Court held in *Sandoval*), the Court's Gonzaga holding suggests that only Congress can create rights enforceable through § 1983.[471]

In addition, the Ninth Circuit, with respect to the disparate-impact regulation at issue in that case, held that the plaintiff "cannot enforce the disparate-impact regulation. Even if a regulation in general *could* create an individual federal right enforceable through § 1983, it is plain that the…regulation at issue here does not create such a right…. Congress in § 602 did not authorize federal agencies to create new rights."[472] Thus, "[t]he disparate-impact regulation cannot create a new right; it can only 'effectuate' a right already created by § 601. And § 601 does not create the right that SOV [Save Our Valley] seeks to enforce, the right to be free from racially discriminating effects."[473]

In 2004, in *Bonano v. East Caribbean Airline Corporation*,[474] the plaintiff had contracted with the defendants for air transportation and related travel services. When the airlines defaulted on the contract, the plaintiff sued, alleging, *inter alia,* violations of the Federal Aviation Act and regulations thereunder.[475] The district court based its determination that an implied private right of action existed primarily on 14 C.F.R. § 380.4.

However, based on the text of the Act, the First Circuit held that no private right of action existed. The appellate court determined that the Act was regulatory in nature, and private rights of action were rarely implied where a statute's core function was to furnish directives to a federal agency. The court ruled that there was no private right of action and hence no basis for jurisdiction.

> We begin with the obvious: Congress, with a single exception (not applicable here, but discussed *infra*), has not explicitly provided for private enforcement of the Act. Consequently, if a private right of action exists, it must be implied. In recent years, the Supreme Court has clarified the principles that must be used to determine the existence *vel non* of an implied private right of action…. Those clarifying decisions necessarily guide our analysis.
>
> A private right of action, like substantive federal law itself, must be created by Congress…. The judiciary's task is to interpret the statute that Congress has enacted in order to determine what the statute reveals about Congress's intentions.[476]

As discussed below, § 1983 does not itself create any substantive rights but provides a civil remedy for the deprivation of federal statutory or constitutional rights. Admittedly, "[t]here is virtually no limit on the types of causes of action allowable under the Act."[477] However, to seek such relief, "a plaintiff must assert the violation of a federal right, not merely a violation of federal law."[478] Furthermore, "[t]he fact that Congress included in section 602 so detailed an enforcement scheme strongly suggests that it did not intend to permit, in the alternative, private lawsuits to enforce section 602."[479] Finally, the Supreme Court held in *Seminole Tribe of Florida v. Florida*[480] that no relief under § 1983 was available under the *Ex parte Young* doctrine "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right…."[481]

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[470] *Id.*

[471] *Id.* at 939 (citations omitted).

[472] *Id.* at 944.

[473] *Id.*

[474] 365 F.3d 81 (1st Cir. 2004).

[475] *Id.* at 83, *citing* 14 C.F.R. §§ 380.12, 380.32(f) & (k), 380.34.

[476] *Id.* at 83–84 (citations omitted).

[477] Rossiter v. Benoit, 152 Cal. Rptr. 65, 88 Cal. App. 3d 706 (1979) (claimant sued for mental distress for an arrest for public drunkenness).

[478] Blessing v. Freestone, 520 U.S. 329, 340, 117 S. Ct. 1353, 1359, 137 L. Ed. 2d 569, 582 (1997) (emphasis in original) (citation omitted).

[479] Lambert, *supra* note 443, at 1246.

[480] 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996).

[481] *Id.* at 74. Moreover, "[e]ven before Seminole, it was clear that no § 1983 claim (based on a federal constitu-

3. Administrative Enforcement Procedures

The regulations list the types of discrimination prohibited by any recipient through any program for which federal financial assistance is provided by the U.S. DOT.[482] As a precondition to receiving federal financial assistance, a recipient must provide assurances to the U.S. DOT that it will comply with the requirements.[483] The Secretary of the U.S. DOT must seek the cooperation of a recipient and provide guidance to it in its attempt to comply voluntarily with the regulations.[484]

The disparate impact regulations generally identify two ways in which the disparate impact policies are enforced. First, federal financial assistance may be refused if an applicant "fails or refuses to furnish an assurance required under [49 C.F.R.] § 21.7 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section…."[485] Section 21.13 of the Department's regulations identifies the procedures that apply when the Department seeks to terminate financial assistance or to refuse to grant or to continue such assistance. A hearing, which occurs before either the Secretary or a hearing examiner, must precede any adverse action taken against an applicant or recipient of federal funds.[486]

As stated, under Title VI and regulations thereto the states must give certain assurances to the U.S. DOT. Moreover, as set forth in U.S. DOT Order 1050.2, the states are required to take affirmative action to correct any violations found by the FHWA within a reasonable time period not to exceed 90 days[487] and to have an adequately staffed civil rights unit and designated coordinator.[488] When there is a review under the regulations, if a report notes violations and makes recommendations, an FHWA Divisional Administrator, who oversees the state's administration of the Federal-aid program and other federal requirements, must forward the report to the state highway agency for corrective action.[489] After a meeting with the state no later than 30 days after receipt of the report, the state is allowed a reasonable time, not to exceed 90 days, for voluntary corrective action.[490] FHWA provides assistance with respect to the state's attempt to comply voluntarily. If the state fails to comply, then the division administrator recommends that the state be found in noncompliance and that the Office of Civil Rights make an additional determination.[491] The foregoing actions are reviewed by the Secretary of the U.S. DOT for final determination and appropriate action in accordance with Title 49 of the C.F.R.[492]

In training material disseminated by the U.S. DOT, the Department has summarized the substance of the procedure.

> In a disparate impact case, the focus of the investigation concerns the consequences of the recipient's practices, rather that the recipient's intent. To establish liability under disparate impact, the investigating agency must first ascertain whether the recipient utilized a facially neutral practice that had a disproportionate impact on a group protected by Title VI. If the evidence establishes a prima facie case, the investigating agency must then determine whether the recipient can articulate a substantial legitimate justification for the challenged practice. To prove a substantial legitimate justification, the recipient must show that the challenged policy was necessary to meeting a goal that was legitimate, important, and integral to the recipient's mission.
>
> If the recipient can make such a showing, the inquiry must focus on whether there are any equally effective alternative practices that would result in less adverse impact or whether the justification proffered by the recipient is actually a pretext for discrimination.
>
> If a substantial legitimate justification is identified, the third stage of the disparate impact analysis is the complainant's demonstration of a less discriminatory alternative.[493]

A decision is then issued, followed by recommendations for compliance if a violation of Title VI is found likely to exist.

The second way in which the disparate impact policies are enforced is when a complaint alleging a violation of the policies is filed with the funding agency.[494] U.S. DOT's regulations provide that "[a]ny person who believes himself or any specific class of persons to be subjected to discrimination

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tional violation or an "and laws" claim based on violation of a federal statute) lies in any forum against a state in its own name." HAROLD S. LEWIS & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 10.35 (2d ed. 2004), at 630 (hereinafter "LEWIS & NORMAN"), *citing* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45 (1989).

[482] 49 C.F.R. §§ 21.3, 21.5.

[483] *Id.* § 21.7.

[484] *Id.* § 21.9.

[485] *Id.* § 21.13(b).

[486] *Id.* § 21.15(d).

[487] 23 C.F.R. § 200.9(a)(1-4).

[488] *Id.* § 200.9(b)(1-15).

[489] *Id.* § 200.11(a).

[490] *Id.* § 200.11(b–c).

[491] *Id.* § 200.11(e–f).

[492] *Id.* § 200.11(f).

[493] U.S. DEP'T OF TRANSP., COMPLAINTS INVESTIGATIONS REFERENCE NOTEBOOK FOR CIVIL RIGHTS PERSONNEL, http://www.fhwa.dot.gov/download/module3.pdf.

[494] 49 C.F.R. § 21.11(b). *See generally* U.S. DOT Order 1000.12, at V-1–V-10 (Jan. 19, 1977).

prohibited by this part may by himself or by a representative file with the Secretary [of the Department of Transportation] a written complaint."[495] The Secretary must investigate a complaint by an allegedly injured party or by his or her representative within 180 days after the alleged discrimination complaint is filed.[496] If the investigation results in a finding of noncompliance, then the Secretary must inform the recipient of funds and attempt to resolve the matter informally.[497] "If there appears to be a failure or threatened failure to comply with this part, and if the noncompliance or threatened noncompliance cannot be corrected by informal means," then the state's noncompliance may result in the cessation of federal financial assistance and a recommendation to the Department of Justice.[498] The U.S. Department of Justice may enforce any rights the United States has under any federal law, any applicable proceeding pursuant to any state or local law, and any other means necessary against the recipient.[499] Not only may there be a hearing,[500] but also judicial review is permitted for action taken pursuant to Title VI, Section 602.[501]

In summary, although private suits may be brought under Title VI and § 1983 for intentional discrimination, the Supreme Court has eliminated Title VI and its implementing regulations as the means by which private redress may be sought for government action alleged to have a disparate impact on minority groups. The sole remedy for a claim of disparate impact caused by a project is as provided under the above regulations.

D. CLAIMS UNDER 42 U.S.C. § 1983

1. Constitutional and Statutory Framework

Section 1983 is based on the constitutional authority of Congress to enforce the Fourteenth Amendment. The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress….

Section 1983 is a powerful lure for potential plaintiffs because in addition to injunctive and declaratory relief, the courts may award money damages and attorney's fees. States have immunity under the Eleventh Amendment; thus, states and their agencies are not amenable to suit under § 1983.[502] State personnel may be sued only when not acting in their official capacity.[503] Moreover, not all state personnel may be sued, because § 1983 only applies to persons acting under color of state law.[504] Section 1983 does not apply to parties acting under color of federal law.[505] An individual state defendant may be held "liable" for injunctive relief.[506]

Section 1983 is not itself a source of substantive rights but merely provides a method for vindicating federal rights conferred elsewhere.[507] Section 1983 does not create a cause of action in and of itself. Rather, the plaintiff must prove that he or she was

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[495] 49 C.F.R. § 21.11(b).

[496] *Id.* § 21.11(a–c).

[497] *Id.* § 21.11(d).

[498] *Id.* § 21.13(a).

[499] *Id.* § 21.13(a).

[500] *Id.* § 21.15.

[501] *Id.* § 21.19; *see* Title VI § 603 (outlining judicial review available for actions taken pursuant to § 602).

[502] Coger v. Connecticut, 309 F. Supp. 2d 274, 281 (D. Conn. 2004); Cummings v. Vernon, No. 95-35460 1996 U.S. App. LEXIS 11051 (April 11, 1996); Fidtler v. Pa. Dep't of Corr., 55 Fed. Appx. 33 (3d Cir. 2002).

[503] Will v. Mich. Dep't of State Police, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) (dismissing a suit where an action was brought against a state official in his official capacity); Printz v. United States, 521 U.S. 898, 930–31, 117 S. Ct. 2365, 2382, 138 L. Ed. 2d 914, 941–42 (1997) (stating that a suit against a state official in his or her official capacity is a suit against the state); Hafer v. Melo, 502 U.S. 21, 22, 112 S. Ct. 358, 360, 116 L. Ed. 2d 301, 308 (1991) (stating that a suit against an official in his or her official capacity is outside the class of persons subject to liability under § 1983).

[504] *See* West v. Atkins, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988) (holding that state employees act under color of state law when acting in their official capacities or when they exercise their responsibilities pursuant to state law).

[505] Jarno v. Lewis, 256 F. Supp. 2d 499, 502 (E.D. Va. 2003) (citations omitted).

[506] *See Will,* 491 U.S. at 71 n.10 (stating that a state official sued in his or her official capacity for injunctive relief would be a person under § 1983 because such actions for prospective relief are not treated as actions against the state), *citing* Kentucky v. Graham, 473 U.S. at 167 n.14 and *Ex parte Young*, 209 U.S. 123, 159–60 (1908); *but see* National Private Truck Council v. Okla. Tax Comm'n, 515 U.S. 582, 588 n.5, 115 S. Ct. 2351 n.5, 132 L. Ed. 2d 509 n.5 (1995) (noting that injunctive or declaratory relief is not authorized under a § 1983 claim dealing with taxes where there is an adequate remedy at law).

[507] Mosely v. Yaletsko, 275 F. Supp. 2d 608, 612 (E.D. Pa.) (Section 1983 itself does not create a cause of action but rather provides redress for violations of constitutional provisions and federal laws).

deprived of a right secured by the United States Constitution or the laws of the United States and that the deprivation of his or her right was caused by someone acting under color of state law.[508] Thus, a § 1983 claim requires that the plaintiff establish that there has been a deprivation of some right, privilege, or immunity secured by either the United States Constitution or by a federal statute.[509] As discussed later, not all federal statutes, however, may be enforced through § 1983 actions.

With respect to disparate impact and § 1983, the Supreme Court does not support such a claim under that section. As one author states, "[t]he Supreme Court has held that claims under 42 U.S.C.A. Section 1981 require a showing of intent rather than disparate impact," citing *General Building Contractors Association*.[510] Also citing *General Building Contractors Association*, the Court in *Gratz v. Bollinger*[511] stated that "*purposeful discrimination* that violates the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981."

As discussed below, neither a state transportation department nor its officers sued in their official capacities are amenable to suit under § 1983. Moreover, government officials who are sued also may have absolute or qualified immunity for § 1983 claims. Next, the report discusses some of the elements of a § 1983 action regardless of whether there is immunity. Because there is a dearth of § 1983 cases specifically against state transportation departments and their officials, the principles stated herein are derived from cases against municipal and other government agencies and officials who are amenable to suit under § 1983. In some limited situations, private companies or individuals may be subject to suit under § 1983 because they have acquired the status or condition of a state actor. The final sections of the report discuss remedies and attorney's fees incident to § 1983 litigation.

2. Meaning of "Persons" Under § 1983

a. "Persons" Under § 1983 and Sovereign Immunity

Under § 1983 "every person" is potentially liable. Although municipalities are persons under § 1983,[512] a state or state agency is not a person under § 1983[513] and cannot be sued under § 1983 in a state or federal court;[514] nor is a state official sued in his or her official capacity a person under § 1983.[515] Although § 1983 does not restrict a state's Eleventh Amendment immunity,[516] there are two exceptions. First, a state may be sued where Congress enacts legislation pursuant to Section 5 of the Fourteenth Amendment unequivocally expressing its intent to abrogate the states' Eleventh Amendment immunity.[517] Second, a state may consent to suit in federal court.[518]

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[508] Hale v. Vance, 267 F. Supp. 2d 725 (S.D. Ohio 2003); Davis v. Olin, 886 F. Supp. 804 (D. Kan. 1995).

[509] Maine v. Thiboutot, 448 U.S. 1, 5, 100 S. Ct. 2502, 2503, 65 L. Ed. 2d 555, 559 (1980).

[510] Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination*: *What's Griggs Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 622 n.43 (2004), *citing* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391, 102 S. Ct. 3141, 3150, 73 L. Ed. 2d 835, 849 (1982). As the Court explained in *General Bldg. Contractors Ass'n*, 458 U.S. at 389–90, 102 S. Ct. at 3150, 73 L. Ed. 2d at 849 (some citations omitted):

> [T]he 1870 Act, which contained the language that now appears in § 1981, was enacted as a means of enforcing the recently ratified Fourteenth Amendment. In light of the close connection between these Acts and the Amendment, it would be incongruous to construe the principal object of their successor, § 1981, in a manner markedly different from that of the Amendment itself….
>
> With respect to the latter, official action will not be held unconstitutional solely because it results in a racially disproportionate impact…." [Even] if a neutral law has a disproportionately adverse impact upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose…." See *Washington v. Davis*, 426 U.S. 229 (1976)….
>
> We conclude, therefore, that § 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination.

[511] 539 U.S. at 276 n.23 (emphasis supplied).

[512] Monell v. N.Y. City Dep't of Social Services, 436 U.S. 658, 688–90, 98 S. Ct. 2018, 2034–35, 56 L. Ed. 2d 611, 634–35 (1978).

[513] A state transportation department is not a person subject to suit under § 1983. Vickroy v. Wis. Dep't of Transp., 73 Fed. Appx. 172, 173 (7th Cir. 2003); Jimenez v. New Jersey, 245 F. Supp. 2d 584, 586 n.2 (D. N.J. 2003); Manning v. S.C. Dep't of Highways and Pub. Transp., 914 F.2d 44, 48 (4th Cir. 1990); Will v. Mich. Dep't of State Policy, 491 U.S. 58, 65–66, 109 S. Ct. 2304, 2309, 105 L. Ed. 2d 45 (1989).

[514] Nichols v. Domley, 266 F. Supp. 2d 1310, 1313 (D. N.M. 2003).

[515] Murphy v. Arkansas, 127 F.3d 750, 754 (8th Cir. 1997).

[516] Beach v. Minnesota, No. 03-CV-862 (MJO/JGL), 2003 U.S. Dist. LEXIS 10856, at *8 (June 25, 2003), *citing* Quern v. Jordan, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979); *see* Williams v. State of Missouri, 973 F.2d 599, 600 (8th Cir. 1992).

[517] *Beach,* 2003 U.S. Dist. LEXIS 10856, at *7, *citing* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99, 104 S. Ct. 900, 907, 79 L. Ed. 2d 67, 77–78 (1984);

Thus, the enactment of § 1983, creating a cause of action for deprivation of civil rights under color of state law, did not abrogate the states' sovereign immunity under the Eleventh Amendment to the United States Constitution.[519] The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." The amendment protects an unconsenting state and state agencies but not units of local government from claims for damages and actions brought by private parties in federal courts.[520]

In *Alden v. Maine*[521] the Supreme Court held in a case involving the Fair Labor Standards Act[522] that Congress did not have the power to subject a nonconsenting state to private suits for damages in the state's own courts. In regard to § 1983, in *Will v. Michigan Department of State Police*[523] the Supreme Court held that states are not within the statute's category of possible defendants and are not subject to suit.

> Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. *The Eleventh Amendment bars such suits unless the State has waived its immunity*, Welch v. Texas Dept. of Highways and Public Transportation, 483 U.S. 468, 472-473 (1987) (plurality opinion), or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity. That Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the federal-state balance in that respect was made clear in our decision in Quern. Given that a principal purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims, and that Congress did not provide such a federal forum for civil rights claims against States, we cannot accept petitioner's argument that Congress intended nevertheless to create a cause of action against States to be brought in state courts, which are precisely the courts Congress sought to allow civil rights claimants to avoid through § 1983.[524]

Although state officials may be sued in their individual capacities for damages under § 1983 for depriving citizens of their federal constitutional and federal statutory rights (*see* part B.2, *infra),* a state transportation department is not subject to suit under § 1983.[525] In *Manning v. South Carolina Department of Highway and Public Transportation*[526] the plaintiff alleged that the department and certain officials thereof in the course of condemning the plaintiff's property violated the plaintiff's constitutional rights of due process.[527] The court held that neither the department nor its officials acting in their official capacities were persons amenable to suit under § 1983.[528]

In *Vickroy v. Wisconsin Department of Transportation*, the plaintiffs, who were injured in an automobile accident, argued "that the Department violated their constitutional rights to travel…by causing or permitting road designs that lead to accidents."[529] The court, while also agreeing that the plaintiffs' claim was frivolous, held that there was an "antecedent" problem in that the department was a unit of state government and thus not a person amenable to suit under § 1983.[530] As explained in *Toledo, Peoria & Western Railroad Co. v. State of*

Egerdahl v. Hibbing Cmty. College, 72 F.3d 615, 619 (8th Cir. 1995).

[518] *Beach,* 2003 U.S. Dist. LEXIS 10856, at *8, *citing* Clark v. Barnard, 108 U.S. 436, 2 S. Ct. 878, 27 L. Ed. 780 (1883); Parden v. Terminal Ry., 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964).

[519] Quern v. Jordan, 440 U.S. 332, 345, 99 S. Ct. 1139, 1147, 59 L. Ed. 2d 358, 369 (1979); *In re Secretary of Dep't of Crime Control and Pub. Safety,* 7 F.3d 1140, 1145 (4th Cir. 1993).

[520] *Quern*, 440 U.S. at 338 ("This suit is brought by Illinois citizens against Illinois officials. In that circumstance, Illinois may not invoke the Eleventh Amendment, since that Amendment bars only federal court suits against States by citizens of other States." *Id.* at 349 (Brennan, J., concurring opinion).

[521] 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999). The Court explained that

> [t]he Eleventh Amendment makes explicit reference to the States' immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., Amdt. 11. We have, as a result, sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for *the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today.…*

Id. at 712 (emphasis supplied).

[522] 29 U.S.C. § 201, *et seq*.

[523] 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989).

[524] *Id.* at 66 (emphasis supplied).

[525] *Vickroy,* 73 Fed. App. 172.

[526] 914 F.2d 44 (4th Cir. 1990).

[527] *Id.* at 46–47.

[528] *Id.* at 46–48 (emphasis supplied).

[529] *Vickroy,* 73 Fed. App. at 173.

[530] *Id.* at 173–74.

Illinois, Department of Transportation,[531] such an action lacks federal jurisdiction. In the *Toledo, Peoria & Western Railroad Co.* case the department and its officials appealed a mandatory injunction that had directed them to restore to the company "all possessory rights as the fee simple owner of a plot of land…."[532] The action was dismissed against the department: "federal courts lack jurisdiction over this matter as a section 1983 suit because a state agency is not a 'person' within the meaning of the Civil Rights Act."[533]

It does not appear that recently there have been many attempted § 1983 actions against transportation departments and their officials. As stated, such actions have been dismissed because of the states' immunity under the Eleventh Amendment. For instance, in *Gregory v. South Carolina Department of Transportation*,[534] the plaintiff and property owner "claim[ed] that the state defendants targeted him and his neighborhood for a systematic undervaluation appraisal because of his race" in connection with the state's use of eminent domain to acquire property for a specific bridge project.[535] The court ruled that the claim was barred by the Eleventh Amendment.

> The practical effect of the Eleventh Amendment in modern Supreme Court jurisprudence is that "nonconsenting States may not be sued by private individuals in federal court." In order for Congress to abrogate the states' sovereign immunity as granted by the Eleventh Amendment, Congress must 1) intend to do so unequivocally and 2) act under a valid grant of constitutional authority….
>
> Plaintiff's suit against the South Carolina Department of Transportation is barred by the Eleventh Amendment. The Fourth Circuit has recognized that the South Carolina State Highway Department ("SCSHD") was protected by the Eleventh Amendment and thus was not amenable to suit unless Congress abrogated its rights under existing law. The South Carolina Department of Transportation ("SCDOT") replaced the SCSHD for all practical purposes as of 1993. *See* S.C. Code Ann. § 57-3-10 (2002) (the notes following state, "The 1993 amendment established the structure of the Department of Transportation, in place of former provisions establishing the Department of Highways and Public Transportation, pursuant to a restructuring of the Department").[536]

The court further noted that "a general jurisdictional grant does not suffice to show [that] Congress abrogated a state's Eleventh Amendment rights…."[537]

More recently, in *Paulson v. Carter*[538] a federal district court agreed that the Oregon State Bar (OSB) and officials of the OSB acting in their official capacity were not persons within the meaning of § 1983. As explained by the Ninth Circuit, "claims under § 1983 are limited by the scope of the Eleventh Amendment."[539] Accordingly, "state officers in their official capacities, like States themselves, are not amenable to suit for damages under § 1983…. Moreover, states or governmental entities that are considered arms of the State for Eleventh Amendment purposes are not persons under § 1983."[540]

As explained also in *Beach v. Minnesota*,[541] the Supreme Court has interpreted the Eleventh Amendment as barring individual citizens from suing states in federal court, including their own state.[542] Thus, a § 1983 claim brought by a terminated administrative law judge for the state's Department of Motor Vehicles against the department was barred by the Eleventh Amendment because the department was a state agency.[543] Sovereign

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[531] Toledo, Peoria & W. R.R. Co. v. State of Ill., Dep't of Transp., 744 F.2d 1296 (7th Cir. 1984).

[532] *Id.* at 1297.

[533] *Id.* The court observed that

> [T]he Third, Fifth, and Ninth Circuits agree. Ruiz v. Estelle, 679 F.2d 1115, 1137 (5th Cir. 1982) (in enacting section 1983, Congress did not intend to override the traditional immunity of states and state agencies), amended and vacated in part, 688 F.2d 266, cert. denied, 460 U.S. 1042, 103 S. Ct. 1438, 75 L. Ed. 2d 795 (1983); United States ex rel. Gittlemacker v. County of Philadelphia, 413 F.2d 84, 86 & n.2 (3d Cir. 1969) (rule that local governments are not "persons" (since overruled by Supreme Court) also applies to states), cert. denied, 396 U.S. 1046, 90 S. Ct. 696, 24 L. Ed. 2d 691 (1970); Bennett v. California, 406 F.2d 36, 39 (9th Cir. (1969)) (state's immunity extends to suits under Civil Rights Act), cert. denied, 394 U.S. 966, 22 L. Ed. 2d 568, 89 S. Ct. 1320 (1969). See also Ohio Inns, Inc. v. Nye, 542 F.2d 673, 676, 680–81 (6th Cir. 1976) (state immunity not waived; open question whether state is "person" under section 1983), cert. denied, 430 U.S. 946, 97 S. Ct. 1583, 51 L. Ed. 2d 794 (1977) n.1. This section 1983 action against IDOT, a state agency, fails for lack of federal court jurisdiction. Id. at 1298–99.

[534] 289 F. Supp. 2d 721, 723 (2003).

[535] *Id.* at 723.

[536] *Id.* at 724 (some internal citations omitted).

[537] *Id.* at 725, *citing* Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991).

[538] No. CV-04-1501-40, 2005 U.S. Dist. LEXIS 10724 (D. Or. Jan. 6, 2005).

[539] *Id.* at *16, *citing* Doe v. Lawrence Livermore Nat'l Lab., 131 F.3d 836, 839 (9th Cir. 1997).

[540] *Id.* at *15 (citations omitted).

[541] No. 03-CV-862 (MJO/JGL), 2003 U.S. Dist. LEXIS 10856 (D. Minn. June 25, 2003).

[542] *Id.* at **6–7, *citing* Hans v. Louisiana, 134 U.S. 1, 10, 10 S. Ct. 504, 505, 33 L. Ed. 842 (1890); Murphy v. State of Ark., 127 F.3d 750, 754 (8th Cir. 1997).

[543] Feingold v. New York, 366 F.3d 138, 149 (2d Cir. 2004).

immunity will defeat entirely a suit under § 1983,[544] except that states retain no sovereign immunity as against the federal government,[545] and one may bring a § 1983 action against state officials in their official capacities for prospective, injunctive relief.[546] *See* subsection E, *infra*.

b. "Persons" Under § 1983 and Government Officials

When a governmental official is sued both in his or her official and individual capacities for acts performed in each capacity, the alleged acts are treated as transactions of two different legal personages.[547] The state's sovereign immunity extends to protect individual defendants sued in their official capacities because the "'Eleventh Amendment bars a suit by private parties to recover money damages from the state or its *alter egos* acting in their official capacities.'"[548] To the extent the allegations are against the individual defendants in their individual or nonofficial capacities, they are considered persons under § 1983.[549] Section 1983 defendants must be connected in some way with a unit of state or local government separate from the state to meet the state action requirement. However, "[s]tate employees in their individual capacities…may be liable for damages under § 1983, even when the conduct in question is related to their official duties."[550] A private person may be a defendant if he or she has acted in conjunction with a governmental entity.[551] Only personal liability is established by showing merely that an official, acting under color of state law, caused the deprivation of a federal right.[552]

In *Toledo, Peoria & Western Railroad Co*., the claim against the departmental officials was dismissed as well. The Seventh Circuit explained that "[a] state official acting under color of state authority may be treated as a 'person' under section 1983."[553] However, "[t]he official may be sued [only] in his own right, in a suit that is not against the state, for acts outside his statutory authority or for acts within authority that is claimed to be unconstitutional."[554] The action was really only one against the state as it was the state that held "the disputed interest in the property."[555]

In a case involving a claim against officers of the state's public safety department alleging that they had violated the plaintiff's constitutional rights under the First, Fourth, and Fourteenth Amendments, the court held that "[a]n official sued in his or her individual capacity is not cloaked in the state's Eleventh Amendment protection from suit and can be a 'person' liable under Section 1983 for deprivation of federal rights."[556] As discussed below, under some circumstances a government officer otherwise amenable to suit under § 1983 may be shielded from liability by the doctrine of qualified immunity if his or her conduct did not violate clearly established constitutional rights about which a reasonable official would have known.

c. "Persons" Under § 1983 and Absolute or Qualified Immunity

Absolute Immunity.—Assuming that the individual defendant is amenable to suit under § 1983, there are, nevertheless, two types of immunity—absolute and qualified—that are available under the common law of governmental liability that remain available to public officials under § 1983. Absolute immunity protects government officials from liability completely but is accorded to public officials only in limited circumstances.[557] Absolute immunity is available if the action in controversy is legislative, prosecutorial, or judicial in nature. To determine whether a defendant is entitled to absolute immunity requires that the court "evaluat[e] whether the official's action is functionally comparable to that of judges."[558] As one district court has noted, "'[t]ruly judicial acts' are among the few functions accorded the more encompassing protections of absolute immunity."[559] One looks at the function performed rather than the identity of the actor.[560]

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[544] Wood v. Strickland, 420 U.S. 308, 317, 95 S. Ct. 992, 998, 43 L. Ed. 2d 214, 222 (1975).

[545] United States v. Miss. Dep't of Pub. Safety, 321 F.3d 495, 498 (5th Cir. 2003) (ADA); West Virginia v. United States, 479 U.S. 305, 312 n.4, 107 S. Ct. 702, 707 n.4, 93 L. Ed. 2d 639, 647 n.4 (1987).

[546] Miller v. King, 384 F.3d 1248, 1260 (11th Cir. 2004).

[547] Johnson v. Bd. of County Comm'rs for County of Fremont, 85 F.3d 489 (10th Cir. 1996).

[548] *Gregory,* 289 F. Supp. 2d at 725, *quoting from* Huang v. Bd. of Governors of Univ. of N.C., 902 F.2d 1134, 1138 (4th Cir. 1990).

[549] *Paulson*, 2005 U.S. Dist. LEXIS 10724 at *16.

[550] McCoy v. Goord, 255 F. Supp. 2d 233, 245 (S.D.N.Y. 2003) (citation omitted) (involving prisoner's claims of excessive force and lack of medical care).

[551] Adickes v. Kress & Co., 398 U.S. 144, 152, 90 S. Ct. 1598, 1605–06, 26 L. Ed. 2d 142, 151 (1970).

[552] Kentucky v. Graham, 473 U.S. 159, 166, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114, 122 (1985).

[553] *Toledo, Peoria & W. R.R. Co,* 744 F.2d at 1299.

[554] *Id.* (citation omitted).

[555] *Id.*

[556] Flores v. Long, 926 F. Supp. 166, 168 (D. N.M. 1995).

[557] Borzych v. Frank, 340 F. Supp. 2d 955, 963 (W.D. Wisc. 2004).

[558] *Id.* (citation omitted).

[559] *Id.*, *quoting* Forrester v. White, 484 U.S. 219, 226–27, 108 S. Ct. 538, 543–44, 98 L. Ed. 2d 555, 564–65 (1988).

[560] *Borzych,* 340 F. Supp. 2d at 963–64.

Judges are absolutely immune from suits for monetary damages, and such immunity cannot be overcome by allegations of bad faith or malice.[561] Judicial immunity applies to bar an unsuccessful state litigant's § 1983 claims for monetary damages asserted against state judges in their individual capacities.[562] Judicial immunity can only be overcome if the judge has acted outside the scope of his or her judicial capacity or in the "complete absence of all jurisdiction."[563] Persons exercising quasi-judicial functions have been held to have absolute immunity.[564] In *Guttman v. Khalsa*[565] an administrative hearing officer and administrative prosecutor for a state medical board were entitled to absolute immunity from liability under § 1983 for their roles in revoking a physician's state medical license. Similarly, prosecutors are absolutely immune from suits for monetary damages "in initiating a prosecution and in presenting the State's case."[566] It has been held that a prosecutor's withholding of exculpatory evidence is a quasi-judicial act protected by absolute immunity.[567] Furthermore, such immunity can not be overcome by allegations of malice.[568]

Qualified Immunity.—If absolute immunity is not available, public officials may still enjoy a qualified immunity. The qualified immunity doctrine strikes a balance between compensating those who have been injured by official conduct and protecting the government's ability to perform its traditional functions; in short, qualified immunity acts to safeguard government and thereby "to protect the public at large, not to benefit its agents."[569]

The courts must rule on the qualified immunity issue from the beginning, focusing on the characterization of the constitutional right in controversy and deciding whether, based on the complaint, a constitutional violation is present.[570] The doctrine requires that a court decide whether a plaintiff's allegation, if true, establishes a violation of a clearly established right. Even if a government official's conduct violates a clearly established right, "the official is nonetheless entitled to qualified immunity if his or her conduct was objectively reasonable."[571] Even an official whose conduct "violates some statutory or administrative provision" does not necessarily lose his or her qualified immunity.[572]

As the Supreme Court stated in *Davis v. Scherer*, "[t]he qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated."[573] Moreover, "[i]n most instances, qualified immunity is regarded as sufficient to protect government officials in the exercise of their duties."[574] The general rule of qualified immunity is intended to provide officials the ability "reasonably [to] anticipate when their conduct may give rise to liability for damages."[575]

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for belief formed at the time and in light of all the circumstances, coupled with good faith belief, that afford a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[576]

A defendant is entitled to qualified immunity only if the constitutional right he or she allegedly violated has not been clearly established.[577] That is, one is not entitled to qualified immunity when the contours of the violated right have not been defined

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[561] Mireles v. Waco, 502 U.S. 9, 11, 112 S. Ct. 286, 116 L. Ed. 2d 9, 14 (1991).

[562] Tsabbar v. Booth, 293 F. Supp. 2d 328 (S.D.N.Y. 2003).

[563] Allen v. Feldman, No. 03-555-JJF, 2004 U.S. Dist. LEXIS 10330, at *10 (D. Del. June 4, 2004).

[564] Van Horn v. Neb. State Racing Comm'n, 304 F. Supp. 2d 1151, 1158 (D. Neb. 2004); Mason v. Arizona, 260 F. Supp. 2d 807, 820–21 (D. Ariz. 2003).

[565] 320 F. Supp. 2d 1164 (D. N.M. 2003).

[566] Imbler v. Pachtman, 424 U.S. 409, 431, 96 S. Ct. 984, 995, 47 L. Ed. 2d 128, 144 (1976).

[567] Douris v. Schweiker, 229 F. Supp. 2d 391 (E.D. Pa. 2002).

[568] *Allen,* 2004 U.S. Dist. LEXIS 10330, at *10 (court dismissed claims against a Delaware state judge, a prosecutor, two public defenders, the Delaware Public Defender Office, the Delaware Public Archives, and the prothonotary of the state superior court brought under 42 U.S.C.S. § 1983).

[569] Wyatt v. Cole, 504 U.S. 158, 168, 112 S. Ct. 1827, 1833, 118 L. Ed. 2d 504, 515 (1992).

[570] Carrasquillo v. Rodriquez, 281 F. Supp. 2d 329, 334 (D.P.R. 2003).

[571] Hernandez v. Tex. Dep't of Protective and Regulatory Servs., 380 F.3d 872, 879 (5th Cir. 2004), citing Lukan v. N. Forest Indep. Sch. Dist., 183 F.3d 342, 346 (5th Cir. 1999).

[572] Beltran v. City of El Paso (5th Cir. 2004), 367 F.3d, 299, 308 (citation omitted).

[573] Davis v. Scherer, 468 U.S. 183, 195, 104 S. Ct. 3012, 3019, 82 L. Ed. 2d 139, 150 (1984).

[574] *Borzych,* 340 F. Supp. 2d at 963.

[575] *Davis,* 468 U.S. at 195.

[576] Scheurer v. Rhodes, 416 U.S. 232, 247–48, 94 S. Ct. 1683, 1692, 40 L. Ed. 2d 90, 103 (1974).

[577] Doe ex rel. Doe v. Haw. Dep't of Educ., 334 F.3d 906, 908 (9th Cir. 2003).

with sufficient specificity such that a state official had fair warning that his or her conduct deprived a victim of his or her rights.[578] In *Davis, supra,* the Supreme Court held that an employee who alleged that his employment was terminated without a due process hearing failed to show that the due process rights were clearly established at the time of the conduct at issue.[579]

As explained in *M.W., etc. v. Madison County Board of Education*,[580]

> [t]o overcome qualified immunity, the right allegedly violated must be so clear that any reasonable public official in the defendant's position would understand that his conduct violated the right: "if officers of reasonable competence could disagree on this issue, immunity should be recognized…."
>
> [T]here are two ways in which a plaintiff seeking to overcome the bar of qualified immunity can show that a right was clearly established in the law at the time the alleged violation occurred. First, "a district court within this circuit must be able to 'find binding precedent from the Supreme Court, the Sixth Circuit, or…itself" that directly establishes the conduct in question as a violation of the plaintiff's rights…. If no binding precedent is "directly on point," the court may still find a clearly established right if it can discern a generally applicable principle from either binding or persuasive authorities whose "specific application to the relevant controversy" is "so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct was unconstitutional."[581]

The doctrine of qualified immunity does not prevent a court from entering an order for declaratory and injunctive relief.[582] For example, in *Fort Eustis Books, Inc. v. Beale*[583] the plaintiffs sought declaratory and injunctive relief against certain city attorneys and police officers in connection with the seizure of plaintiff's property pursuant to a civil *ex parte* "search order." Although the court found that the plaintiff's allegations were insufficient for granting the relief, the court held that the defendants could not claim immunity where the plaintiffs sought only injunctive and declaratory relief.[584] Furthermore, even though a defendant supervisor possibly would not be liable for damages under § 1983, he was nonetheless "a proper party to a suit to enjoin alleged unconstitutional conduct by the officers under his control."[585]

The qualified immunity doctrine thus "protects government officials who perform discretionary functions from suit and from liability for monetary damages under § 1983."[586] Thus, as a general rule, in claims arising under federal law government officials acting within their discretionary authority are immune from civil damages if their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."[587] The doctrine has protected an official from liability when the official enforced an illegal ordinance that the official thought was valid.[588] However, a director of a federally funded teaching program was not entitled to qualified immunity where the director required a teacher to sign a release of various documents, including medical records, as a condition to the renewal of the teacher's contract; "qualified immunity does not protect…'the plainly incompetent or those who knowingly violate the law.'"[589]

3. "Under Color of State Law"

a. Applicability of § 1983 to Units of Government Separate from the State

The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such violations of con-

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[578] Myers v. Baca, 325 F. Supp. 2d 1095, 1112 (C.D. Cal. 2004). *See also Murphy*, 127 F.3d at 755 (8th Cir. 1997) (the circuit court stating that a right is clearly established for qualified immunity purposes if the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right"), *citing* Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

[579] *Davis,* 468 U.S. at 197.

[580] 262 F. Supp. 2d 737 (E.D. Ky. 2003).

[581] *Id.* at 744–45 (citations omitted).

[582] *Hafer*, 502 U.S. at 27; Frank v. Relin, 1 F.3d 1317, 1327 (2d Cir. 1993), *cited* in Meiners v. Univ. of Kansas, 359 F.3d 1222, 1233, n.3 (10th Cir. 2004) ("Qualified immunity applies to claims for monetary relief against officials in their individual capacities, but it is not a defense against claims for injunctive relief against officials in their official capacities").

[583] 478 F. Supp. 1170 (E.D. Va. 1979); *see also infra* note 587 for U.S. Supreme Court decision.

[584] *Id.* at 1173.

[585] *Id.*

[586] Camilo v. Ramirez, 283 F. Supp. 2d 440, 449 (D. P.R. 2003).

[587] Cagle v. Sutherland, 334 F.3d 980, 988 (11th Cir. 2003) (internal quotations omitted); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982); Mendenhall v. Riser, 213 F.3d 226, 230 (5th Cir. 2000).

[588] Hobbs v. County of Westchester, 2003 WL 21919882 (S.D.N.Y. 2003) (Unreported).

[589] Denius v. Dunlap, 330 F.3d 919, 928 (7th Cir. 2003); *see also* Dunnom v. Bennett, 290 F. Supp. 2d 860 (S.D. Ohio 2003) (no qualified immunity for a supervisor in a case alleging sexual harassment).

stitutional or statutory rights occur.[590] The reach of § 1983 was expanded in 1961 when the U.S. Supreme Court decided *Monroe v. Pape*[591] and was extended again by the Court's decision in *Monell v. New York*.[592] In *Monroe*, the Court held that the phrase "under color of law" included the misuse of power exercised under state law, even though the persons committing the acts that constituted the deprivation of rights were acting beyond the scope of their authority. The Court expanded the meaning of the phrase "under color of law" in this way because it believed that § 1983 was intended to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position."[593]

In 1978, the Supreme Court in *Monell v. New York*[594] overruled *Monroe v. Pape* insofar as the *Monroe* Court held that local governments were immune from suit under § 1983.[595] By virtue of the *Monell* decision, municipal corporations are persons amenable to suit under § 1983. The *Monell* Court did uphold the *Monroe* decision insofar as the *Monroe* Court held that the doctrine of *respondeat superior* is not a basis for holding local governments liable under § 1983 for the constitutional torts of their employees.[596] The *Monell* Court held

> that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. Since this case unquestionably involves official policy as the moving force of the constitutional violation found by the District Court …we must reverse the judgment below. In so doing, we have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be. We have attempted only to sketch so much of the § 1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases, and we expressly leave further development of this action to another day.[597]

In ruling that the Eleventh Amendment is not a bar to municipal liability, the *Monell* Court's holding was limited to "local government units which are not considered part of the state for Eleventh Amendment purposes."[598]

b. Applicability of § 1983 to State Actors

In *Lugar v. Edmondson Oil Co*.[599] the Court set forth the standard for determining whether a party had acted under color of state law and is therefore subject to suit under § 1983.

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible…. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.[600]

A federal district court recently explained the *Lugar* standard in *Yanaki v. Iomed, Inc*.[601] In *Yanaki*, Iomed had filed a complaint against Yanaki alleging that Yanaki had appropriated confidential business information and had violated an employment agreement with Iomed. Iomed's attorneys thereafter obtained an *ex parte* civil "search order" for Yanaki's residence pursuant to which certain computer hardware and records were located and seized. Yanaki thereafter filed a § 1983 claim against the involved attorneys and government officials. The district court held that the plaintiff had failed to state a § 1983 claim. The court stated that the Supreme Court's decision in *Lugar, supra*, "clearly distinguishes between court orders purportedly authorized by unconstitutional statutes and unconstitutional orders purportedly authorized by constitutional statutes. The appropriate use by private litigants of a constitutional statute or rule does not constitute state action for the purposes of § 1983."[602]

In *Yanaki*, the plaintiff did not argue that the action taken was based on a statute that was uncon-

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[590] Wyatt v. Cole, 504 U.S. 158, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992).

[591] Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), *overruled in* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) insofar as the Court held in *Monroe* that local governments are immune from suit under § 1983. However, the Court upheld *Monroe* insofar as the *Monroe* Court held that the doctrine of *respondeat superior* is not a basis for rendering municipalities liable under § 1983 for the constitutional torts of their employees.

[592] *Monell,* 436 U.S. at 694–95.

[593] *Id.* at 172.

[594] *Monell,* 436 U.S. at 658.

[595] *Id.* at 663.

[596] *Id.* at 663 n.7.

[597] *Id.* at 694–95 (citation omitted).

[598] *Id.* at 691 n.54.

[599] 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982).

[600] *Id.* at 937.

[601] 319 F. Supp. 2d 1261 (D. Utah 2004).

[602] *Id.* at 1265 (citation omitted).

stitutional but argued that the search order was unconstitutional. However, as for the alleged unconstitutional search order, "the mere involvement of a state court or state law enforcement officer in a private matter does not necessarily constitute state action…."[603] Another court has stated that § 1983 actions are limited to those state court proceedings that are a "complete nullity."[604]

As stated, a plaintiff must show that the conduct at issue resulted from state action. As explained in *Allocco v. City of Coral Gables*,[605] there are other means or tests that have been used to expand the concept of state action. The *Allocco* case involved multiple constitutional and statutory claims against a municipality and the University of Miami (UM), a private institution. The plaintiffs, who had been employed as public safety officers for UM and as part-time law enforcement officers for the city, sought to obtain the same benefits and pay as full-time officers of the city.[606] The court noted that "'only in rare circumstances can a private party be viewed as a state actor for section 1983 purposes.'"[607] The court held that UM did not exercise a "right, privilege, or rule of conduct created by the state."[608] However, the court also addressed whether the plaintiffs could demonstrate that UM was a state actor based on the public function test, the state compulsion test, or the nexus/joint action test, which have been used to hold that a private party could be deemed to be a state actor.[609]

Under the public function test, "state action may be found only where the plaintiff is alleging that the private entity violated his constitutional rights while exercising 'some power delegated to it by the State which is traditionally associated with sovereignty.'"[610] Under the state compulsion test, the government must have "coerced or at least significantly encouraged the action alleged [to have] violate[d] the Constitution."[611] Under the nexus/joint action test, the state must have "'so far insinuated itself into a position of interdependence with the [private party] that it must be recognized as a joint participant in the challenged activity.'"[612] In *Allocco*, the court held that the plaintiffs failed to establish that UM was a state actor for § 1983 purposes.

Finally, to be acting under color of state law it appears that the state employee sued in his or her personal capacity must be a supervisor or manager.[613] As a federal court in the Eastern District of New York has stated, most § 1983 claims "generally involve discrimination by a supervisor at the workplace."[614]

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[603] *Id.* at 1265 n.8.

[604] *Id.* at 1266.

[605] 221 F. Supp. 2d 1317 (S.D. Fla. 2002) (city had not become a joint participant in university's termination of public safety officers); *see also* Commodari v. Long Island Univ., 62 Fed. Appx. 28 (2d Cir. 2003); Hauschild v. Nielsen, 325 F. Supp. 2d 995 (D. Neb. 2004) (state action did not exist in the case for purposes of joint activity test).

[606] *Allocco,* 221 F. Supp. 2d at 1323.

[607] *Id.* at 1373, *quoting* Rayburn v. Hogue, 241 F.3d 1341, 1347 (11th Cir. 2001).

[608] *Id.* (citation omitted).

[609] *Id.* at 1374.

[610] *Id.* at 1374 (citation omitted).

[611] *Id.* at 1375, *quoting* National Broad Co. v. Communications Workers of America, AFL-CIO, 860 F.2d 1026 (11th Cir. 1988).

[612] *Id.* at 1376, *quoting* Patrick v. Floyd Med. Center, 201 F.3d 1313, 1315 (11th Cir. 2000).

[613] Valentine v. Chicago, No. 03C2918, 2005 U.S. Dist. LEXIS 430, at **16–17 (N.D. Ill. Jan. 11, 2005).

> Valentine has utterly failed to point to evidence that shows that, in regards to the alleged harassment, DiTusa, Senese, or Tominello acted under the color of state law. *Neither DiTusa nor Senese were supervisors for Section 1983 purposes*. Even if Senese was deemed a supervisor, in acting on behalf of the City, the evidence is clear that he acted entirely appropriately. There is no indication from the evidence that Tominello, as a mere co-worker, was acting in a role other than on his own behalf. Thus, the absence of any showing that a Defendant acted under the color of state law dictates that we grant Defendants' motion for summary judgment on the Section 1983 equal protection claims.

(Emphasis supplied).

[614] Scatorchia v. County of Suffolk, No. CV 01-3119 (TCP) (MLO), 2006 U.S. Dist. LEXIS 5617, at 12 (E.D.N.Y. Jan. 24, 2006); *see* Gierlinger v. N.Y. State Police, 15 F.3d 32, 34 (2d Cir. 1994), stating that

> *[S]ection 1983 liability can be imposed upon individual employers, or responsible supervisors*, for failing properly to investigate and address allegations of sexual harassment when through this failure [] the conduct becomes an accepted custom or practice of the employer…. Thus, it was proper for the district court to instruct the jury on this claim. But as noted, the instructions must have permitted the jury to understand the requisite showing of involvement on the part of the particular defendant for liability to be sustained.
>
> The trial court erred in its instructions to the jury on the question of § 1983 liability. It is not possible to determine from the instructions whether the jury found Gleason liable on the theory of respondeat superior, which is not available in a § 1983 claim, or liable for his own performance as a commanding officer.

(emphasis supplied; citation omitted). Following a decision on remand, the Second Circuit affirmed the judgment that was adverse to the defendant former supervisor on the plaintiff employee's retaliation claim but the court vacated in part and remanded on other issues. *See* Gierlinger v. Gleason, 160 F.3d 858 (2d Cir. 1998).

c. Section 1983 as a Species of Tort Liability

Section 1983 creates a species of tort liability, and the statute is interpreted in light of the background of tort liability.[615] To satisfy the requirement for action under color of law or the state action element of a § 1983 action there need not be a specific intent to deprive an individual of a federally protected right. However, as very recent cases have held, the U.S. Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.[616] Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference and do not divest officials of qualified immunity.[617] As discussed, "state officials are shielded from § 1983 damage liability if their conduct did not violate clearly established constitutional rights of which a reasonable official would have known."[618]

In *DeShaney v. Winnebago County Department of Social Services*[619] the Court held that the Due Process Clause does not transform every tort committed by a state actor into a constitutional violation.[620] To successfully state a claim for a deprivation of procedural due process, a plaintiff must assert that a person acting under color of state law deprived the plaintiff of a protected property interest and that the procedures for challenging the deprivation are inadequate.[621] To prevail on a substantive due process claim "a plaintiff must establish as a threshold matter that he has a protected property interest to which the Fourteenth Amendment's due process protection applies."[622]

Not all property interests entitled to procedural due process protection are similarly protected by the concept of substantive due process: "[w]hile property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, substantive due process rights are created only by the Constitution."[623] Thus, except in certain situations, such as when a person is in the state's actual custody and must rely on the state for protection or medical care, there is no cause of action under § 1983 when the action complained against was private in nature. In *DeShaney*, *supra,* there was no claim against a county's department of social services and various employees for failing to protect a child from a violent father. The language of the Due Process Clause "cannot fairly be extended to impose an affirmative obligation on the state" to protect citizens against private actors.[624] The Due Process Clause of the Fourteenth Amendment "does not transform every tort committed by a *state* actor into a constitutional violation" actionable under § 1983.[625]

d. State-Created Danger; Deliberate Indifference Doctrine

In *Brown v. Pennsylvania Department of Health Emergency Medical Services Training Institute*[626] the Court of Appeals for the Third Circuit held that there is no federal constitutional right to rescue services, competent or otherwise, pursuant to the Due Process Clause.

> One exception to this general rule of non-liability is the "state-created danger" exception, under which a plaintiff may state a claim for a civil rights violation if the plaintiff shows: (1) the harm ultimately caused was foreseeable and fairly direct; (2) the conduct of a state actor who acts in haste and under pressure is "shocking to the conscience;" (3) there existed some relationship between the State and the plaintiff; and (4) the state actors used their authority to create an opportunity that otherwise would have existed for the third party to cause harm.[627]

If the state actors are not acting in haste and under pressure, the second element of the "state-created danger" exception is that the state actors must have acted in willful disregard for the safety of the plaintiff.[628] Whether action is shocking to the

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[615] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999).

[616] Douglas v. Healy, Nos. 01-CV-7039*,* 02-CV-2935, 2003 U.S. Dist. LEXIS 4922 at 13 (E.D. Pa. Feb. 28, 2003), *quoting* Schieber v. City of Philadelphia, 2003 U.S. App. LEXIS 3013, at **19–20 (3d Cir. 2003).

[617] Hernandez v. Tex. Dep't of Protective and Regulatory Servs., 380 F.3d 872 (5th Cir. 2004).

[618] *Murphy*, 127 F.3d, 750, 755 (8th Cir. 1999), *citing* Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410–11 (1982).

[619] 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).

[620] *Id.* at 202.

[621] Douglas v. Healy, 2003 U.S. Dist. LEXIS 4922, at *4.

[622] *Id.* *10, *quoting* Nicolas v. Pa. State Univ., 227 F.3d 133, 139–40 (3d Cir. 2000).

[623] *Id.* at *5, *quoting* Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 229, 106 S. Ct. 507, 515, 88 L. Ed. 2d 523, 535 (1985) (Powell, J., concurring).

[624] *DeShaney,* 489 U.S. at 195.

[625] *Id.* at 202.

[626] Brown v. Pa. Dep't of Health Emergency Med. Servs. Training Inst., 318 F.3d 473 (3d Cir. 2003).

[627] *See Douglas,* 2003 U.S. Dist. LEXIS 4922, at *12, *quoting Brown,* 318 F.3d at 479 (*citing* Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996)).

[628] *Id.* at *12, *citing Brown,* 318 F.3d at 480–81 (The Third Circuit in *Brown* revised the standard for the second element for state actors acting in haste and under pressure, *i.e.*, emergency personnel, from the standard of

conscience and thus arbitrary in the constitutional sense depends on the context in which the action takes place. The degree of culpability required to meet the standard depends upon the particular circumstances confronting those acting on the state's behalf.[629]

The issue, of course, concerning whether there is an applicable policy or custom that has been violated arises in the context of actions under § 1983 against municipalities. In a case alleging that the government had a policy of intentional discrimination against women, the court held that, to establish deliberate indifference, the plaintiff must demonstrate culpability beyond mere negligence or even gross negligence.[630] To sustain a gender-based equal protection challenge in a case involving an assault, a plaintiff must show (1) the existence of a policy, practice, or custom of law enforcement that provided less protection to victims of domestic assault than to victims of other assaults; (2) that discrimination against women was a motivating fact; and (3) that the plaintiff was injured by the policy, custom, or practice.[631]

e. Liability for Acts in Excess of Authority or for Gross Negligence

If government defendants act in excess of their statutory authority, they may be subject to liability under § 1983. For example, in *Morgan v. Bubar*[632] the plaintiff and defendants were employees of the State of Connecticut. The plaintiff alleged that Bubar made defamatory statements about the plaintiff to their supervisor and that two supervisors failed to investigate or initiate an investigation of a report of violence allegedly committed by the plaintiff in the workplace.[633] The court ruled that the allegations were sufficient "to support a conclusion that the defendants acted in excess of statutory authority such that the defendants are not shielded by the doctrine of sovereign immunity."[634]

Furthermore, "[t]he doctrine of sovereign immunity does not shield state employees from liability for acts or omissions constituting gross negligence."[635] Thus, "[a] state employee who acts wantonly, or in a culpable or grossly negligent manner is not protected [by sovereign immunity]").[636]

> Gross negligence is defined as that degree of negligence "which shows indifference to others, disregarding prudence to the level that safety of others is completely neglected. Gross negligence is negligence which shocks fair-minded people, but is less than willful recklessness." Whether certain behavior constitutes gross negligence is "generally a factual matter for resolution by the jury and becomes a question of law only when reasonable people cannot differ."[637]

In cases alleging § 1983 claims based on a government defendant's nonfeasance or misfeasance, such as the failure to train personnel adequately, there is no basis for a constitutional violation because such claims could be made about almost any encounter resulting in an injury. Even if there is a viable constitutional claim, the defendant may have qualified immunity, which is "a shield from civil liability for 'all but the plainly incompetent or those who knowingly violate the law.'"[638]

f. Non-Liability of Government Supervisors

Supervisors may not be held liable for the acts of their subordinates: "an individual cannot be held liable under Section 1983 in his individual capacity unless he 'participated in the constitutional violation.'"[639]

As one court has explained,

> [l]iability may not be premised on the *respondeat superior* or vicarious liability doctrines, "nor may a defendant be held liable merely by his connection to the events through links in the chain of command…."
>
> Direct participation, however, is not necessary. A supervisory official may be personally liable if she has "actual or constructive notice of unconstitutional

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willful disregard to the standard of conduct that "shocks the conscience." *Id.*).

[629] Schieber v. City of Philadelphia, 320 F.3d 409, 418 (3d Cir. 2003).

[630] *Hernandez,* 380 F.3d at 882, *citing* Conner v. Travis County, 209 F.3d 794, 796 (5th Cir. 2000). In *Hernandez*, the court observed that "[a]ccording to [Child Protective Services] policy, children may not be placed in homes which are under investigation for abuse," a policy allegedly violated by the individual defendants. *See id.* at 884. S*ee also* Rhyne v. Henderson County, 973 F.2d 386, 392 (5th Cir. 1992) (stating that the basis of 1983 liability "must amount to an intentional choice, not merely an unintentionally negligent oversight").

[631] Beltran v. City of El Paso, 367 F.3d 299, 304–05 (5th Cir. 2004) (citation omitted).

[632] No. CV0205625555, 2003 Conn. Super. LEXIS 332 (Feb. 10, 2003).

[633] *Id.* at **10–11.

[634] *Id.* at **11–12.

[635] Gedrich v. Fairfax County Dep't of Family Servs., 282 F. Supp. 2d 439, 474 (E.D. Va. 2003) (citation omitted).

[636] *Id.* (internal quotation marks omitted).

[637] *Id.* at 474–75 (citations omitted).

[638] *Beltran*, 367 F.3d at 308, *quoting* Jones v. City of Jackson, 203 F.3d 875, 883 (5th Cir. 2000) (*quoting* Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271, 278 (1986)).

[639] *Valentine,* 2005 U.S. Dist. LEXIS 430 at *17, *quoting* Hildebrandt v. Ill. Dep't of Natural Res., 347 F.3d 1014, 1039 (7th Cir. 2003).

practices and demonstrates 'gross negligence' or 'deliberate indifference' by failing to act."[640]

To hold a supervisor liable under § 1983, "[a] plaintiff…is required to establish that: (1) his 'constitutional rights were violated' and (2) 'the defendants acted under color of state law.'"[641] It must be shown that the alleged supervisor is one who "directed the constitutional violation" or that the violation must have "occurred with his 'knowledge and consent.'"[642]

4. Official Policy or Custom in Regard to Municipal Liability

The *Monell* decision requires that before a municipal defendant may be held liable for deprivations of civil rights, there must be a showing that the deprivation resulted from a government policy or custom.[643] The plaintiff must set for a "short and plain statement of the claim showing that the pleader is entitled to relief."[644] The official policy need not be formally adopted or written, as a persistent and well-settled custom may be the basis for a § 1983 claim.[645]

To support a claim "based upon the existence of an official custom or policy," the plaintiff must show that

> 1) a policy or custom existed; 2) the governmental policy makers actually or constructively knew of its existence; 3) a constitutional violation occurred; and 4) the custom or policy served as the moving force behind the violation. To adequately state such a claim, Plaintiffs must also specifically describe how the policy or custom relates to the constitutional violation.[646]

For purposes of municipal liability, "a 'policy' may be established by either a policy or decision adopted by the municipality or a single act of a municipal official with final policymaking authority,"[647] but the custom or practice must be "'so well settled and widespread that the policymaking officials of the municipality [may] be said to have actual or constructive knowledge of it, yet did nothing to end the practice.'"[648] An act performed pursuant to a custom that did not have formal approval of the "appropriate decision-maker" may fairly subject a municipality to liability under § 1983 "'on the theory that the relevant practice is so widespread as to have the force of law.'" [649]

In *Valentine v. City of Chicago*,[650] the court agreed that

> [a] local governmental unit's unconstitutional policy, practice, or custom can be shown by: "(1) an express policy that causes a constitutional deprivation when enforced; (2) a widespread practice, that, although unauthorized, is so permanent and well-settled that it constitutes a 'custom or usage' with the force of law; or (3) an allegation that a person with final policymaking authority caused the injury."[651]

Valentine was a female truck driver and sweeper for the city's transportation department who alleged sexual harassment by two supervisors and a co-worker and who eventually filed an action under § 1983, as well as Title VII of the Civil Rights Act of 1964.[652] As for the § 1983 claim, the court granted a summary judgment in favor of the city, because "[a] municipal governmental unit cannot be held liable under Section 1983 'unless the deprivation of constitutional rights is caused by a municipal policy or custom.'"[653] The plaintiff failed to show that "any express policy or practice was behind the alleged

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[640] Morris v. Eversley, 282 F. Supp. 2d 196, 203 (S.D.N.Y. 2003) (internal quotation marks omitted; citations omitted). As for factors to consider, the district court stated that

> the personal involvement of a supervisory defendant may be shown by evidence that (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

Id. (internal quotation marks omitted; citations omitted).

[641] *Valentine,* 2005 U.S. Dist. LEXIS 430, at *15.

[642] *Id.* at **17–18.

[643] *Monell*, 436 U.S. at 694–95.

[644] McClure v. Biesenbach, 402 F. Supp. 753, 760 n.32 (W.D. Tex. 20050), *citing* Leatherman v. Tarrant County Narcotics Intelligence & Coord. Unit, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993).

[645] *See generally* Owen v. City of Independence, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980).

[646] *McClure*, 2005 U.S. Dist. LEXIS 3113, at *18 (emphasis in original) (citations omitted).

[647] Faas v. Washington County, 260 F. Supp. 2d 198, 205–06 (D. Me. 2003), *citing* St. Louis v. Praprotnik, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988).

[648] *Id*. at 206 (D. Me. 2003) (citation omitted).

[649] M.W. ex rel. T.W. v. Madison County Bd. of Educ., 262 F. Supp. 2d 737, 743 (E.D. Ky. 2003) (citation omitted).

[650] No. 03C2918, 2005 U.S. Dist. LEXIS 430 (N.D. Ill. Jan. 11, 2005).

[651] *Id.* at *9, *quoting* Chortek v. City of Milwaukee, 356 F.3d 740, 748 (7th Cir. 2004).

[652] 42 U.S.C. § 2000e.

[653] *Valentine,* 2005 U.S. Dist. LEXIS 430, at *8 (citation omitted).

harassment or alleged failure to prevent the harassment."[654]

One federal court has noted that "an isolated incident or a meager history of isolated incidents is insufficient to prove the existence of an official policy or custom."[655] One incident of unconstitutional conduct by a city employee cannot be a basis for finding that there was an agency-wide custom for purposes of the imposition of municipal liability under § 1983.[656] In *City of Oklahoma City v. Tuttle*[657] the Court held that "[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker."[658] Although it has been held that evidence of a single incident cannot establish the existence of a policy or custom for purposes of a § 1983 claim,[659] in *McClure,* the district court held that in the Fifth Circuit a municipality may be held liable in a § 1983 action "for even a single decision made by its legislative body, even if the decision is singular and not meant as a continuing policy, 'because even a single decision by such a body unquestionably constitutes an act of official government policy.'"[660] On the other hand, it has been held that statements of individual lawmakers are not binding on a city.[661]

For an official to represent government policy he or she must have final policymaking authority, authority that is lacking when an official's decisions are subject to meaningful administrative review.[662] Whether a particular official has final policymaking authority for the purposes of § 1983 is a question of state law.[663] The court must determine whether the person or entity that made the policy at issue speaks for the government entity being sued. Such an inquiry seeks to determine whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue; as stated, the finding is dependent on an analysis of state law.[664]

In a case in which the plaintiffs alleged that a police officer and a code compliance officer unlawfully cancelled a concert the district court dismissed the § 1983 claims. The plaintiffs had failed to establish "that the officials' actions were taken in violation of the ordinance and permit rules."[665] Indeed, the court deemed it to be significant that the plaintiffs had argued that the officials were liable not because they had followed a government policy but rather because they had arbitrarily and capriciously violated it.[666]

5. Remedies

In a § 1983 action, the court may award declaratory and injunctive relief, damages, and attorney's fees. Moreover, as discussed herein, in regard to an individual who is an officer or employee of a state, the individual defendant may be liable for injunctive relief. Nominal, compensatory, and punitive damages also are available under § 1983. To recover compensatory damages, the plaintiff must prove that the unconstitutional activities were the cause in fact of actual injuries.[667] To prove damages, evidence must be received on general damages, including emotional distress and pain and suffering, and on special damages, such as lost income and medical expenses.[668]

In addition to compensatory damages, a court may award punitive damages in a § 1983 suit to punish the defendant for outrageous conduct and to deter others from similar conduct in the future.[669] Even if the plaintiff cannot prove actual damages, the court may award punitive damages.[670] Municipalities, however, are generally immune from puni-

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[654] *Id.* at *9.

[655] *Gedrich,* 282 F. Supp. 2d at 472 (E.D. Va. 2003) (citation omitted).

[656] Davis v. City of N.Y., 228 F. Supp. 2d 327, 346 (S.D.N.Y. 2002).

[657] Oklahoma City v. Tuttle, 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985).

[658] *Id.* at 823–24.

[659] Fultz v. Whittaker, 261 F. Supp. 2d 767 (W.D. Ky. 2003).

[660] *McClure*, 402 F. Supp. 2d at 761.

[661] *Id.* at 762.

[662] Caruso v. City of Cocoa, Fla., 260 F. Supp. 2d 1191, 1203 (M.D. Fla. 2003); *see also* Stewart v. Bd. of Commr's for Shawnee County, Kan., 320 F. Supp. 2d 1143 (D. Kan. 2004) (county department heads did not exercise final policymaking authority); Pino v. City of Miami, 315 F. Supp. 2d 1230 (S.D. Fla. 2004) (Section 1983 action failed where city manager had not ratified decision to transfer police officer).

[663] McMillan v. Monroe County, Ala., 520 U.S. 781, 786, 117 S. Ct. 1734, 1737, 138 L. Ed. 2d 1, 8 (1997).

[664] McClure v. Houston County, 306 F. Supp. 2d 1160 (M.D. Ala. 2003) (held that sheriff was not policymaker for county; thus, county had immunity to claims based on sheriff's alleged failure to train or supervise).

[665] *McClure*, 402 F. Supp. 2d at 762.

[666] *Id.* at 761.

[667] Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 309, 106 S. Ct. 2537, 2544, 91 L. Ed. 2d 249, 260 (1986).

[668] Carey v. Piphus, 435 U.S. 247, 263–64, 98 S. Ct. 1042, 1054, 55 L. Ed. 2d 252, 264–66 (1978); Ellis v. Blum, 643 F.2d 68, 69 (2d Cir. 1981).

[669] Smith v. Wade, 461 U.S. 30, 54–55, 103 S. Ct. 1625, 1639–40, 75 L. Ed. 2d 632, 650–51 (1983).

[670] Glover v. Ala. Dep't of Corrections, 734 F.2d 692 (11th Cir. 1984).

tive damages in § 1983 actions,[671] as are municipal officers when sued in their official capacities.[672]

Individuals who are not protected by other forms of immunity may be subject to punitive damages. Punitive damages are available "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."[673] The standard applicable to common law tort claims is the same for § 1983 actions. In *City of Newport v. Fact Concerts, Inc*. the Supreme Court was clear that punitive damages could be awarded "against the offending official, based on his personal financial resources…."[674]

As for injunctive relief, "[c]ivil rights actions under section 1983 are exempt from the usual prohibition on federal court injunctions of state court proceedings."[675] Although the Eleventh Amendment bars claims for damages against state agencies and officials acting in their official capacity, the federal courts may enjoin state officials acting in their official capacity as long as the injunction governs only the officer's future conduct and no retroactive remedy is provided; the rule applies also to declaratory judgments.[676] As has been noted, "[s]tate officials acting in their official capacities are § 1983 'persons' when sued for prospective relief," such as reinstatement as a state employee.[677] Thus, where a state employee alleged that he was wrongfully terminated by the state's Employment Security Department on account of his race and age, his § 1983 claim was not barred because he sought equitable relief, such as reinstatement as a state employee.[678]

The requirements for an injunction generally are that the movant must show that he or she will suffer irreparable harm if the injunction is not granted; that the movant would probably prevail on the merits; that the state would not be harmed by the injunction more than the movant would be helped by it; and that the granting of the injunction would be in the public interest. Alternatively, the movant must show either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions have been raised and that the balance of hardships tips sharply in the movant's favor.[679]

6. Attorney's Fees

A prevailing party in certain civil rights actions may recover attorney's fees pursuant to 42 U.S.C. § 1988.[680] Moreover, states may be able to prevent supplemental claims against the state either under the Eleventh Amendment or because the federal claims have been dismissed.[681] "Attorney's fees in civil rights and employment discrimination cases are wholly outside the strictures of the Eleventh Amendment as the result of Congressional abrogation that the Supreme Court has upheld."[682] Claimants who bring suit under a comprehensive federal statutory scheme that does not include a provision allowing for the recovery of attorney's fees may not do so under § 1988. The assertion of a § 1983 claim in addition to another statutory claim does not create a claim for attorney's fees under § 1988.[683]

In *Maher v. Gagne*[684] the Supreme Court held that attorney's fees under § 1988 were available in all types of § 1983 actions. A plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that

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[671] Ramonita Rodriquez Sostre v. Municipio de Canovanas, 203 F. Supp. 2d 118 (D.P.R. 2002); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259, 101 S. Ct. 2748, 2756, 69 L. Ed. 2d 616, 627 (1981). *But see* Peden v. Suwannee County Sch. Bd., 837 F. Supp. 1188, 1196–97 (M. D. Fla. 1993) (denying punitive damages where no compensatory damages were awarded). In *Peden*, the court stated that "[t]he real proposition for which the above cited cases stand could be summarized as follows: in a section 1983 action, a jury may properly award punitive damages even though it awards no compensatory damages, but *only* where the jury first finds that *a constitutional violation was committed by the party against whom the punitives are imposed." Id.*

[672] *Ramonita,* 203 F. Supp. 2d at 120, *citing Gomez-Vazquez,* 91 F. Supp. 2d 481, 482–83 (D.P.R. 2000).

[673] Smith v. Wade, 461 U.S. 30 at 56.

[674] *Fact Concerts, Inc.*, 453 U.S. at 269.

[675] Schroll v. Plunkett, 760 F. Supp. 1385, 1389 (D. Or. 1991).

[676] Ippolito v. Meisel, 958 F. Supp. 155, 161 (S.D.N.Y. 1997); *see also* Mercer v. Brunt, 272 F. Supp. 2d 181 (D. Conn. 2002).

[677] Murphy v. Arkansas, 127 F.3d 750, 754 (8th Cir. 1997).

[678] *Id*.

[679] Remlinger v. State of Nevada, 896 F. Supp. 1012, 1014–15 (D. Nev. 1995).

[680] *See* Carrion v. City of N.Y., 2003 WL 22519438 (S.D.N.Y. 2003) (unreported) (court upholding hourly rate of $120 for prevailing defendants' lead attorney in calculating attorney's fees in false arrest claim).

[681] *See Valentine*, 2005 U.S. Dist. LEXIS 430, at **20–21; Dilts v. Blair, 2005 U.S. Dist. LEXIS 29426 (D. Id. 2005).

[682] SMITH & NORMAN, § 10.35, at 633.

[683] Smith v. Robinson, 468 U.S. 992, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984).

[684] Maher v. Gagne, 448 U.S. 122, 128–29, 100 S. Ct. 2570, 2574–75, 65 L. Ed. 2d 653, 660–61 (1980).

directly benefits the plaintiff.[685] The Supreme Court has stated that "although the technical nature of a nominal damage award…does not affect the prevailing party inquiry, it does bear directly on the propriety of fees awarded under § 1988."[686] Ordinarily, the prevailing plaintiff may recover attorney's fees as a matter of course.[687] The prevailing defendant, however, may recover attorney's fees only when the court in its discretion finds that the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."[688]

One issue that has arisen is whether a plaintiff who prevails only on a pendent state law claim rather than his or her § 1983 claim may be awarded attorney's fees. In *Southwestern Bell Telephone Company v. City of El Paso*,[689] Southwestern Bell brought suit under § 1983 for declaratory and injunctive relief against the City and County Water Improvement District No. 1 (EPCWID). The action alleged that EPCWID's application process and fees for the use of its facilities constituted an illegal taking in violation of the Fifth Amendment, as well as were violations of the Contract Clause of the United States Constitution and of the Federal Telecommunications Act of 1996. The district court denied Southwestern Bell's motion for attorney's fees, because the company was not granted any relief under § 1983 in the court's summary judgment order and judgment. The district court held that because the company prevailed on its state law claims, it was not a "prevailing party" under § 1983.[690]

However, the Fifth Circuit held that a plaintiff may be deemed a prevailing party if he or she prevails on a supplemental state law claim that arises from a common nucleus of fact with federal constitutional claims, even if the court chooses to avoid ruling on the constitutional issues.[691] Thus, attorney's fees may be awarded even if the § 1983 claim is not decided, provided that: (1) the § 1983 claim of constitutional deprivation was substantial, and (2) the successful pendent claims arose out of a common nucleus of operative facts. A claim is substantial if it supports federal question jurisdiction; the "common nucleus of operative facts" element must satisfy the test established in *United Mine Workers v. Gibbs* for pendent jurisdiction.[692]

Another issue is whether there is a right to attorney's fees when the plaintiff is awarded only nominal damages. In *Farrar v. Hobby*[693] the Supreme Court held that in a civil rights suit for damages the awarding of nominal damages highlights the plaintiff's failure to prove actual, compensable injury. Whatever the constitutional basis for substantive liability, damages awarded in a § 1983 action must always be designed to compensate injuries caused by the constitutional deprivation. If a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, "the only reasonable fee is usually no fee at all."[694]

However, attorney's fees have been awarded even when the amount of damages awarded was nominal. In *Ortiz de Arroyo v. Barcelo*[695] the First Circuit held that the plaintiffs were the prevailing party entitled to attorney's fees even though they did not obtain a favorable judgment or a formal settlement agreement in their § 1983 suit. In *Norris v. Murphy*,[696] a jury awarded the plaintiff the nominal amount of $1 in damages, but the court awarded virtually the entire amount of attorney's fees and costs requested.

The Court has handed down several decisions that significantly cut into the award of attorney's fees in § 1983 actions. The Court's decision in *Marek v. Chesney,*[697] interpreting Rule 68 of the Federal Rules of Civil Procedure, encourages settlement of civil rights cases by denying the award of attorney's fees under § 1988 for fees incurred after a settlement offer is rejected, unless the final judgment obtained by the offeree is more favorable than the settlement offer.[698]

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[685] *Norris*, 287 F. Supp. 2d at 114, *citing* Farrar v. Hobby, 506 U.S. 103, 111–12, 113 S. Ct. 566, 572–74, 121 L. Ed. 2d 494, 503–04 (1992).

[686] *Farrar,* 506 U.S. at 114.

[687] Newman v. Piggie Park Enters., 390 U.S. 400, 402, 88 S. Ct. 964, 966, 19 L. Ed. 2d 1263, 1266 (1968); Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

[688] Hughes v. Rowe, 449 U.S. 5, 14, 101 S. Ct. 173, 178, 66 L. Ed. 2d 163, 172 (1980); Christianburg Garment Co. v. E.E.O.C., 434 U.S. 412, 421, 98 S. Ct. 694, 700, 54 L. Ed. 2d 648, 657 (1978).

[689] 346 F.3d 541 (5th Cir. 2003).

[690] *Id.* at 550–54.

[691] *Id.* at 550, *citing* Scham v. District Courts Trying Criminal Cases, 148 F.3d 554, 556 (5th Cir. 1998).

[692] *Id.* at 551.

[693] 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992).

[694] *Id.* at 115 (citation omitted).

[695] 765 F.2d 275, 276–77 (1st Cir. 1985).

[696] 287 F. Supp. 2d 111 (D. Mass. 2003).

[697] 473 U.S. 1, 11–12, 105 S. Ct. 3012, 3018, 87 L. Ed. 2d 1, 11 (1985).

[698] In Wilson v. Nomura Securities Int'l, 361 F.3d 86 (2d Cir. 2004), the court held that the acceptance of a Rule 68 offer fully settled Wilson's Title VII claim, including any right to attorney's fees.

Finally, the Eleventh Amendment does not bar recovery of attorney's fees against the state.[699] On the other hand, attorney's fees are not recoverable against the state when the plaintiff prevails against a public official in his or her individual capacity.[700]

E. DISCRIMINATION CLAIMS UNDER OTHER FEDERAL LAWS AGAINST TRANSPORTATION DEPARTMENTS

1. Introduction

Although various forms of discrimination are prohibited by federal law,[701] states and their instrumentalities, such as transportation departments, as well as their officers and employees acting in their official capacity, have immunity for certain claims alleging discrimination by virtue of the states' sovereign immunity under the Eleventh Amendment to the United States Constitution. Moreover, there are law review articles and other commentary[702] arguing that, based on Supreme Court decisions in recent years, some discrimination-type claims presently permitted against the states may be subject to challenge. Nevertheless, states have immunity under the Eleventh Amendment to claims made under the Age Discrimination in Employment Act (ADEA)[703] and under Title I of the Americans with Disabilities Act (ADA).[704] Individual employees may not be sued under Title VII.[705]

Besides the issue of sovereign immunity, this section will discuss how the law has evolved recently in the areas of discrimination prohibited by the ADA,[706] the ADEA,[707] or Title VII of the Civil Rights Act of 1964.[708] This section of the report will discuss whether and when Congress may abrogate the states' sovereign immunity under the Eleventh Amendment, even when a claim arises under federal antidiscrimination law. Moreover, regardless of state immunity, each section will discuss the elements of claims arising out of alleged discrimination on the basis of age, disability, race, or sex.

2. Recent U.S. Supreme Court Decisions on the States' Sovereign Immunity Under the Eleventh Amendment

As discussed previously in the report, when a state transportation department asserts the Eleventh Amendment as a defense, an action under § 1983 will be dismissed unless the state has waived such immunity. Eleventh Amendment immunity will not shield agency officials from suit if they are sued in their individual, non-official capacity. Moreover, where government officials, sued in their individual capacity, have raised the defense of qualified immunity, some courts have imposed a "heightened pleading requirement"; that is, some factual detail is necessary so that the court will be able to determine whether a right was a clearly established one at the time of the allegedly wrongful conduct.[709]

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[699] Hutto v. Finney, 437 U.S. 678, 689–92, 98 S. Ct. 2565, 2572–74, 57 L. Ed. 2d 522, 533–35 (1978) (validity questioned by some citing references).

[700] *Graham*, 473 U.S. at 167 (validity questioned by some citing references).

[701] *See* discussion and cases in HAROLD S. LEWIS, JR., EMPLOYMENT DISCRIMINATION LAW AND PRACTICE (2d ed. 2004); JOHN J. DONOHUE III, FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW (Foundation Press 2003); MICHAEL A. WARNER & LEE E. MILLER, EMPLOYMENT DISCRIMINATION LAW (2000); SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (1997); GABRIEL M. NUGENT, EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION (1998); and SHELDON H. NAHMOD, MICHAEL L. WELLS, & THOMAS A. EATON, CONSTITUTIONAL TORTS (Anderson Pub. Co. 1995).

[702] *See* Nicole E. Grodner, *Disparate Impact Legislation and Abrogation of the States' Sovereign Immunity after Nevada Department of Human Resources v. Hibbs and Tennessee v. Lane,* 83 TEX. L. REV. 1173, 1184 (2005) (hereinafter "Disparate Impact Legislation"). *See also* Bryan Dearinger, *The State of the Nation, not the State of the Record: Finding Problems with Judicial 'Review' of Eleventh Amendment Abrogation Legislation,* 53 DRAKE L. REV. 421, 422 (2005) (hereinafter "State of the Nation").

[703] Cal. Public Employees' Retirement Sys. v. Arnett, 528 U.S. 1111, 120 S. Ct. 930, 145 L. Ed. 2d 807 (2000) (*vacating and remanding* in light of Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000) (holding that the ADEA did not abrogate the states' Eleventh Amendment immunity from suit by private individuals)).

[704] The Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001) (holding that Eleventh Amendment immunity bars suits under Title I of the ADA for money damages against states). *See* Lopez v. Police Dep't of Commonwealth of Puerto Rico, 247 F.3d 26 (1st Cir. 2001).

[705] Dearth v. Collins, 441 F.3d 931 (11th Cir. 2006) (holding that relief under Title VII is provided solely against the employer and not an individual employee); Grant v. Lone Star Co., 21 F.3d 649, 651–53 (5th Cir. 1994); Wathen v. Gen. Elec. Co., 115 F.3d 400, 404–05 (6th Cir. 1997).

[706] 42 U.S.C. § 12101 *et seq*.

[707] 29 U.S.C. § 621 *et seq*.

[708] 42 U.S.C. § 2000e *et seq*.

[709] *See* GJR Investments v. County of Escambia, Fla., 132 F.3d 1359, 1367 (11th Cir. 1998) (citation omitted).

As for whether states have any immunity under the Eleventh Amendment from claims under the ADA, ADEA, or Title VII of the Civil Rights Act of 1964, the analysis in this section begins with the decision of the United States Supreme Court in 1976 in *Fitzpatrick v. Bitzer.*[710] In *Fitzpatrick*, a group of Connecticut state employees brought suit against the state alleging sexual discrimination regarding retirement benefits.[711] The *Fitzpatrick* Court held that when Congress amended Title VII in 1972 to extend coverage to the states as employers, Congress clearly exercised its power under [Section] 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity.[712] The issue, however, that was not raised in the *Fitzpatrick* case was whether the abrogation of immunity was "a proper exercise of congressional authority under [Section] 5 of the Fourteenth Amendment."[713]

On several occasions since the *Fitzpatrick* decision, the Supreme Court has addressed the issue of whether Congress has exercised its authority properly when abrogating the states' sovereign immunity. The cases since *Fitzpatrick* are, of course, particularly relevant to whether the states have sovereign immunity for some claims under the federal antidiscrimination laws. A preliminary question that the Court has had to address was on which constitutional grants of authority Congress permissibly could rely to abrogate the states' sovereign immunity. In 1996, in *Seminole Tribe v. Florida*[714] the Court held that Congress may only authorize suits against nonconsenting states, that is, abrogate the states' sovereign immunity under the Eleventh Amendment, when Congress is acting within its power under Section 5 of the Fourteenth Amendment. Congress may not abrogate the states' sovereign immunity under another grant of constitutional authority to Congress, such as the Commerce Clause."[715]

After the decision in *Seminole Tribe*, beginning in 1997, the Supreme Court struck down acts of Congress that were, in the Court's view, in excess of Congress's power under Section 5 of the Fourteenth Amendment. Thus, in 1997, in *City of Boerne v. Flores*,[716] the Supreme Court held that the Religious Freedom Restoration Act of 1993 (RFRA) exceeded Congress's power under Section 5 of the Fourteenth Amendment. As the Court explained, the

> RFRA prohibits "government" from "substantially burdening" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[717]

The Court, stating that Congress does not have the "power to determine what constitutes a constitutional violation,"[718] held that Congress did not have "the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause."[719] The Court, recognizing that it is not easy to differentiate "between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law,"[720] held that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[721]

In rendering its decision, the Court emphasized the absence of a sufficient record for the Congress to act under its Section 5 power. The "RFRA's legislative record lacks examples of modern instances of generally applicable laws [that were] passed because of religious bigotry."[722] The intent of the law, in the opinion of the Court, "cannot be understood as a response to, or designed to prevent, unconstitutional behavior."[723] The Court noted that the "RFRA's substantial burden test…is not even a discriminatory effects or disparate impact test…."[724]

Although the first question is whether the Congress clearly expressed an intent to abrogate the states' sovereign immunity in a given area, the Congress may not purport to do so under Section 5 unless there is sufficient evidence to justify congressional action. Whether Congress has enacted purportedly remedial legislation pursuant to its Section 5 power depends on whether the legislation

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[710] 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976).

[711] *Id.* at 448.

[712] *Id.* at 453.

[713] *Id.* at 456 n.11. *See* discussion of *Fitzpatrick* in LEWIS & NORMAN, *supra* note 481 § 10.35, at 624.

[714] 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996).

[715] Gill v. Publ. Emples. Ret. Bd., 135 N.M. 472, 476, 90 P.3d 491, 495 (2004).

[716] 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).

[717] *Id.* at 515–16, *citing* 42 U.S.C. § 2000bb-1.

[718] *Id.* at 519.

[719] *Id.*

[720] *Id.* at 508.

[721] *Id.* at 520.

[722] *Id.* at 530.

[723] *Id.* at 532.

[724] *Id.* at 535.

passes the Court's congruence and proportionality test. An example is the case of *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.[725] The state agency argued that the Patent Remedy Act[726] was an unconstitutional abrogation of the states' sovereign immunity under Section 5 of the Fourteenth Amendment. In the Act, Congress had provided that states, their instrumentalities, and their officers and employees acting in their official capacities were subject to suit in federal court by any person for patent infringement.[727] College Savings alleged that Florida Prepaid had infringed College Savings' patent for certain "financing methodology."[728]

The Court noted that pursuant to its holding in *City of Boerne*, the Court had to "identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy…."[729] However, the Court held that in enacting the Patent Remedy Act, Congress had "identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."[730] Moreover, "Congress itself said nothing about the existence or adequacy of state remedies in the statute," nor was there any evidence in the legislative history of patent infringement by the states.[731] Hence, the Congress had not properly abrogated sovereign immunity in making "all States immediately amenable to suit in federal court for all kinds of possible patent infringement and for an indefinite duration."[732]

In contrast, in 2003 in *Nevada Department of Human Resources v. Hibbs*,[733] the Court upheld the Family and Medical Leave Act (FMLA) of 1993 that "entitles eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons, including the onset of a 'serious health condition' in an employee's spouse, child or parent."[734] The FMLA permits claims for monetary damages and equitable relief against employers, including public agencies. To the surprise of some commentators,[735] in light of the Court's decision in the *City of Boerne* and *Florida Prepaid* cases, the Court held that employees of the State of Nevada may recover damages in the event of the state's failure to comply with the family-care provision of the Act.

In *Hibbs* there was no serious issue regarding whether Congress intended to abrogate the sovereign immunity of the states. Moreover, the Court reiterated that under Section 5 of the Fourteenth Amendment, Congress may "do more than simply proscribe conduct" that the Court has held to be unconstitutional and that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct in order to prevent and deter unconstitutional conduct."[736] In *Hibbs*, the Court concluded that the Congress had evidence of a pattern of constitutional violations by the states. Furthermore, "Congress had evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways."[737] The Court concluded that "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough" for the enactment of the FLMA.[738] The law, moreover, was "narrowly targeted" with other limitations that Congress had placed on its "scope."[739]

Other decisions upholding or denying congressional authority to abrogate the states' Eleventh Amendment immunity are discussed hereafter under the relevant sections pertaining to age, disability, and race and sex discrimination. In some areas of federal antidiscrimination law, the states are wholly or partially immune. After discussing the immunity issue, each section will discuss both the legal elements for claims of discrimination and any recent cases brought against transportation agencies. As will be seen, in discrimination cases, even when a transportation agency is not immune from suit, the agency frequently has prevailed on a motion for summary judgment, resulting in a dismissal of all or part of the case.

3. Age Discrimination in Employment Act

a. State Sovereign Immunity for Claims for Monetary Damages Under the ADEA

The ADEA, which prohibits employment discrimination on the basis of age against individuals

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[725] 527 U.S. 627, 119 S. Ct. 2199, 144 L. Ed. 2d 575 (1999).

[726] 35 U.S.C. §§ 2171h, 296(a).

[727] *Fla. Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. at 632.

[728] *Id.* at 631.

[729] *Id.* at 639, *citing City of Boerne*, 521 U.S. 507, 525, 117 S. Ct. 2157, 2166, 138 L. Ed. 2d at 642.

[730] *Id.* at 640.

[731] *Id.* at 644.

[732] *Id.* at 647.

[733] 538 U.S. 721, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003).

[734] *Hibbs,* 538 U.S. at 724, *quoting* 29 U.S.C. § 2612(a)(1)(C).

[735] *See supra* note 702, at 1184; *see also* Dearinger, *supra* note 702, at 422.

[736] *Hibbs,* 538 U.S. at 727–28.

[737] *Id.* at 732.

[738] *Id.* at 735.

[739] *Id.* at 738.

age 40 or over, may be enforced in accordance with the powers, remedies, and procedures provided in the Fair Labor Standards Act.[740] The ADEA provides:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.[741]

In 1974 Congress provided that employees could maintain a suit under the ADEA against a public entity in any federal or state court.[742] However, in 2000 in *Kimel v. Florida Board of Regents*[743] the Supreme Court struck down the law that abrogated the states' sovereign immunity for ADEA claims.[744] The *Kimel* case concerned three suits by plaintiffs against Alabama and Florida state agency employers, *inter alia*, for monetary damages for alleged age discrimination. However, the *Kimel* Court held that Congress had exceeded its authority in abrogating the states' immunity for such suits.

Applying the congruence and proportionality test, the Court held that the substantive requirements imposed by the ADEA on the states "are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."[745] Stating that "[s]tates may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest,"[746] the Court held that Congress had not properly abrogated the states' immunity under Section 5 of the Fourteenth Amendment. The Court's reasoning was that the ADEA was "'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'"[747] That is, when extending the ADEA to the states, Congress "never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of a constitutional violation."[748] Accordingly, Congress did not validly abrogate the states' sovereign immunity to suits by private individuals.[749] In any case, the Court stated that in almost every state, "[s]tate employees are protected by state age discrimination statutes,"[750] which are cited in a footnote to the opinion.[751]

b. Elements of an ADEA Claim

Although a state transportation agency has sovereign immunity for claims for monetary damages, but not for injunctive relief, other transportation agencies that are not part of the state government may be subject to suit; thus, the elements of an ADEA claim will be discussed. For a plaintiff to establish a *prima facie* case of age discrimination, the plaintiff must show that "'(1) he is a member of the protected class; (2) he is qualified for his position; (3) he has suffered an adverse employment action; and (4) the circumstances surrounding that action give rise to an inference of age discrimination.'"[752] Claims under the ADEA "are analyzed according to a burden shifting framework first articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*[753]…."[754] If the employer's action is motivated by something other than the employee's age, then there is no disparate treatment under the ADEA.[755] Under the ADEA, employees may not hold another individual or a supervisor liable as they are not liable under the Act.[756]

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[740] 29 U.S.C. § 201, *et seq*.

[741] *Id*. § 623(a)(1)–(3).

[742] *Id*. § 626(c).

[743] 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000).

[744] 29 U.S.C. § 626(b), *citing* 29 U.S.C. §§ 626(c), 211, 216(b), 217.

[745] *Kimel*, 528 U.S. at 83 (citations omitted).

[746] *Id.*

[747] *Id.* at 86, *citing City of Boerne*, 521 U.S. at 532, 117 S. Ct. at 2170, 138 L. Ed. 2d at 646.

[748] *Id.* at 89.

[749] *Id.* at 91.

[750] *Id.*

[751] *Id.* at 92 n.1.

[752] Concepcion v. Nice Pak Products, No. 03 Civ. 1984 (LTS) (THK) 2004 U.S. Dist. LEXIS 15873, *8 (S.D.N.Y. Aug. 13, 2004) (citation omitted). This formulation is by the court based on the ADEA, and is not found *per se* in the statute. *See* 29 U.S.C. §§ 621–34.

[753] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973).

[754] *Concepcion*, 2004 U.S. Dist. LEXIS 15873, at *8 (citation omitted).

[755] MacKinnon v. City of N.Y., Human Resources Admin., No. 99 Civ. 10193 (GBD) 2003 U.S. Dist. LEXIS 16622, at *5 (S.D.N.Y. Sept. 22, 2003).

[756] Cheng v. Benson, 358 F. Supp. 2d 696, 700 (N.D. Ill. 2005) (citing precedents and a law review article for the proposition that "'[t]he appellate courts consistently hold that liability [in employment discrimination law] should fall solely to the employer, thus prohibiting personal liability….'" *Id*.).

The ADEA makes it unlawful for an employer to subject an employee to an adverse employment action because the employee previously charged the employer with age discrimination. To state

> [a] *prima facie* case of retaliation under the ADEA requires proof that: (1) the plaintiff was engaged in an activity protected under the ADEA; (2) the employer was aware of the plaintiff's participation in the protected activity; (3) the plaintiff was subject to an adverse employment action; and (4) there is a nexus between the protected activity and the adverse action taken.[757]

It is not completely clear whether Congress has abrogated sovereign immunity as to retaliation claims against *federal agencies* under the ADEA. According to a federal court in Virginia, although 29 U.S.C. § 633a(a) waives sovereign immunity of federal agencies for age discrimination suits against them, the ADEA does not expressly prohibit suits for *retaliation* by federal agencies.[758] Although the court recognized that the Second Circuit and D.C. Circuit have held that Congress waived sovereign immunity for retaliation claims against federal agencies under the ADEA,[759] the district court in Virginia held that Congress chose not to waive immunity for retaliation claims against federal agencies.

4. Americans with Disabilities Act

a. Sovereign Immunity for Claims for Monetary Damages Under Title I

The ADA is designed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[760] Prohibiting discrimination in the contexts of employment, public services, and public accommodations and services operated by private entities, the ADA provides the following for each context:

Employment.—"No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[761]

Public Services.—"Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[762]

Public Accommodations and Services Operated by Private Entities.—"No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[763]

As the Court stated in 2004 in *Tennessee v. Lane*,[764] the ADA "forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III."[765]

"Title II…prohibits any public entity from discriminating against 'qualified' persons with disabilities in the provision or operation of public services, programs, or activities."[766] A "public entity" includes state and local governments and their agencies or instrumentalities.[767] In 42 U.S.C. § 1213(2), the ADA specifically identifies transportation services. Thus,

> [p]ersons with disabilities are "qualified" if they, "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."[768]

The ADA incorporates Section 505 of the Rehabilitation Act of 1973[769] that authorizes private citizens to bring suit for money damages.[770] A state is

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[757] *Concepcion*, 2004 U.S. Dist. LEXIS 15873 at **8–9, *quoting* Wanamaker v. Columbian Rope Co., 108 F.3d 462, 465 (2d Cir. 1997).

[758] Cyr v. Perry, 301 F. Supp. 2d 527 (E.D. Va. 2004).

[759] *Id.* at 533 ("Two other circuits…have addressed this issue and concluded that Congress has in fact waived this sovereign immunity and thus the federal government may be sued for retaliation under the ADEA," *citing* Forman v. Small, 350 U.S. App. D.C. 24, 271 F.3d 285, 298–99 (D.C. Cir. 2001); Bornholdt v. Brady, 869 F.2d 57, 62 (2d Cir. 1989)).

[760] 42 U.S.C. § 12101(b)(1).

[761] *Id*. § 12112.

[762] *Id*. § 12132.

[763] *Id.* § 12182.

[764] 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004).

[765] *Id.* at 516–17.

[766] *Id.* at 517. *See* 42 U.S.C. § 12132.

[767] 42 U.S.C. § 1213(1).

[768] *Lane,* 541 U.S. at 517.

[769] 29 U.S.C. § 794a.

[770] 42 U.S.C. § 12133.

subject to suit for discrimination in violation of the Rehabilitation Act if the state accepts Federal Rehabilitation Act funds.[771] In contrast, "[u]nder the ADA Congress did not manifest a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity."[772] A retaliation claim may not be brought under the ADA against a state entity if the state entity is not otherwise subject to subchapters I, II, and IV of the ADA.[773]

Although Title 1 of the ADA authorizes claims for monetary damages, such claims may not be made against states or their agencies or instrumentalities. In *Board of Trustees of the University of Alabama v. Garrett*[774] the respondents had filed suits against Alabama state employers seeking monetary damages under Title I of the ADA. Title I, as noted, prohibits states and other employers from "discriminating against a qualified individual with a disability because of that disability…in regard to…terms, conditions, and privileges of employment."[775] In *Garrett*, the Court held that the Eleventh Amendment bars suits against the states for money damages for their failure to comply with Title I. In the Court's opinion, congressional authority to abrogate the states' sovereign immunity under Section 5 of the Fourteenth Amendment "is appropriately exercised only in response to state transgressions."[776] The legislative record, however, "fail[ed] to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."[777] Furthermore, the Court held that the remedy imposed by Congress was not "congruent and proportional to the targeted violation."[778]

The Eleventh Amendment, however, may not be asserted to bar an ADA claim made by the United States against a state for monetary damages or injunctive relief. In *U.S. v. Mississippi Department of Public Safety*[779] the United States alleged that the Mississippi state agency violated the ADA by dismissing an individual from the training academy of the Mississippi Highway Safety Patrol because of his disability, Type 2 diabetes.[780] The United States maintained that if the agency had made reasonable accommodations for his disability, the individual "would have been able to perform the essential functions of the job…."[781]

The Fifth Circuit, reversing the district court's dismissal of the suit, held that the claim for monetary damages and other compensatory relief was not barred by the Eleventh Amendment.[782] Although the State of Mississippi argued that the United States was attempting to "circumvent the safeguards of the Eleventh Amendment [to] obtain personal relief for private individuals,"[783] the Fifth Circuit held that the Supreme Court in *Garrett, supra*, had stated that its ruling "had no impact on the ability of the United States to enforce the ADA in suits for money damages," and that the United States was not barred by the Eleventh Amendment from suing to enforce federal law as authorized by the ADA.[784]

b. Sovereign Immunity and Title II of the ADA

Under Title II the states do not have sovereign immunity from ADA claims that arise out of a state's denial of a fundamental right, such as access to the courts. Three years after the decision in *Garrett*, the Supreme Court in *Tennessee v. Lane*[785] considered whether Title II of the ADA was a proper exercise of congressional authority under Section 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity. The Court held that although Congress has broad power under Section 5 to devise "appropriate remedial and preventative measures for unconstitutional actions," Congress "may not work a 'substantive change in the governing law.'"[786] Where the Congress acts to enforce constitutional rights based on disability, legislation is constitutional if it passes the lowest level of scrutiny, the rational basis test. Thus, classifications based on disability violate the said test only "if they lack a rational relationship to a legitimate governmental purpose."[787]

In *Lane* the respondents alleged that as paraplegics "they were denied access to, and the services of, the state court system by reason of their dis-

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[771] Prowell v. State of Oregon, No. 03-80-HA, 2003 U.S. Dist. LEXIS 25530, at *11 (D. Or. Aug. 11, 2003).

[772] *Id.* at *14.

[773] *Id.* at **21–22.

[774] 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001).

[775] 42 U.S.C. § 12112(a).

[776] *Garrett*, 531 U.S. at 368.

[777] *Id.*

[778] *Id.* at 374.

[779] 321 F.3d 495 (5th Cir. 2003).

[780] *Id.* at 497.

[781] *Id.*

[782] *Id.* at 498. The district court dismissed the claim for injunctive relief because the request was made against the state agency rather than a public official.

[783] *Id.*

[784] *Id.* at 499, *citing* EEOC v. Waffle House, 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002).

[785] 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004).

[786] *Id.* at 520.

[787] *Id.* at 522.

abilities."[788] One respondent was unable to answer criminal charges without crawling up two flights of stairs to get to the courtroom because of the absence of an elevator. When he refused to crawl or to be carried the next time he was arrested for failure to appear.[789] The other respondent, a court stenographer, had lost work and "an opportunity to participate in the judicial process" because of her disability.[790] The Court found that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivation of fundamental rights" of persons with disabilities "in a variety of settings," including courthouses and other state-owned buildings.[791] The Court held that Congress had the power under Section 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity "to enforce the constitutional right of access to the courts."[792] The Court also found that the remedy under the ADA was a limited one as Congress had only "required the States to take reasonable measures to remove architectural and other barriers to accessibility,"[793] or in some instances to use less costly or other measures as allowed by the regulations.[794]

The Court decided the *Lane* case, however, on the narrow basis of whether the Congress could abrogate the states' Eleventh Amendment immunity under Title II of the ADA where the claim involved a fundamental right, such as access to the courts. The *Lane* Court stated that "the decision in *Garrett*, which severed Title I of the ADA from Title II for purposes of the § 5 inquiry, demonstrates that courts need not examine 'the full breadth of the statute' all at once."[795] Furthermore, the Court stated that "[b]ecause this case implicates the right of access to the courts, we need not consider whether Title II's duty to accommodate exceeds what the Constitution requires in the class of cases that implicate only *Cleburne*'s prohibition on irrational discrimination."[796] The Eleventh Amendment does not preclude injunctive relief from being sought and awarded against a state agency for a violation of federal law.

Thus, the states have sovereign immunity for claims for monetary damages under Title I of the ADA. As for sovereign immunity for claims arising under Title II, the *Lane* decision dealt with the limited issue of a disability and a claim of discrimination in connection with the denial of a fundamental right—access to the courts. The Court has not ruled on whether there is sovereign immunity for other claims against the states under Title II.

As for future developments, it may be noted that in *Goodman v. Georgia*[797] the Eleventh Circuit affirmed a district court's decision granting summary judgment with respect to claims for monetary damages in an inmate's suit against Georgia brought under Title II of the ADA. The court granted summary judgment on behalf of the state pursuant to state sovereign immunity but held that injunctive relief may be sought. During the appeal, the United States intervened by filing suit against Georgia.[798] In 2005, the Supreme Court granted Goodman's petition for *certiorari*,[799] thus raising the issue of whether the ADA abrogates the states' sovereign immunity for inmate suits by prisoners with disabilities alleging discrimination by state-operated prisons. In January 2006, the Supreme Court reversed the Eleventh Circuit and remanded. The Court held that "insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity. The Eleventh Circuit erred in dismissing those of Goodman's Title II claims that were based on such unconstitutional conduct."[800]

c. Elements of an ADA Claim

Claims may arise in which there is the presumably remote possibility that the state transportation agency does not have immunity (*see* discussion of Title II, *supra*) or in which the transportation agency is not an agency of the state. Thus, the elements of an ADA claim will be discussed next, as well as recent cases against transportation agencies.

There are two basic theories for claims by persons with disabilities. One theory is based on disparate treatment, "when an employer treats a person less favorably than others because of his or her

[788] *Id.* at 513.

[789] *Id.* at 514.

[790] *Id.*

[791] *Id.* at 524–25.

[792] *Id.* at 531.

[793] *Id.*

[794] 28 C.F.R. §§ 35.151; 35.150(b)(1); 35.150(a)(2), (a)(3).

[795] *Lane*, 541 U.S. at 531.

[796] *Id.* at 533 n.20.

[797] Goodman v. Georgia, 120 Fed. Appx. 785 (11th Cir. 2004) (unreported opinion) (referenced in "Table of Decisions without Reported Opinions").

[798] *See* Duke Law, Supreme Court Online, available at http://www.law.duke.edu/publiclaw/supremecourtonline/certgrants/2005/goovgeo.html.

[799] Goodman v. Georgia, 544 U.S. 1031, 125 S. Ct. 2266, 161 L. Ed. 2d 1057 (2005).

[800] United States v. Goodman, 544 U.S. 1031, 126 S. Ct. 877, 882, 163 L. Ed. 2d 650, 659 (2006).

protected characteristic, such as a disability."[801] The second theory is based on disparate impact, which "involves facially neutral employment practices or fixed qualifications that in fact impact one group, such as the disabled, more harshly than others and 'cannot be justified by business necessity' or the particular business activity involved."[802] Proof of a discriminatory motive is not required for a disparate impact claim.[803]

For a plaintiff to establish a *prima facie* case of discrimination under the ADA, the

> plaintiff must show "(1) she is disabled within the meaning of the ADA, (2) she is qualified to perform the essential functions of her job with or without reasonable accommodation, and (3) she suffered from an adverse employment decision because of her disability."
>
> With respect to the first part of the *prima facie* case, a plaintiff must prove that her condition, either in fact or in the perception of the employer, meets the statutory definition of a disability. The term "disability" is defined as follows:
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.[804]

To establish that a claimant is disabled under the ADA, a "plaintiff must eventually show (1) that he is an individual with a disability as defined in the ADA, (2) that defendant knew this, (3) that he could have performed the essential functions of his job with reasonable accommodations, and (4) that defendant failed to make such accommodations."[805]

There is a dearth of reported decisions involving the ADA and transportation departments in the past few years. In *Jordon v. Dallas Area Rapid Transit*[806] the plaintiff (*pro se*) alleged discrimination under the ADA after sustaining an injury to her neck and shoulder after a panel from a Dallas Area Rapid Transit (DART) bus fell on her. Jordon claimed that she was denied a reasonable accommodation for her disability because DART denied her request for alternative duty.[807] The district court stated that for one to qualify as being disabled under the ADA, "an individual must meet what the United States Supreme Court has characterized as a 'demanding standard.'"[808]

To qualify as disabled, an individual must "have a physical or mental impairment that substantially limits one or more of her major life activities."[809] The court held that Jordon "failed to raise a genuine issue of material fact as to whether she was 'disabled' within the meaning of the ADA…."[810] As the court explained,

> the focus of the disability inquiry turns on the impact that Jordon's injury had on everyday, routine aspects of her daily life rather than its impact on her ability to perform specific tasks associated with her job as a bus operator at DART. Jordon must also show that the impact of her impairment was permanent or long term.[811]

The district court also rejected Jordon's claim that DART had retaliated against her for having made a claim of discrimination.[812] A *prima facie* case of retaliation requires a plaintiff to show

> 1) engagement in an activity protected by the ADA; 2) an adverse employment action; 3) a causal connection between the protected activity and the adverse action. "Once the plaintiff has established a *prima facie* case, the defendant must come forward with a legitimate, non-discriminatory reason for the adverse employment action." If the defendant advances such a reason, the plaintiff must then come forward with sufficient evidence that the proffered reason is a pretext for retaliation and, ultimately, must show that "but for" the protected activity, the adverse employment action would not have occurred.[813]

However, the court found, *inter alia*, that DART had "presented evidence of a legitimate, non-retaliatory reason for the employment actions" taken in respect to Jordon.[814] The court granted a summary judgment for DART and dismissed all claims.

Another case of interest under the ADA is *Gilbert v. Indianapolis Public Schools, Department of*

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[801] Casey's Gen. Stores v. Blackford, 661 N.W.2d 515, 519 n.2 (Iowa 2003), *quoting* Hazen Paper Co. v. Biggins, 507 U.S. 604, 609, 113 S. Ct. 1701, 1705, 123 L. Ed. 2d 338, 346 (1993).

[802] *Id.*

[803] *Id.*

[804] Gilbert v. Indianapolis Pub. Schools, Dep't of Transp., No. IP 00-1799-C-T/K, 2003 U.S. Dist. LEXIS 1193, at **14–15 (S.D. Ind. Jan. 5, 2003), (internal citations omitted).

[805] Faircloth v. Duke Univ., 267 F. Supp. 2d 470, 472 (M.D. NC 2003), *citing* Rhoads v. Fed. Deposit Ins. Corp., 257 F.3d 373, 387 (4th Cir. 2001), *cert. denied*, 535 U.S. 933, 122 S. Ct. 1309, 152 L. Ed. 2d 219 (2002).

[806] No. 3:04-CV-205-B, 2005, U.S. Dist. LEXIS 2888 (N.D. Tex. Feb. 24, 2005).

[807] *Id.* at *10.

[808] *Id.* at *11, *quoting* Toyota Mf., Ky. v. Williams, 534 U.S. 184, 195, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002).

[809] *Id.*, *citing* 42 U.S.C. § 12102(2)(A).

[810] *Id.* at *14 (citation omitted).

[811] *Id.* at *12 (citation omitted).

[812] *Id.* at **15–16.

[813] *Id.* at *15 (internal citations omitted).

[814] *Id.* at *17.

Transportation,[815] in which Gilbert filed claims based on alleged discrimination and retaliation. Gilbert, a bus driver, beginning in 1991 or 1992 suffered from degenerative disc disease and wore a cervical neck collar as needed. However, Gilbert was reassigned in 1999 to drive a route that required her to assist children with special needs. Gilbert claimed "to be (regarded as) impaired in the major life activity of working, not that of performing manual tasks…."[816]

The court held, however, that Gilbert had failed to show that any agent of the defendant regarded her "as impaired to the extent that she would have difficulty performing any function central to daily life, or that she would be excluded from a broad class or range of jobs."[817] As for the plaintiff's retaliation claim based on her transfer to a different bus after she refused to settle her lawsuit, the court agreed that "a refusal to settle would seem to qualify as participation in a proceeding under the ADA" and was protected conduct.[818] Nevertheless, Gilbert failed to show that she had been the victim of an adverse employment action as her transfer had been a lateral transfer without loss of benefits.[819]

In a case on asthma and the ADA involving a private university, in which the plaintiff also made claims based on a hostile work environment and harassment, the university's motion for summary judgment was denied where the plaintiff "alleged that his asthma, combined with the smoke in his working environment, made it difficult for him to perform his job to the point that he was forced into early retirement."[820] There were issues of fact regarding what would have been a reasonable accommodation and whether the defendant had done enough to enforce its workplace policy, as well as issues of fact concerning several of the plaintiff's other claims.

d. Administration of the ADA from the Federal Perspective

The U.S. DOT has promulgated rules and regulations, entitled "Transportation for Individuals with Disabilities," in response to the enactment of the ADA[821] that address transportation and disabled persons issues in full. The Federal Transit Administration's (FTA) Web site contains extensive information on the ADA.[822] The site provides access to guidance on U.S. DOT disability law, bulletins on the topic, a toll-free assistance line, and a civil rights complaint form. In addition to the above rules and regulations, other rules and regulations have been promulgated by both the FHWA and the U.S. DOT that require each state to comply actively with the ADA. Compliance takes different forms and may require, for example, research on future transportation projects and what actions need to be taken with respect to the ADA. Generally, these rules and regulations require each state to certify multiple times at various stages of transportation projects that the state is in compliance with the ADA.[823]

e. State Laws Prohibiting Discrimination Against Persons with Disabilities

States also have civil rights laws prohibiting discrimination against persons with disabilities. For example, the Iowa Civil Rights Act "prohibits an employer from discriminating against a qualified person with a disability because of the person's disability."[824] Iowa looks to the federal ADA "to help establish the framework to analyze claims and otherwise apply [the Iowa] statute."[825]

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[815] No. IP 00-1799-C-T/K, 2003 U.S. Dist. LEXIS 1193 (S.D. Ind. Jan. 5, 2003).

[816] *Id.* at *18 (citation omitted).

[817] *Id.* at *19.

[818] *Id.* at *22.

[819] *Id.* at *23.

[820] *Faircloth*, 267 F. Supp. 2d 470, at 474.

[821] *Transportation for Individuals with Disabilities*, 40 C.F.R. pts. 37 and 38 (May 21, 1996). *See* ADA REGULATIONS, GUIDANCE, AND PROCEDURES, FEDERAL TRANSIT ADMINISTRATION, available at http://www.fta.dot.gov/14533_ENG_HTML.htm.

[822] AMERICANS WITH DISABILITIES ACT OF 1990, FEDERAL TRANSIT ADMINISTRATION, available at http://www.fta.dot.gov/transit_data_info/ada/14524_ENG_HTML.htm.

[823] *See* 23 C.F.R. § 450.220 (Apr. 6, 2006) (requiring each state to certify to the FHWA and FTA that its transportation planning process is being carried out in accordance with the ADA); *see also Metropolitan Transportation Planning Process*, 23 C.F.R. § 450.316 (2006) (requiring states to identify actions necessary to comply with the ADA); 23 C.F.R. § 450.334 (2006) (requiring each state to certify that the planning process addressed and is being conducted in accordance with the ADA); *Transportation for Individuals with Disabilities*, 49 C.F.R. pts. 27, 37, and 38 (containing U.S. DOT regulations on the ADA).

[824] *Casey's General Stores*, 661 N.W.2d at 519 (citation omitted). Although alcoholism was a disability under the law, the employee's claim was not based on the employer's failure to accommodate him due to his disability but rather based on the employee's claim that he had suffered disparate treatment as the employer had failed to reassign him after revocation of the employee's driver's license. The claim failed in part because the employee did not identify a position that was available to which he could have been reassigned.

[825] *Id.* (citation omitted).

A case applying state law on disability in the workplace is *Campbell v. N.C. Department of Transportation—Division of Motor Vehicles*[826] in which the petitioner, employed as a process assistant with duties requiring her to work with open files, suffered from asthma. Dust in the open files allegedly aggravated her condition. The court held that someone such as Campbell "is 'deemed to have voluntarily resigned' by the State agency for being unable or unwilling to work in conditions that may constitute discrimination[;] such resignation can constitute a constructive discharge entitling the employee to file a contested case alleging termination" under the statute.[827] Remanding the case, the court held, *inter alia*, that the "petitioner was clear in her request for reasonable accommodations" and "[t]he fact that her solution for a clean work environment was a job transfer does not support a conclusion that petitioner did not properly prove that she could perform her job with reasonable accommodations."[828]

In sum, state agencies have sovereign immunity for claims for monetary damages under Title I of the ADA but no sovereign immunity for claims under Title II, at least insofar as the claims arise out of the denial of a fundamental right, such as access to the courts.

5. Discrimination Under Title VII of the Civil Rights Act of 1964

a. Absence of Sovereign Immunity for Title VII Claims Against States Under Present Law

As one authority has written, "Title VII of the Civil Rights Act of 1964 is the most broadly based and influential federal statute prohibiting discrimination in employment."[829] The law "protects against discrimination across the full range of employment practices or decisions…."[830] Even so, there must be "persuasive evidence that any unlawful conduct on the part of the employer caused a real detriment" to the person's employment.[831]

Section 2000(e)-2(a) of Title 42 states:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The Civil Rights Act of 1991 amended Title VII, *inter alia*, "'to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;' to 'confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII;' and to 'respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes.'"[832] Thus, 42 U.S.C. § 2000(e)-2 (k)(1)(A) provides:

> An unlawful employment practice based on disparate impact is established under this subchapter only if—
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

With respect to liability for disparate treatment,[833] "the federal courts have at times struggled to clarify the evidentiary frameworks for proving individual and systemic disparate treatment, but there has been no real question that such intentional conduct constitutes unlawful discrimination."[834] As seen, besides liability for disparate treatment, there is liability for neutral or "facially nondiscriminatory practices" or "neutral employer practices"…"that have greater adverse statistical impact on members of the plaintiff's protected group (and therefore, inferentially, on the plaintiff) than on others."[835] Facially nondiscriminatory or neutral practices "that in operation fall with disproportionate adverse impact on the plaintiff's protected group have proven far more troublesome" for

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[826] 155 N.C. App. 652, 575 S.E.2d 54 (N.C. App. 2003).

[827] *Campbell,* 575 S.E.2d at 60 (citation omitted).

[828] *Id.* at 62, 65.

[829] LEWIS & NORMAN, *supra* note 481 § 2.1, at 42.

[830] *Id*. § 2.1, at 43.

[831] *Id*. § 2.1, at 44.

[832] *Id.* § 2.1, at 45, *citing* Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(1), (3), (4), 105 Stat. 1071. *See also* 42 U.S.C. § 1981(1), (3), (4).

[833] *Id*. § 3.2, at 165.

[834] *Id*. § 3.35, at 242.

[835] *Id*. § 3.2, at 165.

the courts.[836] Even with liability being imposed for disparate impact discrimination, a plaintiff may be unable "to specify a particular aspect of an employer's subjective decision[-]making process that is allegedly responsible for an under[-] representation of the plaintiff class."[837]

As the Eleventh Circuit observed in 1999 in *In re Employment Discrimination Litigation Against the State of Alabama,* (hereinafter the *"Alabama Employment Discrimination Case"*),[838] "[t]he genesis of the disparate impact theory lies in the Supreme Court's decision in *Griggs v. Duke Power Co*., 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971)." In the *Griggs* case, Duke Power had abandoned a policy of open discrimination and substituted instead various employment qualification requirements or tests that had a disparate impact on African Americans.[839] Under Title VII, "'practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze the *status quo* of prior discriminatory employment practices.'"[840] In a disparate impact case the plaintiff does not have to show discriminatory intent on the part of the employer.[841] After the *Griggs* decision, Congress codified the appropriate burdens of proof in a disparate impact case in 42 U.S.C. § 2000e-2(k) (1994).[842]

There is some law review and other commentary suggesting that, based on recent decisions of the Supreme Court (*e.g*, *Flores*, *Garrett*, and *Kimel*), Congress's abrogation of the states' sovereign immunity under the Eleventh Amendment to Title VII claims for anything other than intentional discrimination could be successfully challenged. On the other hand, as seen, the Court, in *Hibbs* and in *Lane*, upheld the authority of Congress to abrogate the states' immunity with respect to the FMLA and at least to some extent with respect to Title II of the ADA, respectively. Nevertheless, a few articles contend that the states should be able to claim immunity, particularly for Title VII claims based on gender-based disparate impact discrimination, because there was in their view an inadequate record of gender discrimination by the states. As discussed below, however, federal circuit courts of appeal have rejected arguments that Congress improperly abrogated the states' sovereign immunity under Title VII, including claims for disparate impact.

In the *Alabama Employment Discrimination Case* the question was whether "Congress validly abrogated the states' Eleventh Amendment sovereign immunity from claims arising under the disparate impact provisions of Title VII of the Civil Rights Act of 1964, as amended…."[843] Plaintiffs, African Americans, alleged discrimination against them in a wide variety of employment actions, including, for example, hiring, lay-offs, terminations, and otherwise, for which they sought declaratory, compensatory, and injunctive relief.[844] As the Eleventh Circuit noted, the court was addressing only the disparate impact provisions of Title VII.[845] The district court "held that the Eleventh Amendment did not bar private suits against states under Title VII, which are predicated on a disparate impact theory of liability."[846]

Likewise, the Eleventh Circuit held first that Congress had clearly "abrogate[d] the states' sovereign immunity," because in 1972 Title VII was amended to include governments, government agencies, and political subdivisions.[847] Second, the court held that Congress's authority was appropriately exercised under Section 5 of the Fourteenth Amendment. The court distinguished the disparate impact legislation at issue in this case from the RFRA at issue in *City of Boerne v. Flores*, *supra*. The court noted that, as decided in the *City of Boerne* case, *supra,* under Section 5 of the Four-

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[836] *Id*. § 3.35, at 242.

[837] *Id*. § 3.35, at 243.

[838] 198 F.3d 1305, 1310 (11th Cir. 1999).

[839] *Ala. Employment Discrimination Case*, 198 F.3d at 1311.

[840] *Id.* at 1310 (some internal quotation marks omitted), *quoting Griggs*, 401 U.S. at 430, 91 S. Ct. at 853, 28 L. Ed. 2d at 163.

[841] *Id.* at 1310 n.8. As noted in Shoben, "*supra,* note 510 at 601 (2004):

> *Disparate impact must be distinguished from disparate treatment, which is a discrimination theory requiring a showing of intent*. The confusing similarity in the names of these two discrimination theories is the unfortunate result of the Supreme Court's footnote in *International Brotherhood of Teamsters v. United States*, [431 U.S. 324, 335 n.15 (1977)] in which the Court drew the distinction between Griggs-based impact claims and individual claims of intentional exclusion. The Court used the terms disparate impact and disparate treatment to make the distinction, and those terms have prevailed.

[842] *See* Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911 (2005) (includes overview of the disparate treatment approach to discrimination under Title VII). Sullivan argues that "[t]he state of employment discrimination practice can be easily summarized: plaintiffs are losing almost all of the cases they file except for a few isolated ones, most notably sexual harassment claims." *Id*. at 912.

[843] *Ala. Employment Discrimination Case,* 198 F.3d at 1308, *citing* 42 U.S.C. § 2000e, *et seq*.

[844] *Id.* at 1309.

[845] *Id.* at 1309 n.3.

[846] *Id.* at 1310.

[847] *Id.* at 1316, *citing* 42 U.S.C. § 2000e(a).

teenth Amendment Congress "does not have the power to alter the 'substance of the Fourteenth Amendment's restrictions on the States.'"[848] Although "what the Constitution prohibits is intentional discrimination on the part of State actors," Congress may deter or remedy constitutional violations "'even if in the process [Congress] prohibits conduct which is not itself unconstitutional'" as long as there is "'congruence and proportionality between the injury to be prevented or remedied and the means to that end.'"[849]

The Eleventh Circuit agreed that "the disparate impact analysis does not require plaintiffs to demonstrate a subjective discriminatory motive…."[850] However, according to the court, the "issue of intent is [not] wholly irrelevant to a claim of disparate impact" as "a genuine finding of disparate impact can be highly probative of the employer's motive since a racial 'imbalance is often a telltale sign of purposeful discrimination.'"[851] Thus, the court held that "'Congress has not sought to alter 'the substance of the Fourteenth amendment's restrictions on the States' with the disparate impact provisions of Title VII."[852] The court explained that "although the form of the disparate impact inquiry differs from that used in a case challenging state action directly under the Fourteenth Amendment, the core injury targeted by both methods of analysis remains the same: intentional discrimination."[853]

Although the court addressed whether there was evidence supporting the law against disparate impact discrimination, the court did not review the record evidence in detail:[854] "we need not dredge up this nation's sad history of racial domination and subordination to take notice of the fact that the 'injury' targeted by Title VII, intentional discrimination against racial minorities, has since our inception constituted one of the most tormenting and vexing issues…."[855] Nor did the court analyze whether or how the law satisfied the test of congruence and proportionality. Although the court referred to the strict scrutiny test, the court did not explain whether or how the legislation met the strictures of strict scrutiny. On the contrary, the court declared that "it is a rare day, indeed, that the courts find government actors to have adequately demonstrated a compelling interest, and a rarer one still that courts find no less restrictive alternatives to be available."[856] The court concluded that "[t]he means used by Congress in the disparate impact provisions of Title VII, so closely aligned to the constitutional equal protection analysis," were neither incongruent nor disproportional.[857]

The issue of whether Congress properly abrogated sovereign immunity in regard to disparate impact discrimination was addressed also in 2001 in *Okruhlik v. University of Arkansas*,[858] a case involving claims of both race and sex discrimination and harassment under Title VII. More particularly, the plaintiffs brought claims based on disparate treatment and impact discrimination on the basis of gender, hostile workplace environment, sexual harassment, and discrimination in terminations and promotions. Arkansas argued that "claims of disparate treatment and disparate impact discrimination under Title VII…are barred by the Eleventh Amendment."[859]

The court in *Okruhlik* observed that in 1972 Congress amended Title VII to extend the coverage of the Act to states and their employees.[860] Furthermore, the court observed that in 1991 Congress expanded the available remedies against a state from back pay and equitable relief to include compensatory damages, but excluded punitive damages.[861] The court agreed that, as held by the Supreme Court and other courts, Congress clearly had abrogated sovereign immunity in regard to Title VII actions.[862] The court's approach in *Okruhlik* differed from the court's approach in the *Alabama Employment Discrimination Case* in that the *Okruhlik* court addressed initially "'whether Congress identified a history and pattern of unconstitutional employment discrimination by the states [on the basis of race and gender].'"[863] The court rejected Arkansas's contention that "Congress did not identify a history and pattern of unconstitutional race and gender employment discrimination *by states* and that the studies it relied upon were limited in scope."[864] Among other things, the court found "much support" in the record, including at various

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[848] *Id.* at 1319.

[849] *Id.* at 1320, *quoting City of Boerne*, 521 U.S. at 520, 117 S. Ct. at 2164, 138 L. Ed. 2d at 639 (1997).

[850] *Id.* at 1321.

[851] *Id.* (citations omitted).

[852] *Id.* at 1321–22 (citation omitted).

[853] *Id.* at 1322.

[854] *Id.*

[855] *Id.* at 1323.

[856] *Id.*

[857] *Id.* at 1323–24.

[858] 255 F.3d 615 (8th Cir. 2001).

[859] *Id.* at 621.

[860] *Id.* at 622–23.

[861] *Id.* at 623.

[862] *Id.* at 624.

[863] *Id.*, *quoting Bd. of Trustees of Univ. of Garrett*, 531 U.S. 356, 368, 121 S. Ct. 955, 964, 148 L. Ed. 2d 866, 880 (2000).

[864] *Id.* (emphasis supplied).

times "numerous reports detailing racial and gender discrimination by the states…."[865]

As for whether Title VII's prohibitions impose greater limits on the states than does the Constitution, the court concluded that "Title VII does not make acts of state unlawful that would be permitted under the Constitution, and it is appropriate legislation."[866] The court recognized the congruence and proportionality test without discussing how the legislation met the test. Nevertheless, in the court's view Congress could legislate against such discrimination by states where such discrimination "had the same effect as intentional discrimination…."[867]

More recently, in *Downing v. Board of Trustees of University of Alabama*[868] the Eleventh Circuit held that Title VII's antiharassment provision replicates the kind of intentional discrimination prohibited by the Equal Protection Clause and is congruent and proportional to it.[869] The statutory provision was a valid abrogation under Section 5 of the Fourteenth Amendment "even if it prohibits conduct not itself unconstitutional it deters the kind of conduct the Clause prohibits."[870]

Notwithstanding the fact that two circuits have ruled that Congress acted within its constitutional authority to abrogate the states' sovereign immunity under Title VII, one article maintains that based on the Supreme Court's decisions in *Hibbs* and *Lane*, *supra*, "many civil rights statutes, such as Title VII's disparate impact provision, are still at risk of being deemed an invalid exercise of Congress's abrogation authority."[871] Some of the reasons given by the article and authorities cited therein are that

> [a]lthough *Hibbs* and *Lane* represent refinements of the Court's Eleventh Amendment jurisprudence, Title VII disparate impact claims against the state are still at risk…. First, the legislative record may not sufficiently justify prophylactic legislation. Second, the Court has repeatedly evidenced skepticism over the practical utility of disparate impact legislation. Third, the scope of Title VII more closely resembles the broadness of RFRA, the ADEA, and Title I of the ADA than the limited provisions of the FMLA and Title II of the ADA—at least as those provisions were interpreted by the Court.[872]

Moreover, the foregoing article argues that because "Title VII prohibits disparate impact, whereas the Court has determined that only intentional discrimination violates the Constitution, Title VII's ban on disparate impact discrimination does in fact extend beyond the applicable constitutional provision, making it prophylactic legislation."[873] The article argues that under recent Supreme Court precedent the Congress is required to "document massive findings" before abrogating the states' sovereign immunity.[874] In particular, it is questioned whether before Congress abrogated the states' sovereign immunity for Title VII claims, there was a sufficient legislative record of "specific evidence" of discrimination by the states against women[875] or whether the Title VII disparate impact legislation demonstrates congruence and proportionality.[876] Nevertheless, the article concedes that "[a] majority of lower courts considering the issue [has] determined that Title VII's prohibition of disparate impact discrimination is a congruent and proportional response…."[877]

Another article similarly argues that the Supreme Court

> "increasingly appears to require a legislative record to justify enactments, and it then probes the record to determine its sufficiency." The "findings" requirement, once considered an advantageous but unnecessary Section Five enforcement element, is now mandatory. An "unmistakably clear" statement, "remedial legislation," and "congruence and proportionality" are not enough today for the states or the Court.[878]

Furthermore, the viability of the decisions in the *Alabama Employment Discrimination* case and in the *Okruhlik* case, has been questioned because they were decided, for example, prior to *Hibbs* and *Lane* and rely on a "'nexus rationale,'" meaning that "Congress is justified in prohibiting disparate impact because there are enough instances where unconstitutional purposeful discrimination can be inferred from disparate impact even without being provable."[879] Finally, the article also observes that

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[865] *Id.* at 624–25.

[866] *Id.* at 625.

[867] *Id.* at 626.

[868] 321 F.3d 1017 (11th Cir. 2003).

[869] *See* LEWIS & NORMAN, *supra* note 481, § 10.35, at 626 n.42.

[870] *Id*. § 10.35, at 626 n.42.

[871] Disparate Impact Legislation, *supra* note 702, at 1184.

[872] *Id.* at 1211–12.

[873] *Id*. at 1212.

[874] State of the Nation, *supra* note 702, at 421, 422.

[875] Disparate Impact Legislation, *supra* note 702, at 1216.

[876] *Id*. at 1218.

[877] *Id*. at 1219.

[878] State of the Nation, *supra* note 702, at 435–36.

[879] Disparate Impact Legislation, *supra* note 702, at 1220.

in *Alexander v. Sandoval*,[880] the Supreme Court held that there is "no implied private right of action to enforce disparate impact regulations adopted by federal agencies…under Title VI of the Civil Rights Act of 1964."[881]

b. Prerequisites to Filing a Title VII Claim

As stated, under Title VII of the Civil Rights Act of 1964, it is unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin…."[882]

Title VII includes federal and state agency prerequisites to filing a Title VII lawsuit.[883] As one authority observes, "[t]he path to court is strewn with a series of intricate and time-consuming administrative procedures at the state and federal levels" that are designed to give the federal and state agencies "opportunities to obtain voluntary resolution of discrimination disputes, as well as to promote federal–state comity."[884] To bring a Title VII claim, the plaintiff must timely file a charge of discrimination "with the U.S. Equal Employment Opportunity Commission ('EEOC') either in the first instance or, in the majority of states that have parallel state or local antidiscrimination legislation and agencies, after filing with [the state] agencies."[885] Second, the plaintiff must file "a federal or state court action within 90 days after receipt from EEOC of a 'notice of right to sue.'"[886] If the employee fails to adhere to these requirements, a court will lack jurisdiction over an employment discrimination action under Title VII. Title VII claims thus may be subject to dismissal for failure to exhaust administrative remedies,[887] and claims may be time-barred depending on the claims and circumstances of the case.[888]

c. Direct and Indirect Method of Proof

As with other forms of discrimination discussed herein, "a plaintiff may prove employment discrimination under Title VII by using either the 'direct method' or 'indirect method.'"[889] Although a specific situation may "implicate two or more modes of proof," there are "distinct proof modes that have developed…."[890]

The direct method of proof occurs when a plaintiff must present "direct evidence of (1) a statutorily protected activity; (2) an adverse action taken by the employer; and (3) a causal connection between the two…." Under the indirect method, the plaintiff must show that "(1) she engaged in a statutorily protected activity; (2) [the plaintiff] performed her job according to her employer's legitimate expectations; (3) despite her satisfactory job performance, she suffered an adverse action from the employer; and (4) she was treated less favorably than similarly situated employees who did not engage in statutorily protected activity."[891]

As for disparate impact cases, 42 U.S.C. § 2000e-2 (k)(1)(B)(i) states that

> [w]ith respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision[-]making process are not capable of separation for analysis, the decision[-]making process may be analyzed as one employment practice.

Thus, with disparate impact, a plaintiff's burden is only to show that the practice in question has a disproportionate impact on the protected class.[892] With intentional discrimination, intent matters, whereas there is no intent-analysis in disparate impact cases.[893]

There may be direct evidence of disparate treatment without the need of "inferences or presumption."[894] Nevertheless, a plaintiff may meet his or her burden "by constructing a 'convincing mosaic' of circumstantial evidence that allows a jury to infer intentional discrimination."[895] The types of circum-

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[880] 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

[881] Disparate Impact Legislation, *supra* note 702, at 1220–22.

[882] 42 U.S.C. § 2000(e)-2(a); Rhodes v. Ill. Dep't of Transp., 359 F.3d 498, 504 (7th Cir. 2004).

[883] LEWIS & NORMAN, *supra* note 481, § 4.1, at 261.

[884] *Id*. § 4.1, at 261.

[885] *Id*.; *see also* Barlow v. AVCO Corp., 527 F. Supp. 269 (E.D. Va. 1981).

[886] LEWIS & NORMAN, *supra* note 702 § 4.1, at 261.

[887] Gomez v. Orleans Parish Sch. Bd., No. 04-1521 Section "N" (1) 2005 U.S. Dist. LEXIS 17810, at *23 (E.D. La. Aug. 11, 2005).

[888] *Id.* at *12.

[889] Rhodes v. Illinois, 359 F.3d 498, 504 (7th Cir. 2004).

[890] LEWIS & NORMAN, § 3.2, at 165.

[891] *Rhodes*, 359 F.3d at 508 (citations omitted).

[892] *See* E.E.O.C. v. Consol. Servs. Sys., 777 F. Supp. 599, 603 (1991).

[893] *See* Nash v. Consol. City of Jacksonville, Duval County, Fla., 763 F.2d 1393, 1397 (1985).

[894] LEWIS & NORMAN, *supra* note 702 § 3.2, at 165.

[895] Nobles v. NALCO Chemical Co., No. 01C 8944 2004, U.S. Dist. LEXIS 3284, at *24 (N.D. Ill. March 3, 2004)

stantial proof include "suspicious timing, ambiguous statements, or other behavior;" statistical or anecdotal evidence "that persons outside the plaintiff's protected group, otherwise similarly situated to the plaintiff, were treated differently with respect to the relevant terms and conditions of employment;" and the "pretext mode" as developed in the *McDonnell Douglas Corp. v. Green* case.[896]

Passage of time may defeat a direct or indirect claim because of the inability to prove proximate cause. For example, in *Sims v. Fort Wayne Community Schools*[897] the defendant had disciplined and then terminated the plaintiff, a bus driver, who argued that she was discriminated against because of her race and that "other employees who engaged in similar conduct…were not disciplined as harshly."[898] Although the court recognized that the plaintiff could establish her claim either by a direct[899] or indirect[900] method, the plaintiff had failed to show the ability to prove under the direct method the "causal link between her protected activity and her suspensions and termination."[901] There has to be "temporal proximity" between the time of the protected activity and the adverse employment action, *i.e.*, between the time of the recommended termination and the time of the complaint. "Here, the passage of time is far too great to infer a causal connection and time has become the Plaintiff's enemy."[902] The court also ruled that the evidence failed to show a material issue of fact as to whether the plaintiff's discipline was pretext. That is, the record did not establish "that the [d]efendants' reasons were (1) factually baseless, (2) not the actual motivation for the discharge, or (3) insufficient to motivate the discharge."[903] The court granted the defendant's motion for summary judgment as the plaintiff was unable to show that her "discipline was a sham."[904]

d. Elements for a Prima Facie Case of Discrimination Under Title VII

To establish a *prima facie* case, a plaintiff alleging discrimination must prove that he or she (1) was a member of a protected class; (2) was performing his or her job satisfactorily; (3) experienced an adverse employment action; and that (4) similarly situated individuals were treated more favorably.[905] If the plaintiff establishes these required elements, the burden shifts to the defendant to come forward with a legitimate, noninvidious reason for its adverse action. Although the burden of production shifts to the defendant under this method, the burden of persuasion rests at all times on the plaintiff. Once the defendant presents a legitimate, noninvidious reason for the adverse action, the burden shifts back to the plaintiff to show that the defendant's reason is pretextual. Direct evidence may consist of "statements by persons involved in the decision-making process which tend to show a discriminatory attitude" such that the court may "conclude that a discriminatory animus was the motivating factor in the employment decision."[906]

As for what constitutes a materially adverse employment action, in *Rhodes v. Illinois Department of Transportation*[907] the court agreed with the district court that Rhodes "failed to set forth a materially adverse employment action under either the

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(citation omitted) (employer's motion for summary judgment granted in case in which plaintiff alleged race and sex discrimination claims under Title VII regarding termination of employment, failure to promote or transfer plaintiff, denial of a salary increase, failure to train, as well as a claim for retaliation for a harassing work environment).

[896] LEWIS & NORMAN, *supra* note 702 § 3.10, at 179–81. *See id*. for elements required for *prima facie* case under *McDonnell Douglas* for "failure to hire."

[897] No. 1103-CV-430-TS, 2005 U.S. Dist. LEXIS 6174 (N.D. Ind. Feb. 2, 2005).

[898] *Id.* at *19.

[899] The direct evidence approach requires a plaintiff to present evidence of (1) a statutorily protected activity; (2) an adverse action taken by the employer; and (3) a causal connection between the two. *Id.* at *35, *citing* Sitar v. Ind. Dep't of Transp., 344 F.3d 720, 728 (7th Cir. 2003).

[900] The court explained that

> under *the indirect method* the Plaintiff must show that: (1) she engaged in statutorily protected activity; (2) she was performing her job according to her employer's legitimate expectations; (3) despite her satisfactory performance, she suffered an adverse employment action; and (4) she was treated less favorably than similarly situated employees who did not engage in protected activity. This rule was developed to clarify the traditional burden shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), *in the retaliation context, and eliminates the need for a plaintiff to show a causal link between protected activity and adverse employment action*.

Id. at **35–36 (emphasis supplied) (citation omitted).

[901] *Id.* at *36.

[902] *Id.* at *37.

[903] *Id.* at *48, *citing* Tincher v. Wal-Mart Stores, 118 F.3d 1125, 1130 (7th Cir. 1997).

[904] *Id.* at *53.

[905] *Rhodes*, 359 F.3d at 504.

[906] Merritt v. Iowa Dep't of Transp., No. 3-964/03-0858, 2004 Iowa App. LEXIS 436, at *6 (Iowa App. March 10, 2004), *citing* Price Waterhouse v. Hopkins, 490 U.S. 228, 245, 109 S. Ct. 1775, 1787, 104 L. Ed. 2d 268, 284 (1989).

[907] *Rhodes*, 359 F.3d at 504 (7th Cir. 2004).

direct or indirect method of proof."[908] Title VII was not designed "'to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions.'"[909] In another case, in ruling against the plaintiff, the district court stated that at least in the Fifth Circuit it was well established that "negative reprimands and poor performance evaluations do not constitute ultimate adverse employment decisions actionable under Title VII."[910] Furthermore, "whether docking or withholding an employee's pay constitutes an adverse employment action depends in part on whether the loss to the employee is *de minimis*."[911]

Several cases were found in which plaintiffs brought one or more Title VII claims for disparate treatment against transportation agencies. A former employee brought an action alleging disparate treatment, a racially hostile work environment, and constructive discharge under Title VII, as well as claims under state law, in *Brown v. Arkansas State Highway and Transportation Department.*[912] In dismissing nearly all claims, the district court emphasized that as soon as the plaintiff filed an official grievance, the Department launched an internal investigation and provided the crew with diversity training. With respect to the alleged racial slurs, there was insufficient evidence of harassment "so extreme as to change the terms or conditions of Plaintiff's employment."[913] Because of the dismissal of the claim of a racially hostile work environment, the court also dismissed the claim of constructive discharge.[914] However, as for Brown's claim based on disparate treatment, the plaintiff made out a *prima facie* case of racial discrimination to overcome the defendant's motion for summary judgment based on a merit raise having been awarded to a similarly situated white co-worker.[915]

Payne v. State of Connecticut Department of Transportation,[916] in which the plaintiff alleged that the state DOT denied him a promotion on the basis of his race, age, and gender, is an example of how the burden shifts on a motion for summary judgment in a Title VII claim. Payne, an African American male, was 49 years old at the time he was denied a promotion. The DOT argued that Payne failed to establish a *prima facie* case because he could not show that he was the most qualified candidate for the position of section manager, and the record disclosed no irregularities in the DOT's process. The court, noting that Payne satisfied the elements for establishing a *prima facie* case (including the fact that he possessed the basic skills necessary for the job of section manager), ruled that he was denied a promotion under circumstances that gave rise to an inference of discrimination. However, if the defendant DOT offers a legitimate, nondiscriminatory reason for its actions, then the burden shifts back to the plaintiff to fulfill his ultimate burden of proving that the defendant intentionally discriminated against him in the employment decision.[917] In order to satisfy this burden, the plaintiff may attempt to prove that the legitimate, nondiscriminatory reason offered by the defendant was not the employer's true reason but was a pretext for discrimination. The court denied the DOT's motion for summary judgment, *inter alia*, because Payne "has established a record sufficient to support an inference that the adverse employment action was pre-textual."[918]

In *Merritt v. Iowa Department of Transportation* the plaintiff, a long-time employee of the department, applied for a promotion to the position of Right-of-Way Agent IV, a position in which "women, minorities and disabled people were statistically under-represented."[919] However, the court ruled that Merritt had "produced no evidence from which a reasonable fact finder could conclude [that] the DOT's stated reason for not hiring her was 'so lacking in merit as to call into question its genuineness.'"[920]

In *Sallis v. Minnesota*,[921] a Title VII case involving alleged racial slurs, in which plaintiff made a variety of claims (failure to promote, disparate treatment, hostile work environment, and retaliation), all claims were dismissed. As stated, one of the plaintiff's claims was based on disparate treatment. To make a *prima facie* claim of disparate treatment,

> the plaintiff must establish that (1) he is a member of a protected class, (2) he was qualified for his position and performed his duties adequately, and (3) he suffered an adverse employment action under cir-

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[908] *Id.* at 508.

[909] *Gomez,* 2005 U.S. Dist. LEXIS 17810 at *32, *quoting* Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997).

[910] *Id.* at *37 (citation omitted).

[911] *Id.* at *42 (citation omitted). Nevertheless, there were genuine issues of fact relating to Gomez's retaliation claim and the docking of her pay, the increase in work duties, and the denial of opportunity to work overtime. *Id.* at *46.

[912] 358 F. Supp. 2d 729 (W.D. Ark. 2004).

[913] *Id.* at 735.

[914] *Id.* at 736.

[915] *Id.* at 737.

[916] 267 F. Supp. 2d 207 (D. Conn. 2003).

[917] Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 143, 120 S. Ct. 2097, 2106, 147 L. Ed. 2d 105, 117 (2000).

[918] *Payne*, 267 F. Supp. 2d at 212.

[919] 2004 Iowa App. LEXIS 436, at *2.

[920] *Id.* at *11, *quoting* Dister v. Continental Group, 859 F.2d 1108, 1116 (2d Cir. 1988).

[921] 322 F. Supp. 2d 999 (D. Minn. 2004).

> cumstances that would permit the court to infer that unlawful discrimination had been at work.[922]

The district court ruled that "[w]ithout evidence of a racial motive, the Court can only conclude that the well-documented antipathy between Sallis and his supervisors was of a personal, rather than racial nature. And personal animus, even against a member of a protected class, 'does not discrimination make.'"[923]

e. Title VII Claims Based on Sexual Harassment and Hostile Work Environment

For a plaintiff to prevail on a sexual harassment claim under Title VII, the

> plaintiff must establish that: (1) [plaintiff] was subjected to unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; (2) the conduct was severe or pervasive enough to create a hostile work environment; (3) the conduct was directed at her because of [plaintiff's] sex; and (4) there is a basis for employer liability. Proof of a hostile work environment requires evidence that the plaintiff was subjected to conduct "so severe or pervasive as to alter the conditions of employment and create an abusive working environment." To qualify as "hostile," the work environment must be "both objectively and subjectively offensive…."[924]

For a plaintiff to establish a hostile work environment claim, the "plaintiff must show that he was a member of a protected class, that he was subjected to unwelcome harassment, that the harassment resulted from his membership in the group, and that the harassment affected a term, condition, or privilege of his employment."[925] To determine whether the conduct in the work environment has created "an objectively hostile work environment, courts must consider all of the circumstances, including factors such as: the frequency of the discriminatory conduct, the severity of the conduct, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance."[926]

Not all verbal or physical harassment in the workplace is prohibited under Title VII.[927] To succeed on such a claim, the plaintiff must show that the work environment was "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."[928] In the *Sallis* case, *supra*, where the plaintiff's claims was based on a hostile work environment, in granting the defendant's motion for summary judgment, the district court stated that "[b]ecause the discrimination laws are not a general civility code, offhand comments (unless extremely serious) and isolated incidents…will not amount to discriminatory changes in the terms and conditions of employment."[929]

In the *Rhodes* case, the Department "concede[d] that Rhodes was subject to unwelcome, sexually-related conduct severe or pervasive enough to create a hostile work environment."[930] However, to hold the employer liable where the harasser is a coworker, the plaintiff must show that the employer has been "negligent either in discovery or remedying the harassment."[931] On the other hand, "[h]arassment by a supervisor of the plaintiff triggers strict liability, subject to the possibility of an affirmative defense in the event the plaintiff suffered no tangible employment action."[932] The supervisor must be the plaintiff's supervisor. However, in *Rhodes* the court held that Rhodes failed "to establish that she made a concerted effort to inform IDOT" that a problem existed.[933]

Finally, in a case in which the plaintiff alleged that an applicant for a position had a sexual relationship with her supervisor, the court agreed that the Title VII implementing regulation[934] specifically identified favoritism based on sexual relationships as coming within the purview of what is prohibited by federal law, and furthermore agreed that the plaintiff's complaint stated a claim because she had identified a specific lost opportunity.[935]

f. Retaliation Claims Under Title VII

As for claims of retaliation under Title VII, the title "prohibits an employer from discriminating against an employee because that employee has opposed any practice deemed unlawful under the

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[922] *Id.* at 1006–07, *citing* Habib v. NationsBank, 279 F.3d 563, 566 (8th Cir. 2001).

[923] *Id.* at 1008 (citation omitted).

[924] *Rhodes*, 359 F.3d at 505 (internal citations omitted).

[925] Brown v. Ark. State Highway and Transp. Dep't, 358 F. Supp. 2d at 734, *citing* Jackson v. Flint Ink North Am. Corp., 370 F.3d 791, 793 (8th Cir. 2004).

[926] *Nobles*, 2004 U.S. Dist. LEXIS 3284, at **34–35.

[927] *Id.* at *35. According to the court, a few e-mails and documents that "paint men and/or African-Americans in a negative light are not sufficiently severe or pervasive so as to create a hostile work environment." *Id.*

[928] *Brown*, 358 F. Supp. 2d at 734 (citation omitted).

[929] *Sallis*, 322 F. Supp. 2d at 1008, *quoting* Wallin v. Minn. Dep't of Corrections, 153 F.3d 681, 688 (8th Cir. 1998) (citation and internal quotations omitted).

[930] *Rhodes*, 359 F.3d at 505.

[931] *Id.* at 506 (internal quotation marks omitted).

[932] *Id.* at 505 (citation omitted).

[933] *Id.* at 507.

[934] *See* 29 C.F.R. § 1604.11(g).

[935] *Prowell,* 2003 U.S. Dist. LEXIS 25530 at *19.

Act."[936] A plaintiff may establish a *prima facie* case of retaliation and overcome the defendant's motion for summary judgment using either the direct method or the indirect method.[937] However, in a case involving sex discrimination, the Ninth Circuit held that a "plaintiff need not prove she was discriminated against under Title VII to sustain a claim for retaliation under § 2000(3)(a)."[938]

In the *Rhodes* case, *supra,* the court stated that the plaintiff could

> overcome defendant's motion for summary judgment using either the direct method or the indirect method. Under the direct method, the plaintiff must present direct evidence of (1) a statutorily protected activity; (2) an adverse action taken by the employer; and (3) a causal connection between the two.
>
> Under the indirect method, the plaintiff must show that (1) she engaged in a statutorily protected activity; (2) she performed her job according to her employer's legitimate expectations; (3) despite her satisfactory job performance, she suffered an adverse action from the employer; and (4) she was treated less favorably than similarly situated employees who did not engage in statutorily protected activity.[939]

The court held in the *Rhodes* case that plaintiff's retaliation claim failed "because IDOT had a legitimate, non-pretextual reason for marking her absent without pay."[940]

In *Bovee v. State of New Mexico Highway and Transportation Department*[941] the state appellate court affirmed the dismissal of the plaintiff's retaliation suit. The court agreed with the trial court that the department legitimately could refuse to hire her based on representations she had made in an earlier Title VII lawsuit in which she had alleged her incapacity to perform the job of an engineer. It was not error for the trial court to dismiss Bovee's claims for breach of contract and violation of civil rights.

[936] *Rhodes*, 359 F.3d at 508, *citing* 42 U.S.C. § 2000e-3(a).

[937] *See* Sitar v. Ind. Dep't of Transp., 344 F.3d 720 (7th Cir. 2003). In *Sitar*, the plaintiff was one of the few women to work for INDOT in its historically male Westfield Unit, but she was transferred and terminated before the end of 6 months. INDOT claimed that the reason for the brevity of Sitar's tenure was unsatisfactory performance; Sitar argued that it was the result of sex discrimination, sexual harassment, and retaliation. The appellate court reversed and remanded a summary judgment in favor of the department.

[938] *Prowell,* 2003 U.S. Dist. LEXIS 25530, at *23, *citing* Trent v. Valley Elec. Ass'n, 41 F.3d 524 (9th Cir. 1994).

[939] *Rhodes*, 359 F.3d at 508 (citations omitted).

[940] *Id.* at 509.

[941] 133 N.M. 519, 65 P.3d 254 (N.M. App. 2002).

F. FIRST AMENDMENT ISSUES

1. Adopt-a-Highway Programs

Several cases have presented a free speech issue under the First Amendment to the United States Constitution in the context of the "adopt-a-highway" programs and use of logos on state license plates. Because another report is addressing First Amendment issues in the transportation context, only several recent cases will be discussed in this section.

The question is to what extent the highway is a public forum and thus subject to the First Amendment, thereby prohibiting viewpoint discrimination by the government. In *Knights of KKK v. Arkansas State Highway and Transportation Department*[942] the court held that the Adopt-a-Highway Program was an innately public forum or had become one by the state's action. The court enjoined the state from denying the group's application to participate in the program as the state was constitutionally prohibited from discriminating against the group because it disagreed with the group's espoused views.

In *Robb v. Hungerbeeler*[943] the court held the that Missouri Highways and Transportation Commission had infringed the group's expressive and associational rights to the extent that it had denied the group the ability to participate in the Adopt-a-Highway program based on the group's choice of name and the conduct of other groups and individuals associated with that name. The timing of the amended regulations and the fact that the applicant was the only group that the regulations had ever been used to exclude strongly suggested that the regulations had been used as a pretext to target the group in a viewpoint-discriminatory manner.

In *Cuffley v. Mickets*[944] also involving an Adopt-a-Highway program, the court held that the state unconstitutionally denied the group's application based on the group's views; that there was no question that the state treated the group differently from the vast majority of applicants based on the state's perception of the group's beliefs and advocacy; and that the state's action violated the group's freedom of political association.[945]

[942] 807 F. Supp. 1427 (W.D. Ark. 1992).

[943] 370 F.3d 735 (8th Cir. 2004).

[944] 208 F.3d 702 (8th Cir. 2000).

[945] In Mo. ex rel. Mo. Highway & Transp. Comm'n v. Cuffley, 112 F.3d 1332 (8th Cir. 1997), the Court of Appeals vacated a summary judgment and an award of attorney fees to the political group where the Commission brought a declaratory action that would have been a defense to a hypothetical action by the group. Because the action by the political group was only hypothetical, the Commission was not prejudiced by the inability to bring a

However, in an earlier case, *State of Texas v. Knights of the Ku Klux Klan*,[946] the court ruled otherwise. The group brought suit to force the state to grant the group's application to participate in the state Adopt-a-Highway program. The court concluded that the state did not violate the First Amendment by refusing to allow the group to adopt a section of highway near a public housing project. The state's denial of the group's application was a reasonable effort to avoid strife and intimidation of current and prospective residents of the nearby housing project and to promote compliance with a federal desegregation order. The state's limit on speech was also a reasonable measure to insure free use of the state's public highways and to protect against the imposition of a message on captive recipients.

> We hold that the State will not violate the First Amendment by rejecting the Klan's application to adopt a portion of highway near the housing project in Vidor, Texas. Assuming that the Klan's participation in the Program would constitute speech or expressive conduct protected by the First Amendment, the Program is a nonpublic forum and the Klan's exclusion from the Program is reasonable and viewpoint-neutral.[947]

The court held: "The Program is a nonpublic forum. The Program is not a traditional public forum, as are public streets and parks. Nor has it been designated by the State as a public forum. There is no indication that the State intended to open up the Program for public discourse."[948] Furthermore, the court observed that the Klan wished to adopt a highway near a housing project that was under an order to desegregate; "[g]iven this context, the State could reasonably believe that the Klan's adoption of a section of highway outside the project would result in further intimidation of the residents of the housing project and would create unreasonable conflict."[949] Although the court stressed the proximity of the housing project, later judicial authority, discussed above, holds that a denial of an application to a group such as the Ku Klux Klan is a violation of the group's First Amendment rights.

2. Logos on License Plates

It is also a denial of a group's First Amendment rights to deny a group's application to place a logo on a state license plate. In *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Dept. of Motor Vehicles,*[950] in contrast to other Virginia statutes authorizing special plates for members or supporters of various organizations, the statute at issue contained a restriction (the logo restriction) providing that no logo or emblem of any description should be displayed or incorporated into the design of license plates issued under Virginia Code Section 46.2-746.22. The court held that the special plates authorized in Virginia were not instances of "government speech" and concluded that the logo restriction was an instance of viewpoint discrimination that did not survive review based on strict scrutiny.[951] Accordingly, the restriction that prohibited the Sons of Confederate Veterans from receiving special plates bearing the symbol of their organization, which included the Confederate flag, violated their First Amendment rights.

G. SUMMARY AND CONCLUSIONS

1. Constitutionality of Federal U.S. DOT DBE Law and Regulations

In *Adarand III*, the Supreme Court held that in the matter of race-based classifications in the field of public contracting, the standard of review that must be applied is strict scrutiny, whereas gender-based classifications continue to be reviewed on the basis of intermediate scrutiny. Strict scrutiny is applied to "'smoke out' illegitimate uses of race" by assuring that the legislature had sufficient evidence of discrimination before resorting to the use of a "suspect tool" and to assure that the means chosen are a proper fit.[952]

Post *Adarand III*, several courts have held that TEA-21 and the DBE regulations promulgated in 1999 are constitutional. The federal DBE program has several objectives, including the assurance that there is "nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs."[953] The regulations are intended "[t]o create a level playing field on which DBEs can compete fairly for DOT-assisted contracts"[954] and "[t]o ensure that the Department's

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preemptive action. The Commission had to act upon the political group's application before the case would be ripe.

[946] 58 F.3d 1075, 1995 U.S. App. LEXIS 19468 (5th Cir. 1995).

[947] *Knights of the Ku Klux Klan*, 58 F.3d at 1078.

[948] *Id.* (citation omitted).

[949] *Id.* at 1079.

[950] 288 F.3d 610 (4th Cir. 2002).

[951] *Id.* at 627.

[952] *Rothe IV*, 324 F. Supp. 2d at 848, *quoting Croson,* 488 U.S. at 493, 109 S. Ct. 706, 721, 102 L. Ed. 2d 854, 882 (1989).

[953] 49 C.F.R. § 26.21(a)(1). *See also* § 26.3(a)(1) through (3). A recipient under the DBE program includes any recipients of Federal-aid highway funds pursuant to certain federal laws, federal transit funds, and airport funds.

[954] *Id.* § 26.1(b).

DBE program is narrowly tailored in accordance with applicable law…."[955]

When a governmental program relies on racial classifications, the program must satisfy a two-prong test: it "must serve a compelling governmental interest, and [it] must be narrowly tailored to further that interest.'"[956] When racial classifications are present in public contracting, the court "must determine whether the government's articulated goal in enacting the race-based measures…is appropriately considered a 'compelling interest'…."[957] The court must decide whether the government's interest is sufficiently strong to meet the government's initial burden of demonstrating that there is a compelling interest, after which the court must decide whether the party challenging the program has met its "ultimate burden of rebutting the government's evidence…."[958]

When enacting a DBE program, Congress may consider evidence of discrimination in society at large with respect to public contracting because the reach of Congress is "nationwide."[959] The courts in *Adarand*, *Sherbrooke Turf*, *Western States,* and *Northern Contracting* concluded "that Congress 'had 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.'"[960] Thus, "Congress had a 'strong basis in evidence' to conclude that the DBE program was necessary to redress private discrimination in federally-assisted highway subcontracting."[961] Strong evidence is that "'approaching a *prima facie* case of a constitutional or statutory violation,' *not* irrefutable or definitive proof of discrimination."[962]

In regard to TEA-21, prior to the current SAFETEA-LU and the 1999 DBE regulations, the courts thus far have "conclude[d] that the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements."[963] For the government to fulfill the requirement that there is a compelling interest for a program, there must be "a strong basis in evidence to conclude that remedial action was necessary…."[964] However, the government need not prove conclusively "the existence of past or present racial discrimination."[965]

Assuming that a compelling interest has been demonstrated for a "race-conscious" approach, the government may use race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a "passive participant in a system of racial exclusion practiced by elements of the local construction industry by allowing tax dollars to finance the evil of private prejudice."[966] However, the law must be narrowly tailored; reliance first on race-neutral means is important in demonstrating that an affirmative action program for public contracting is narrowly tailored.

Although several cases have addressed whether a claimant challenging a DBE program has standing, as the court observed in *Northern Contracting*, in most cases the claimants were held to have standing.[967] Moreover, although complaints contesting contracts awarded on the basis of a DBE requirement have been challenged for mootness because the government had suspended the use of the DBE requirement and/or contract clause at issue, it has been held that because the program could be renewed, that means there is still a "live controversy."[968]

As for whether a state implementing the federal DBE program had to make an independent showing to satisfy strict scrutiny, it has been held that the states did not have to satisfy independently

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[955] *Id*. § 26.1(c). *See also* § 26.1(d) through (g) for other stated objectives.

[956] *Adarand VII*, 228 F.3d at 1164.

[957] *Id.*

[958] *Id.*

[959] *Id.* at 1165.

[960] *N. Contracting*, 2004 U.S. Dist. LEXIS 3226, at *100, *quoting Sherbrooke Turf*, 345 F.3d at 969–70.

[961] *Id.* at *121.

[962] *Concrete Works*, 321 F.3d at 971, *quoting Croson*, 488 U.S. at 500, 109 S. Ct. at 725, 102 L. Ed. 2d at 886 (O'Connor, J.).

[963] *Adarand VII*, 228 F.3d at 1165, *citing Croson,* 488 U.S. at 492, 109 S. Ct. at 721, 102 L. Ed. 2d at 881 (O'Connor, J.).

[964] *N. Contracting*, 2004 U.S. Dist. LEXIS 3226, at * 89, *quoting* Shaw v. Hunt, 517 U.S. at 909–10, 116 S. Ct. at 1903, 135 L. Ed. 2d at 222 (1996).

[965] *Concrete Works*, 321 F.3d at 958, *citing Concrete Works,* 36 F.3d at 1522.

[966] *Adarand VII*, 228 F.3d at 1164 (internal quotation marks omitted), *quoting Concrete Works*, 36 F.3d at 1519 (*quoting Croson*, 488 U.S. at 492).

[967] *See* Northeastern Fla. Chapter of Associated Gen. Contractors of America v. City of Jacksonville, 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993); *Adarand III,* 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995); Sherbrooke Turf v. Minn. Dep't of Transp., 345 F.3d 964 (8th Cir. 2003); Contractors Ass'n of Eastern Pa. v. City of Philadelphia, 6 F.3d 990 (3d Cir. 1993); and Monterey Mech. Co. v. Wilson, 125 F.3d 702 (9th Cir. 1997).

[968] *Rothe IV*, 324 F. Supp. 2d at 848.

"the compelling interest aspect of strict scrutiny review."[969] A contractor may not challenge a grantee state for "'merely complying with federal law.'"[970] However, "a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed."[971] Thus, although a state DOT, for example, may not need to make a separate showing to satisfy the compelling-interest prong of the strict scrutiny test, the state may be required to show that the program was narrowly tailored; "'to the extent the federal government delegates this tailoring function, a [s]tate's implementation becomes critically relevant to a reviewing court's strict scrutiny.'"[972]

2. Claims Based on Highway Projects and Disparate Impact

In regard to disparate impact cases arising out of the location of highways and related projects, under Section 601 of Title VI of the Civil Rights Act of 1964,[973] "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." However, the Supreme Court has interpreted Section 601 to proscribe only "intentional" discrimination.[974]

Moreover, as for the disparate impact regulations promulgated under Section 602 of Title VI, the Supreme Court has held that there is no private right of action to enforce the regulations.[975] Nonetheless, transportation officials need to be aware of other civil rights-related laws and regulations that are implicated by planning and project decisions. The U.S. DOT is obligated "to assure that possible adverse economic, social, and environmental effects relating to any proposed project on any Federal-aid system have been fully considered in developing such project, and that the final decisions on the project are made in the best overall public interest...."[976] Presently there are two means of enforcing the disparate impact regulations. First, federal financial assistance may be refused if an applicant "fails or refuses to furnish an assurance required under [49 C.F.R.] § 21.7 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section...."[977] Second, an affected person may file a complaint with the funding agency alleging a violation.[978]

3. Immunity of a State or Its Officer Acting in Official Capacity from § 1983 Actions

As for actions under § 1983 of the Civil Rights Act of 1871,[979] the section is based on the constitutional authority of Congress to enforce the Fourteenth Amendment. Section 1983 is not itself a source of substantive rights but merely provides a method for vindicating federal rights conferred elsewhere.[980] The section does not create a cause of action in and of itself. Rather, a plaintiff must prove that he or she was deprived of a right secured by the United States Constitution or the laws of the United States and that the deprivation of his or her right was caused by someone acting under color of state law.[981]

Neither a state transportation department nor its officers acting in their official capacities may be sued under § 1983. Moreover, government officials who are sued also may have absolute or qualified immunity for § 1983 claims. The qualified immunity doctrine thus "protects government officials who perform discretionary functions from suit and from liability for monetary damages under § 1983."[982] Thus, as a general rule in claims arising under federal law, government officials acting within their discretionary authority are immune from civil damages if their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."[983] Although municipalities are persons under § 1983,[984] a state or state agency is not a person under § 1983[985] and cannot be sued under § 1983 in state or federal court;[986] neither may a state official be sued in his or her official capacity under §

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[969] *Sherbrooke Turf*, 345 F.3d at 970.

[970] *Id.* (citations omitted).

[971] *Id.* at 971.

[972] *Western States*, 407 F.3d at 997, *quoting Sherbrooke Turf*, 345 F.3d at 973.

[973] 42 U.S.C. § 2000d.

[974] *Choate*, 469 U.S. at 293.

[975] Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

[976] 23 U.S.C. § 109(h).

[977] 49 C.F.R. § 21.13(b).

[978] *Id.* § 21.11(b). *See generally* U.S. DOT Order 1000.12, at V-1–V-10 (Jan. 19, 1977).

[979] 42 U.S.C. § 1983.

[980] *See generally Mosely*, 275 F. Supp. 2d at 612.

[981] Hale v. Vance, 267 F. Supp. 2d 725 (S.D. Ohio 2003); Davis v. Olin, 886 F. Supp. 804 (D. Kan. 1995).

[982] *Camilo,* 283 F. Supp. 2d at 449 (D.P.R. 2003).

[983] *Cagle*, 334 F.3d at 988 (internal quotations omitted). S*ee also Harlow*, 457 U.S. at 818; *Mendenhall*, 213 F.3d at 230.

[984] *Monell*, 436 U.S. at 688–90.

[985] A state transportation department is not a person subject to suit under § 1983. *Vickroy*, 73 Fed. Appx. at 173 (7th Cir. 2003); *Jimenez*, 245 F. Supp. 2d at 586 n.2 (D. N.J. 2003); *Manning,* 914 F.2d at 48 (4th Cir. 1990); *Will*, 491 U.S. at 65–66.

[986] *Nichols*, 266 F. Supp. 2d at 1313.

1983.[987] In some limited situations, private companies or individuals may be subject to suit under § 1983 because they have acquired the status or condition of a state actor.

Although § 1983 does not restrict a state's Eleventh Amendment immunity,[988] there are two exceptions. First, a state may be sued where Congress enacts legislation pursuant to Section 5 of the Fourteenth Amendment, unequivocally expressing its intent to abrogate the states' Eleventh Amendment immunity under the United States Constitution.[989] Second, a state may consent to suit in federal court.[990] Thus, § 1983 creating a cause of action for deprivation of civil rights under color of state law did not abrogate the states' sovereign immunity under the Eleventh Amendment.[991] As explained in *Beach v. Minnesota*,[992] the Supreme Court has interpreted the Eleventh Amendment as barring individual citizens from suing states in federal court, including their own state.[993] The "'Eleventh Amendment bars a suit by private parties to recover money damages from the state or its *alter egos* acting in their official capacities.'"[994]

The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such violations of constitutional or statutory rights occur.[995] The reach of § 1983 was expanded in 1961 when the U.S. Supreme Court decided *Monroe v. Pape*[996] and was extended again by the Court's decision in *Monell v. New York*.[997] In *Monroe*, the Court held that the phrase "under color of law" included the misuse of power exercised under state law, even though the persons committing the acts that constituted the deprivation of rights were acting beyond the scope of their authority. In 1978 the Supreme Court in *Monell v. New York*[998] overruled *Monroe v. Pape* insofar as the *Monroe* Court held that local governments were immune from suit under § 1983.[999] By virtue of the *Monell* decision, municipal corporations are persons amenable to suit under § 1983. The *Monell* Court did uphold the *Monroe* decision insofar as the *Monroe* Court held that the doctrine of *respondeat superior* is not a basis for holding local governments liable under § 1983 for the constitutional torts of their employees.[1000]

For there to be a § 1983 action against a municipality, the claim must result from the violation of a government policy or custom.[1001] Section 1983 creates a species of tort liability, and the statute is interpreted in light of the background of tort liability.[1002] As held in *DeShaney v. Winnebago County Department of Social Services,*[1003] the Due Process Clause does not transform every tort committed by one acting under color of law into a constitutional violation.[1004] Moreover, not all property interests entitled to procedural due process protection are similarly protected by the concept of substantive due process: "[w]hile property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, substantive due process rights are created only by the Constitution."[1005]

There is no cause of action under § 1983 when the action complained against was private in nature. The language of the Due Process Clause "cannot fairly be extended to impose an affirmative obligation on the state" to protect citizens against private actors.[1006] The Due Process Clause of the Fourteenth Amendment "does not transform every tort committed by a *state* actor into a constitutional violation" actionable under § 1983.[1007] Nevertheless, "[t]he doctrine of sovereign immunity does not shield state employees from liability for acts or

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[987] *Murphy*, 127 F.3d at 754.

[988] *Beach*, 2003 U.S. Dist. LEXIS 10856, at *8, *citing* Quern v. Jordan, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979) and Williams v. Missouri, 973 F.2d 599, 600 (8th Cir. 1992).

[989] *Id.* at *7, *citing* Pennhurst State Sch. & Hosp. v. Haldermann, 465 U.S. 89, 99, 104 S. Ct. 900, 907–08, 79 L. Ed. 2d 67, 77–78 (1984) and Egerdahl v. Hibbing Cmty. Coll., 72 F.3d 615, 619 (8th Cir. 1995).

[990] *Id.* at *8, *citing* Clark v. Barnard, 108 U.S. 436, 2 S. Ct. 878, 27 L. Ed. 780 (1883) and Parden v. Terminal Ry., 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964).

[991] *Quern,* 440 U.S. at 345; In re Sec'y of Dep't of Crime Control and Pub. Safety, 7 F.3d at 1145.

[992] No. 03-CV-862 (MJD/JGL), 2003 U.S. Dist. LEXIS 10856 (D. Minn. June 25, 2003).

[993] *Id.* at **6–7, *citing* Hans v. Louisiana, 134 U.S. 1, 10, 10 S. Ct. 504, 505, 33 L. Ed. 842, 845 (1890) and Murphy v. Arkansas, 127 F.3d 750, 754 (8th Cir. 1997).

[994] *Gregory,* 289 F. Supp. 2d at 725, *quoting Huang*, 902 F.2d at 1138 (4th Cir. 1990).

[995] Wyatt v. Cole, 504 U.S. 158, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992).

[996] 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

[997] *Monell*, 436 U.S. at 694.

[998] 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

[999] *Id.* at 663.

[1000] *Id.* at 663 n.7.

[1001] *Id.* at 694-694.

[1002] *City of Monterey Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999).

[1003] 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).

[1004] *Id.* at 202.

[1005] *Douglas,* 2003 U.S. Dist. LEXIS 4922, at *5, *quoting Ewing*, 474 U.S. at 229, 106 S. Ct. at 515, 88 L. Ed. 2d at 535 (1985) (Powell, J., concurring).

[1006] *DeShaney,* 489 U.S. at 195.

[1007] *Id.* at 202 (citation omitted).

omissions constituting gross negligence.[1008] Thus, "[a] state employee who acts wantonly, or in a culpable or grossly negligent manner is not protected [by sovereign immunity]").[1009] However, supervisors may not be held liable for the acts of their subordinates: "an individual cannot be held liable under Section 1983 in his individual capacity unless he 'participated in the constitutional violation.'"[1010] It must be shown that the alleged supervisor is one who "directed the constitutional violation," or the violation must have "occurred with his 'knowledge and consent.'"[1011]

In a § 1983 action, the court may award declaratory and injunctive relief, damages, and attorney's fees. A plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.[1012] Nominal, compensatory, and punitive damages also are available under § 1983. To recover compensatory damages, the plaintiff must prove that the unconstitutional activities were the cause in fact of actual injuries.[1013] To prove damages, evidence must be received on general damages, including emotional distress and pain and suffering, and on special damages, such as lost income and medical expenses.[1014] In addition to compensatory damages, a court may award punitive damages in a § 1983 suit to punish the defendant for outrageous conduct and to deter others from similar conduct in the future.[1015] Even if the plaintiff cannot prove actual damages, the court may award punitive damages.[1016] Municipalities, however, are generally immune from punitive damages in § 1983 actions,[1017] as are municipal officers when sued in their official capacities.[1018]

As for injunctive relief, "[c]ivil rights actions under section 1983 are exempt from the usual prohibition on federal court injunctions of state court proceedings."[1019] Although the Eleventh Amendment bars claims for damages against state agencies and officials acting in their official capacity, the federal courts may enjoin state officials acting in their official capacity as long as the injunction governs only the officer's future conduct and no retroactive remedy is provided; the rule applies also to declaratory judgments.[1020]

4. Discrimination Claims Against Transportation Departments Under Federal Law

In regard to discrimination claims against transportation departments under other federal laws, state transportation departments, as well as their officers and employees acting in their official capacity, have immunity for certain claims alleging discrimination by virtue of the states' sovereign immunity under the Eleventh Amendment. On several occasions the Supreme Court has addressed the issue of whether Congress exercised its authority properly when abrogating the states' sovereign immunity. After the decision in *Seminole Tribe*, *supra,* the Supreme Court struck down acts of Congress that were in the Court's view in excess of Congress's power under Section 5 of the Fourteenth Amendment. For example, in *City of Boerne v. Flores*,[1021] the Supreme Court held that the RFRA exceeded Congress's power under Section 5 of the Fourteenth Amendment. In rendering its decision, the Court emphasized the absence of a sufficient record for the Congress to act under its Section 5 power. Whether Congress has enacted purportedly remedial legislation pursuant to its Section 5 power depends on whether the legislation passes the Court's "congruence and proportionality" test. On the other hand, in 2003, in *Nevada Department of Human Resources v. Hibbs*,[1022] the Court upheld the FMLA in which the Court concluded that "the

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[1008] *Gedrich*, 282 F. Supp. 2d at 474 (E.D. Va. 2003) (citation omitted).

[1009] *Id.* (internal quotation marks omitted).

[1010] *Valentine,* 2005 U.S. Dist. LEXIS 430, at *17, *quoting Hildebrandt*, 347 F.3d at 1039 (7th Cir. 2003).

[1011] *Id.* at **17–18.

[1012] *Norris*, 287 F. Supp. 2d at 114, *citing Farrar*, 506 U.S. at 111–12, 113 S. Ct. at 572–74, 121 L. Ed. 2d at 503–04 (1992).

[1013] *Memphis Cmty. Sch. Dist.*, 477 U.S. at 309.

[1014] *Carey*, 435 U.S. at 263–64; *Ellis*, 643 F.2d at 69 (2d Cir. 1981).

[1015] *Smith*, 461 U.S. at 54–55.

[1016] Glover v. Ala. Dep't of Corrections, 734 F.2d 692 (11th Cir. 1984).

[1017] Ramonita Rodriquez Sostre v. Canovance, 203 F. Supp. 2d 118 (D.P.R. 2002); *Fact Concerts, Inc.,* 453 U.S. at 259. *But see* Peden v. Suwanee County Sch. Bd., 837 F. Supp. 1188 (1993) (denying punitive damages where no compensatory damages were awarded), *aff'd without opinion*, 51 F.3d 1049 (11th Cir. 1995).

> The real proposition for which the above cited cases stand could be summarized as follows: in a section 1983 action, a jury may properly award punitive damages even though it awards no compensatory damages, but only where the jury first finds that a constitutional violation was committed by the party against whom the punitives are imposed..

Id. at 1196–97.

[1018] *Ramonita,* 203 F. Supp. 2d at 120, *citing Gomez-Vazquez,* 91 F. Supp. 2d at 482–83.

[1019] *Schroll,* 760 F. Supp. at 1389 (D. Or. 1991).

[1020] *Ippolito*, 958 F. Supp. at 161 (S.D.N.Y. 1997); *see also* Mercer v. Brunt, 272 F. Supp. 2d 181 (D. Conn. 2002).

[1021] 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).

[1022] 538 U.S. 721, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003).

States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough" for the enactment of the FLMA.[1023]

Nevertheless, in regard to the ADEA, in 2000 in *Kimel v. Florida Board of Regents*[1024] the Supreme Court struck down the law that abrogated the states' sovereign immunity for ADEA claims.[1025] The *Kimel* Court held that Congress had exceeded its authority in abrogating the states' immunity for such suits. The Court's reasoning was that the ADEA was "'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'"[1026]

As for claims against state transportation departments under the ADA, although Title 1 of the ADA authorizes claims for monetary damages, in 2001 the Court held in *Board of Trustees of the University of Alabama v. Garrett*[1027] that such claims may not be made against states or their agencies or instrumentalities. The Court held that the legislative record "fail[ed] to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."[1028] Furthermore, the Court held that the remedy imposed by Congress was not "congruent and proportional to the targeted violation."[1029]

However, in *Tennessee v. Lane*[1030] the Court held that under Title II the states do not have sovereign immunity from ADA claims that arise out of a state's denial of a fundamental right, such as access to the courts. The Court found that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivation of fundamental rights" of persons with disabilities "in a variety of settings," including courthouses and other state-owed buildings.[1031] The Court held that Congress had the power under Section 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity "to enforce the constitutional right of access to the courts."[1032]

The Court decided the *Lane* case, however, on the narrow basis of whether the Congress could abrogate the states' Eleventh Amendment immunity under Title II of the ADA where the claim involved a fundamental right, such as access to the courts. The *Lane* Court stated that "the decision in *Garrett*, which severed Title I of the ADA from Title II for purposes of the § 5 inquiry, demonstrates that courts need not examine 'the full breadth of the statute' all at once."[1033] It is unclear to what extent the states have sovereign immunity for other claims under Title II.

There could be ADA claims in which there is a presumably remote possibility that the state transportation agency would not have immunity (*see* discussion of Title II, *supra*) or in which the transportation agency is not an agency of the state. Assuming there is no immunity, as for the elements of an ADA claim, there are two basic theories for claims by persons with disabilities. One theory is based on disparate treatment "when an employer treats a person less favorably than others because of his or her protected characteristic, such as a disability."[1034] The second theory is based on disparate impact that "involves facially neutral employment practices or fixed qualifications that in fact impact one group, such as the disabled, more harshly than others and 'cannot be justified by business necessity' or the particular business activity involved."[1035] Proof of a discriminatory motive is not required for a disparate impact claim.[1036] As seen in the report, only a handful of decisions involving the ADA and transportation departments in the past few years have been located. It should be noted that states also have civil rights laws prohibiting discrimination against persons with disabilities.

Under Title VII of the Civil Rights Act of 1964, it is unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin…." Once more, under Title VII there may be both disparate treatment and disparate impact claims. As with other forms of discrimination discussed in the report, "a plaintiff may prove

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[1023] *Id.* at 735.

[1024] 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000).

[1025] 29 U.S.C. § 626(b), *citing* 29 U.S.C. §§ 626(c), 211, 216(b), 217.

[1026] *Kimel*, 528 U.S. at 86, *quoting City of Boerne*, 521 U.S. at 532.

[1027] 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001).

[1028] *Id.* at 368.

[1029] *Id.* at 374.

[1030] 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004).

[1031] *Id.* at 524–25.

[1032] *Id.* at 531.

[1033] *Id.*

[1034] *Casey's General Stores*, 661 N.W.2d at 519 n.2 (Iowa 2003), *quoting* Hazen Paper Co. v. Biggins, 507 U.S. 604, 609, 113 S. Ct. 1701, 1705, 123 L. Ed. 2d 338, 346 (1993).

[1035] *Id.*

[1036] *Id.*

employment discrimination under Title VII by using either the 'direct method' or 'indirect method.'"[1037]

Several cases were found in which plaintiffs brought one or more Title VII claims for disparate treatment against transportation agencies, for example, for alleged discrimination in hiring and promotions or retaliation occurring after an employee made a complaint. As for claims arising out of harassment and/or hostile workplace environment, not all verbal or physical harassment in the workplace is prohibited under Title VII.[1038] To succeed on such a claim, the plaintiff must show that the work environment was "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."[1039]

There is some law review and other commentary suggesting that, based on recent decisions of the Supreme Court, Congress's abrogation of the states' sovereign immunity under the Eleventh Amendment to claims under Title VII for anything other than intentional discrimination could be subject to challenge. On the other hand, as seen, the Court in *Hibbs* and in *Lane*, *supra*, upheld the authority of Congress to abrogate the states' immunity with respect to the FMLA and at least to some extent with respect to Title II of the ADA, respectively. Nevertheless, a few recent articles contend that the states may be able to claim immunity, particularly for Title VII claims based on gender-based disparate impact discrimination, because, in the authors' opinion, Congress had an inadequate record of gender discrimination by the states. However, at least two federal circuit courts of appeal have rejected arguments that Congress improperly abrogated the states' sovereign immunity under Title VII, including claims for disparate impact.

5. First Amendment Issues

Lastly, the refusal to allow groups such as the Ku Klux Klan to participate in an Adopt-a-Highway program or to permit a group such as the Sons of Confederate Veterans to have a logo on a license plate may constitute viewpoint discrimination by the government and violate the First Amendment. One case has held, however, that under the Adopt-a-Highway program, the state could refuse to permit the Klan to participate where the group sought to do so near a public housing project subject to a desegregation order because the housing project would be both a captive audience and at risk of intimidation by the group.

[1037] *Rhodes*, 359 F.3d at 504.

[1038] *Nobles,* 2004 U.S. Dist. LEXIS 3284 (N.D. Ill. 2004), at *35.

[1039] *Brown*, 358 F. Supp. 2d at 734 (citation omitted).